NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2011] NZLCDT 14

LCDT 018/10

IN THE MATTER of the Lawyers and Conveyancers Act 2006 and the Law Practitioners Act 1982

AND

IN THE MATTER OF **EDWARD ERROL JOHNSTON** of Auckland, Solicitor

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Ms R Adams

Mr J Clarke

Ms S Gill

Ms J Gray

HEARING at AUCKLAND on 18 & 19 April 2011

APPEARANCES

Ms K Davenport and Mr Trealeaven for Standards Committee

Mr A H Waalkens QC for the Practitioner

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS TRIBUNAL

Introduction

[1] Mr Johnston, the practitioner, faces six charges of misconduct in his professional capacity. Two charges are laid under section 112 of the Law Practitioners Act 1982 ("LPA") and the remaining four charges are laid under the Lawyers and Conveyancers Act 2006 ("LCA"). The charges were amended prior to the hearing to carry alternatives of "conduct unbecoming a barrister or solicitor, or negligence or incompetence". In respect of the LCA, the second alternative was one of "unsatisfactory conduct". Each charge was supported by particulars and some by multiple particulars relating to a number of different transactions – (that is, charge six).

[2] Prior to the commencement of the hearing, the practitioner entered pleas of guilty as follows:

(a) Charge 1 to "conduct unbecoming".

(b) Charge 2 to misconduct in his professional capacity.

(c) Charge 4 to unsatisfactory conduct.

(d) Charge 6, particular (a), to unsatisfactory conduct.

All other charges or particulars of charges were defended.

Background

[3] The conduct complained of falls into three categories. The first relates to conflicts of interest, both between clients and between Mr Johnston and his clients. The second relates to his management of the affairs of a deceased client during her life acting under her power of attorney granted to him, and his actions following her death as a trustee and executor of her estate. The third area relates to Mr Johnston's

conduct whilst being investigated in terms of his correspondence with the Standards Committee.

[4] The first concerns were raised by means of a complaint by beneficiaries of the estate of Mrs McG, alleging that Mr Johnston had been very difficult to deal with, uncommunicative and had failed to account for estate funds; in particular they complained that he had lapsed in following up certain investments. Indeed, they went further to allege his handling of the investment of their aunt's funds had been reckless and unwise. In addition to investigating this complaint, the Standards Committee resolved to initiate an "own motion" investigation in relation to a number of matters. That investigation uncovered some concerns that had arisen back as far as 2006. After further investigation and correspondence with Mr Johnston and his legal adviser the Standards Committee determined to lay the present charges:

> **Charge 1 - Own Motion Investigation pre 1 August 2008 conduct**
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> **TAKE NOTICE THAT AUCKLAND STANDARDS COMMITTEE 3 OF THE NEW ZEALAND LAW SOCIETY** charges Edward Errol Johnston of Auckland, practitioner pursuant to section 112 of the Law Practitioners Act 1982 with:
>
> (a) misconduct in your professional capacity, or in the alternative
> (b) conduct unbecoming a barrister or solicitor, or in the alternative
> (c) negligence or incompetence in your professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on your fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute.
>
> 1. From May 2008 until 31 July 2008 in the management of your trust account you acted in breach of Rule 1.03 and/or 1.06 of the Rules Professional Conduct for Barristers and Solicitors and/or Regulation 6 of the Solicitors Trust Account Regulations 1998 in that you (and the trustees of your Family Trust) personally borrowed sums up to $550,000 from your clients Mr and Mrs W without referring them for independent legal advice and/or ensuring that they obtained independent legal advice and/or disclosing the full nature of your involvement in the borrowing.

[5] In response to this charge Mr Johnston has pleaded guilty to "conduct unbecoming a barrister or solicitor", that is alternative (b). He has filed an affidavit from his client Mr W, supporting his assertion that the Ws were experienced businesspeople with good commercial knowledge who had rejected his suggestion of independent advice from him. Mr W's affidavit (which was not challenged) confirms

that Mr Johnston had represented him and his wife for 20 years and had their utmost confidence. They indicated that they were keen to invest the funds with Mr Johnston, initially for a six-month period. Mr W asserts they paid particular attention to the documents with which they were provided and that following an extension of the unregistered mortgage, the funds had been repaid in full. Mr W affirmed that he and his wife had always felt that Mr Johnston had their best interests at heart.

[6] What Mr W does not say, but Mr Johnston affirmed in evidence, was that the Ws, as well as being clients, were also personal friends. Indeed Mr Johnston's own brother is a trustee in the Ws family trust.

[7] It is clear from this evidence that the Society cannot sustain the final part of the pleaded particular that the practitioner failed to disclose the full nature of his involvement in the borrowing. Notwithstanding that, counsel for the Society submitted that this was such a gross breach of Rule 1.03 and 1.06 of the Rules of Professional Conduct for Barristers and Solicitors, and Regulation 6 of the Solicitors Trust Account Regulations 1998 ("the Regulations") that it must amount to professional misconduct. Those Rules and Regulations provide as follows:

> "**1.03 Rule**
> **A practitioner must not act or continue to act for any person where there is a conflict of interest between the practitioner on the one hand, and an existing or prospective client on the other hand.**
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> Commentary
> (1) The rule is based on the premise that a person who occupies a position of trust must not permit his or her personal interests to conflict with the interests of those whom it is that person's duty to protect.
> (2) The rule is intended to protect a client in situations where the interest or position of the practitioner would or could make the practitioner's professional judgement less responsive to the interests of the client.
> ...
> (4) A practitioner may not enter any financial, business or property transactions with a client if there is a possibility of the fiduciary relationship between practitioner and client being open to abuse. This applies even if the practitioner does not propose to act for the client in the particular transactions.
> (5) It is impossible to detail all the situations, which arise where a practitioner should not act or where independent representation or advice must necessarily be obtained under this rule. One example would be where a practitioner borrows money from a client other than a client whose normal

business is lending money. It is not then enough to offer independent advice to the client. The solicitor must sever the relationship of solicitor and client in that matter and ensure that the person concerned receives independent and competent advice. If the client refuses to take independent advice, the transaction should not proceed."

"**1.06 Rule**

1. **A practitioner who advises a client on borrowing or investing must act as an independent adviser in the client's best interests.**
2. **A practitioner may, notwithstanding rule 4.04, accept a financial or other reward by way of a fee ("the reward") from a third party in respect of the client's borrowings or investment provided that the following conditions are satisfied:**
   - **(i) The nature and value of the reward is fair and reasonable.**
   - **(ii) The practitioner has advised the client upon relevant alternative sources of funds or investments, as the case may be.**
   - **(iii) The nature and value of the reward have been fully disclosed to the client.**
   - **(iv) The client's consent has been obtained.**
3. **Nothing in this rule shall be construed as derogating from any of the provisions of the Investment Advisers (Disclosure) Act 1996.**

Commentary

(1) Without limiting the general application of this rule, its provisions apply to the following circumstances:

   (i) where one of the potential lenders to the client is a client of the practitioner or the practitioner's firm, or a solicitors nominee company of which the shares are owned by the practitioner or the practitioner's firm;

   (ii) where one possible avenue of investment for the client is a solicitors nominee company of which the shares are owned by the practitioner or the practitioner's firm or another client of the practitioner or the practitioner's firm;

And practitioners must always have regard to the provisions of rule 1.04.

(2) The provisions of this rule may not apply where a client has, prior to instructing the practitioner, already made firm and specific arrangements independently of the practitioner for an appropriate avenue for the lending or borrowing of money.

(3) Practitioners are referred for further guidance, particularly in regard to the need for the fully informed consent of clients, to the judgment of the Privy Council in *Clark Boyce v Mouat* [1993] 3 NZLR 641.

(4) Nothing in paragraph 2(iv) of this rule shall require separate independent advice to be obtained."

"**Solicitors Trust Account Regulations 1998**

6. Restriction on certain transactions involving money of solicitors' clients:-

(1) A solicitor acting in that capacity must not cause or permit money of any client of the solicitor of the solicitor's firm to be lent, or credit to be otherwise provided by a client, to any of the following persons:

(a) The solicitor:

(b) Any parent, sibling, child, or spouse of the solicitor:

(c) Any body corporate, partnership, or trust if the principal financial benefit or the effective control is vested directly or indicrectly in any of the persons referred to in paragraphs (a) and (b).

(2) Despite subclause (1), a solicitor may cause or permit money of a client to be lent, or credit to be otherwise provided, to any of the persons referred to in paragraphs (a) to (c) of that subclause if:_

(a) The client obtains legal advice and representation in respect of that loan, or provision of credit, from an independent solicitor; or

(b) The client is a financial institution that normally instructs borrowers' solicitors to prepare loan or credit or security documentation in respect of loans made or credit provided by that client."

[8] For the practitioner Mr Waalkens argued that there is, despite the clear wording of Rule 1.03, room for misinterpretation of that because of what he submits are longstanding and settled practices to the contrary. Furthermore Mr Waalkens referred us to comments made by Professor Webb in his text "Ethics, Professional Responsibility and the Lawyer" at chapter six. That chapter opens with the words:

> "As with any fiduciary, a lawyer may not act in the situation where his or her own interests conflict with those of the client. In such a case the loyalty the lawyer owes to the client is seriously at risk, and the danger exists that the lawyer will take steps in his or her own interests that will be prejudicial to the client, so not disclose to the client. It is for this reason such conflicts are prohibited."

The author then goes on to refer to Rule 1.03.

[9] Later at page 219 the author says:

> "Lawyers are expected to avoid not only an actual conflict with their own interest, but the appearance of any conflict. The rule makes no allowance for a lawyer to act for a client where a conflict of interest between lawyer and client exists."

[10] Distinguishing this from rule 1.04 which deals with client-client conflicts, Professor Webb points out that rule 1.03 would not appear to permit a lawyer continuing to act even with informed consent. The passage at page 220 which is relied on by counsel for Mr Johnston is as follows:

> The difficulty is that an interpretation which imposes an absolute bar on acting for a client in the face of a conflict of interest is at odds with the well established practice in the profession of acting in the fact of a lawyer-client conflict provided fully informed consent is obtained."

[11] The learned author comments further under the heading "6.7 Lending and Borrowing" as follows:

> "Entering into a relationship of debtor or creditor with a client is problematic as it is often inconsistent with the fiduciary obligations the lawyer owes. The lawyer may be in need of finance and the client may be prepared to act as lender. However, for the lawyer to borrow money directly from clients is difficult. It places the interests of the lawyer in quite opposed positions. To take a loan from a client is likely to be misconduct ..."

[12] Professor Webb then goes on to refer to the commentary to Rule 1.03 (see paragraph [7] above). As is apparent from the final sentence from that commentary, it is intended by the rule that should the situation of lawyer-client borrowing arise, the relationship of lawyer and client must be severed. This is reinforced by the Regulation 6 (above), specifically sub-clause (2)(a,) thus the provision of independent advice is mandatory. With great respect to the learned author Professor Webb, we consider that the comments as to "well established practice" are at odds with his text on page 231 which reads as follows:

> "This blanket prohibition on lending transactions contrasts with the rather vague approach the rules take in respect of other transactions between lawyer and client. It reflects the fact a client will often trust the lawyer to a greater degree than they would others, even when the lawyer is clearly negotiating for personal advantage. Because the client will have a possibly unfounded expectation of fair dealing, the rules state that if such a transaction is to proceed, the lawyer-client relationship must be severed. Not only must the relationship be severed, but it is incumbent on the lawyer

> to ensure the client receives independent advice on the transaction, without which the transactions must not proceed."

[13] Again, with great respect to the learned author, we do not accept that it is common practice for a lawyer to borrow funds from a client on the basis of informed consent only and the declining of independent legal advice. There is no evidence before the Tribunal to this effect.

[14] Whilst giving his evidence, Mr Johnston referred to discussions with his colleagues as to common practice. However, he was at that point discussing borrowing transactions between clients, in other words client-to-client conflict not lawyer-client conflict.

Discussion

[15] We accept the submission of Mr Waalkens that mere breach of any particular rule does not of itself carry an automatic finding of professional misconduct. We must also address the law as to the meaning of "professional misconduct". We refer to two authorities, *Complaints Committee No 1 of the Auckland District Law Society v C*[1] and *Re A (Barrister and Solicitor of Auckland)*[2]. Both of these decisions adopted the standard of misconduct in the medical decision *Pillai v Messiter* (No 2).[3] In the *C* decision, the Court held at paragraph [33]:

> "[33] ... While intentional wrongdoing by a practitioner may well be sufficient to constitute professional misconduct, it is not a necessary ingredient of such conduct ... [A] range of conduct may amount to professional misconduct, from actual dishonesty through to serious negligence of a type that evidences an indifference to and an abuse of the privileges which accompany registration as a legal practitioner."

[16] It is common ground between counsel that the civil standard of proof is the appropriate one, that is the balance of probabilities. The Tribunal reminds itself that that standard must be applied having regard to the seriousness of the matters alleged and to be proved. Regard must be had to the inherent likelihood or unlikelihood of an occurrence as described by the evidence.

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[1] [2008] 3 NZLR 105 (HC).
[2] [2002] NZAR 452 (HC).
[3] (1989) 16 NSWLR 197.

[17] We consider that the views of the client as expressed in this instance go to mitigation of penalty rather than in assessing whether misconduct has occurred. Having regards to the very high standard of behaviour that is demanded of practitioners in the situation of borrowing from a client, we consider that to depart so blatantly from it, as Mr Johnston has in the instance of this very large borrowing (albeit at commercial rates), we find this amounts to professional misconduct and is more serious than the alternative charge of "conduct unbecoming" pleaded to by the practitioner.

Charge 2 - Complaint from D S pre 1 August 2008 conduct

AUCKLAND STANDARDS COMMITTEE 3 OF THE NEW ZEALAND LAW SOCIETY charges Edward Errol Johnston of Auckland, practitioner, pursuant to section 112 of the Law Practitioners Act 1982 with:

(a) Misconduct in your professional capacity, or in the alternative;
(b) Conduct unbecoming a barrister and solicitor, or in the alternative
(c) Negligence or incompetence in your professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on your fitness to practise as a barrister or solicitor or as tot end to bring the profession into disrepute.

When acting under the unlimited power of attorney given to you by your client J McG on or about 16th day of May 2002 you acted in breach of all or any of Rules 1.01, 1.03, 1.06 and 5.01 of Rules of Professional Conduct for Barristers and Solicitors when investing her money for the following clients:

(a) A & AM (also known as M & AA)
(b) TH Limited
(c) M & AA (also known as A & AM)
(d) P & KV

A & AM (also known as M & AA)

1. On 19 December 2006 Mr Johnston, as attorney for Mrs McG signed a Specific Authority for Investment to purchase an existing mortgage from Wendy Ruth Johnston (wife and employee of Mr Johnston). The principal sum was $53,900.00. The Borrower as recorded on the authority was MA and AA. The security was an unregistered second mortgage secured by a Caveat. Wendy Johnston had sold the security property to the Borrowers with the Borrowers signing an unregistered

mortgage to her four days before the unregistered mortgage was transferred to Mrs McG.

2. At the time of this transaction Mrs McG was in a rest home and not competent to handle her own affairs. Mr Johnston made the decisions and completed the documents on behalf of Mrs McG as her attorney. All parties involved in the transaction were clients of Mr Johnston's firm. The loan was subsequently extended by Mr Johnston, as attorney for Mrs McG until 18 June 2008. The principal sum is recorded as being repaid on 26 February 2010.

M & AA (also known as A & AM)

3. On 12 April 2007 Mr Johnston signed a Specific Authority for Investment as attorney for Mrs McG to invest $20,000.00 in a loan to:
   (a) AAI and SSH and
   (b) MA and AA.

   The interest rate was 12% with a penalty rate of 16%. The security for the loan was:

   (i) an unregistered 4th mortgage secured by Caveat over the property of Borrower (A) in Title B;
   (ii) an unregistered 5th mortgage secured by Caveat over the property of Borrower (B) in Title C; and
   (iii) an unregistered 3rd mortgage secured by caveat over the property of Borrower (B) in Title D.

4. On 29 November 2007 Mr Johnston signed a Specific Authority of Investment as Attorney for Mrs McG to extend that investment to 12 May 2008 on the same securities. The loan was due for repayment on 12 May 2008. The loan is recorded as being repaid on 26 February 2010.
5. On 22 February 2008 Mr Johnston signed a Specific Authority for Investment as attorney for Mrs McG to purchase from PIA and PA a loan of $20,000.00 which they had made in April 2007 to:
   (a) AAI and SSH and
   (b) MA and AA.

The loan was secured by Caveats over B, C and D (above) as supported by:
an unregistered 3rd mortgage; and
an unregistered 4th mortgage; and
an unregistered 2nd mortgage.

6. On 22 February 2008 PIA and PA signed a transfer of two of the mortgages to Mrs McG. The witness to the signatures of PIA and PA on the transfer was Mr Johnston.

7. The loan was due for repayment on 12 May 2008. The loan is recorded as being repaid on 26 February 2010.
8. As A & AM, M & AA and A & A all refer to the same two people, Mr Johnston had, as Mrs McG's attorney, authorised the investment of a total of $93,900.00 over the two properties owned by this couple and the property owned by their children I and H, all parties being his clients.

TH Limited

9. An advance was made to TH Limited of $31,000.00 by Mrs McG on 20 February 2007. The term loan agreement dated 20 February 2007 records that the loan was for a term expiring on 14 August 2007. The interest rate was 12% with a penalty rate of 16%. The security for the loan is stated as an unregistered sixth mortgage over two properties of the Borrower.
10. A further term loan agreement was signed on 14 August 2007 to extend the loan for a further six months to 14 February 2008 with the same interest rates. A specific Authority for Investment for this advance was signed by Mr Johnston as attorney for Mrs McG.
11. Trust account records from EJ & Co show that the loan was in default in December 2007 and intermittently so thereafter.
12. A further Specific Authority for Investment was signed, but not dated, by Mr Johnston as attorney for Mrs McG to lend $31,000.0 to TH Limited from 15 April 2008 to 15 July 2008 secured by an unregistered sixth mortgage over six properties of the Borrower and an unregistered seventh mortgage over two further properties of the Borrower.
13. The loan is recorded as being repaid on 26 March 2010.
14. TH Limited is a client of Mr Johnston and EJ & Co Trustees Limited (Mr Johnston's trustee company) is a trustee of the shareholders in TH Limited.

P and KV

15. On 14 February 2008 Mr Johnston as attorney for Mrs McG signed as Specific Authority for Investment to make a loan of $10,000.00 to P and KV. The security for the loan was an unregistered seventh mortgage secured by caveat over the property of the borrower. The Information about the loan signed on the same day by Mr Johnston as attorney for Mrs McG contains conflicting information about whether the security was to be an unregistered sixth or seventh mortgage and records seven prior mortgages totalling $315,000.00 over a property having a registered valuation dated 23 October 2007 of $335,000.00. The interest rate was 14% with a penalty rate of 18%. The loan was for a term of six months until 14 August 2008.
16. On 22 August 2008 Mr Johnston signed a Specific Authority for Investment as attorney for Mrs McG for a loan of $10,000.00 to P and KV to be secured by an unregistered eight mortgage over the property of the borrower. The interest rate was

14% with a penalty rate of 18%. The loan was for a term of a year from 14 February 2008 to 14 February 2009. The same valuation of 23 October 2007 was used to support the loan.

17. At the time of the lending P and KV were clients of Mr Johnston.
18. The loan was repaid to the Estate of Mrs McG on 15 April 2011 by Mr Johnston personally providing the funds.

Relevant Rules of Professional Conduct for Barristers and Solicitors

Rule 1.01 provides:

The relationship between practitioner and client is one of confidence and trust, which must never be abused.

Rule 1.03 and Rule 1.06 are quoted above at paragraph [7]:

Rule 5.01 provides:

A practitioner must observe strictly the requirements of:

(i) Part VI of the Law Practitioners Act 1982;

(ii) The Solicitors' Trust Account Regulations 1988;

(iii) The Solicitors' Trust Account Rules 1996;

(iv) The Solicitors' Nominees Company Rules 1996.

Commentary

1. Failure to comply with the above requirements may amount to professional misconduct.

Determination

19. Mr Johnston has pleaded guilty to misconduct in his professional capacity to Charge 2.
20. Acting as attorney for a client under a Power of Attorney places upon a practitioner a duty to act in the best interests of the donor of the power, placing the practitioner's fiduciary duty to the donor client as paramount. This is particularly so when the power is granted under an enduring power of attorney and the donor no longer has the mental capacity to oversee or understand what is happening with their affairs.
21. Absolute power as the attorney for a donor who is no longer in a position of overseeing the actions being taken on their behalf gives the attorney the greatest opportunity to abuse the power entrusted to them.
22. Lawmakers have viewed the responsibility held by attorneys under enduring powers of attorney and the risk of abuse of the power held by the attorney as so great that in 2007 the provisions of the Protection of Personal and Property Rights Act 1988 were

amended to insert section 94A to ensure the independence of the advisor and witness to the donor from the attorney.

23. In authorising loans to clients of his firm, Mr Johnston was not able to exercise the required level of independence in his decisions as the attorney for Mrs McG.
24. Although the securities were not required to be enforced and were therefore untested, we consider that the level of security provided for the loans Mr Johnston authorised on behalf of Mrs McG is not that which a prudent lender should accept. The higher interest rate paid on the loans was reflective of the greater risk involved in the investment. All of the loans referred to in this Charge experienced difficulties in meeting repayment on their due dates and ran overdue, placing Mr Johnston in the position of being conflicted in having to act against his clients to enforce repayment.
25. Mr Johnston stated that by making the investments for Mrs McG he was endeavouring to ensure that sufficient funds were generated to cover her ongoing resthome costs and daily needs without eroding her capital.
26. It is concerning that Mr Johnston did not recognise his conflicted position in authorising the loans as attorney for Mrs McG, when she was in no position to have any input into the decision to lend to other clients Mr Johnston acted for. That is particularly concerning when Mr Johnston signed the Authority to invest for Mrs McG and also witnessed the signatures of the parties transferring the investment to her.
27. Most serious is the action of Mr Johnston signing the Authority to Invest for Mrs McG to take over a loan made by Wendy Johnston (Mr Johnston's wife and employee) just four days after the advance was made by Mrs Johnston. It is not possible for Mr Johnston to exercise independent thought to act in the best interests of Mrs McG where the result was to benefit his wife by the immediate repayment of her outstanding funds of $53,900.00. It is of particular concern that Mr Johnston could not recognise his conflicted position.

[18] The Tribunal accepts Mr Johnston's plea of guilty of misconduct in his professional capacity to this charge is appropriate.

Charge 3 - Complaint from D S post 1 August 2008 conduct

AUCKLAND STANDARDS COMMITTEE 3 OF THE NEW ZEALAND LAW SOCIETY further charges Edward Errol Johnston of Auckland, practitioner pursuant to section 241 of the Lawyers and Conveyancers Act 2006 with:

(a) misconduct, or in the alternative
(b) unsatisfactory conduct that is not so gross, wilful, or reckless as to amount to misconduct, or in the alternative

(c) negligence or incompetence in your professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on your fitness to practise or as to bring your profession into disrepute.

3. When acting under the unlimited power of attorney given to you by your client Mrs McG on or about 16th day of May 2002 you acted in breach of all or any of Rules 5; 5.1; 5.2; 5.4; 5.5; 5.6; and 6.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 when investing her money for the following clients:

(i) A & AM (also known as M & AA)
(ii) TH Limited
(iii) M & AA (also known as A & AM)
(iv) P & KV

Particulars

(a) In breach of all or any of Rules 5, 5.1; 5.2; 5.3; 5.4; 5.5; 5.6; and 6.1 of Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 on various dates from 1 August 2008 to Mrs McG's death on 23 August 2008 you exercised the power of attorney for Mrs McG to lend money to your existing clients A & AM (also known as M & AA). TH Limited, M & AA (also known as A & AM) and P & KV in circumstances where there was a clear conflict of interest between their respective interests and Mrs McG's and in circumstances where Mrs McG was unable to exercise an independent choice.

(b) From 1 August 2008 to Mrs McG's date of death on 23 August 2008 in breach of all or any of Rules 5, 5.1; 5.2; 5.3; 5.4; 5.5; 5.6; and 6.1 of Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 you failed to act as an independent advisor to Mrs McG in giving her independent financial advice in that the investments were made to clients of your firm on inadequate securities and/or where there was little actual security for the advance.

[19] As will be noted the facts situation covered by this charge is almost identical to the previous charge. Counsel for the Standards Committee advised the Tribunal that because this behaviour covered the two time periods of the difference statutory regimes (that is, it flowed into the period covered by the new legislation), that on the authority of *Parlane*[4] the Standards Committee decided to bring both Charges 2 and 3 under separate legislation.

[4] *Waikato Bay of Plenty Standards Committee v Parlane* [2010] NZLCDT 8, at pp 17.

[20] We do not consider that *Parlane* is quite so prescriptive as has been assumed.

[21] Where it is possible to assess a particular time when misconduct has occurred, it is appropriate to bring the charge under the relevant legislation which was in force at that time. However where a single course of conduct continues or its consequences continue we do not consider this necessarily justifies a second charge under the new legislation. In respect of Charge 2 the misconduct accepted by the practitioner occurred at the time the investments were made. No discrete act of misconduct occurred after 1 August 2008 when the LCA came into effect.

[22] For this reason we accept the submission made by Mr Waalkens on behalf of the practitioner that Charge 3 involves duplication of charges and for that reason we have determined to dismiss it. It will be noted later in this decision that a different position exists between Charge 1 and Charge Particular 6(c) where the behaviour is repeated after 1 August 2008, in a new event.

> **Charge 4 - Complaint from D S post 1 August 2008 conduct**
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> **AUCKLAND STANDARDS COMMITTEE 3 OF THE NEW ZELAND LAW SOCIETY** further charges Edward Errol Johnston of Auckland, practitioner pursuant to section 241 of the Lawyers and Conveyancers Act 2006 with:
>
> (a) Misconduct, or in the alternative
> (b) Unsatisfactory conduct that is not so gross, wilful, or reckless as to amount to misconduct, or in the alternative
> (c) Negligence or incompetence in your professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on your fitness to practise or as to bring your profession into disrepute.
>
> 4. In breach of Rule 3 and/or 7.2 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rule 2008 and/or Regulation 12(7) Lawyers and Conveyancers Act (Trust Account) Regulations 2008, when acting as solicitor/executor in the estate of Mrs McG (who died at Auckland on 23 August 2008) you failed to promptly account for all monies due to the estate and failed to render statements of the estate to the beneficiaries in a timely manner or at all.

[23] This Charge was the one which arises directly from the complaint made by the beneficiaries of Mrs McG's estate. It is denied by the practitioner on the basis that he reported (on one occasion) prior to the charge, and again shortly before the

hearing, to his co-executor in the estate. There was some email correspondence with the beneficiaries also but it is clear that at the point their requests became challenging and Mr Johnston was having difficulty in collecting on a number of the investments, he adopted an ostrich-like approach to the matter and simply stopped communication with the beneficiaries. We accept that pending the final winding up of the estate strictly speaking he did not have an obligation to formally report to the beneficiaries but rather to the executor. He did this, albeit in a very limited and somewhat unsatisfactory form. However it would have been accepted practice, in the Tribunal's view, to have shown the beneficiaries courtesy and to have kept them advised of progress in collecting and realising the assets in which they clearly had an interest.

[24] We do not consider that this behaviour however amounts to professional misconduct and we make a finding of unsatisfactory conduct in respect of this Charge.

Charge 5 - Own Motion Investigation post 1 August 2008 conduct

AUCKLAND STANDARDS COMMITTEE 3 OF THE NEW ZEALAND LAW SOCIETY further charges Edward Errol Johnston of Auckland, practitioner pursuant to section 241 of the Lawyers and Conveyancers Act 2006 with:

(a) Misconduct, or in the alternative
(b) Unsatisfactory conduct that is not so gross, wilful, or reckless as to amount to misconduct, or in the alternative
(c) Negligence or incompetence in your professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on your fitness to practise or as to bring your professional into disrepute.

5. When asked to give information about the advances to the New Zealand Law Society ("NZLS" or "Society") pursuant to s.141 Lawyers and Conveyancers Act 2006 at various dates in 2009 and 2010 you gave false/misleading information to the NZLS.

Particulars

(a) You did not advise the Society that the advance to A and AM was in fact an advance to M and AA, existing clients of the firm to whom other advances had been made by you in exercise of your power of attorney.
(b) You advised the NZLS on 4 March 2010 that all loans for the estate had been repaid in full when in fact the loan to P and KV was still outstanding.

[25] The practitioner denies this Charge on the basis that both examples recorded in the particulars arise out of unintentional errors on his part. He apologises for difficulties caused to the Society by these errors.

[26] The Tribunal did have some concerns about these matters. There appeared to be a general lack of frankness in the information provided through the whole process, including to the Tribunal. By way of example, the practitioner failed to disclose, when seeking interim suppression, a recent adverse disciplinary finding against him. Indeed he declared that there were no other adverse findings other than a 17-year-old one to which he referred the Tribunal. He seemed not to appreciate that investigations into a practitioner's behaviour rely on the practitioner being completely forthcoming with his professional body and indeed this is the expectation of the Tribunal also.

[27] These securities for the loans under investigation between clients were unregistered mortgages secured by caveat (up to the level of eighth mortgage), although it is noted that there were on occasions multiple cross-securities.

[28] Given that, it was clearly relevant from the Society's point of view to understand the exact nature of the borrower-clients and prospects of recovery in each case. To fail to inform the Society at the first opportunity that two of the borrowers recorded were in fact the same people, was most unsatisfactory. However the evidence fell short of deliberate dishonesty and in respect of this Particular we were prepared to give the practitioner the benefit of the doubt because he simply was following the format of the Law Society's request letter which set out each transaction for response (as opposed to each client), and the practitioner continued to follow that format.

[29] As to the second particular, which was that the practitioner misinformed the Society that all loans had been repaid when in fact they had not, this was a reckless and irresponsible communication. Also, at one point there was an attempt to shift the blame, although it is noted not complete responsibility, to a staff member. However it is clear from the responses of that staff member, Ms T, under cross examination that she was acting on the instructions of the practitioner.

[30] Mr Johnston may have dictated that letter in a thoughtlessly optimistic frame of mind, however it was entirely unsatisfactory. Because we do not consider that

there is evidence of a deliberate intention to mislead we consider it falls short of professional misconduct and enter a finding of unsatisfactory conduct.

Charge 6 - Own Motion Investigation post 1 August 2008 conduct

AUCKLAND STANDARDS COMMITTEE 3 OF THE NEW ZEALAND LAW SOCIETY further charges Edward Errol Johnston of Auckland, practitioner pursuant to section 241 of the Lawyers and Conveyancers Act 2006 with:

(a) Misconduct, or in the alternative
(b) Unsatisfactory conduct that is not so gross, wilful or reckless as to amount to misconduct, or in the alternative
(c) Negligence or incompetence in your professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on your fitness to practise or as to bring your professional into disrepute.

6. From 1 August 2008 until April 2009 in the management of your trust account you acted in breach of all or any of Rules 5.4.2, 5.4.3, 5.4.4 and 5.4.5; 5.5, 5.6 and 6.1 of Lawyers and Conveyancers Act (Lawyers: Conduct & Client Care) Rules 2008 and/or Regulation 7 Lawyers and Conveyancers Act (Trust Account) Regulations 2008.

Particulars

(a) On or about 31 December 2008 you advanced the sum of $19,000 from your client MMI to your clients BF, AM, RT & CR S without entering the advance into your trust account records and/or ledger card. When this sum and a prior advance of $20,000 was due to be repaid you failed to repay this sum or any interest on it until April 2009.
(b) On 31 August 2008 you on-sold a mortgage of $100,000 from TH Limited in favour of LFS Limited (a company for which you are the sole shareholder and director) to Ms R, a client of your practice without advising her to seek independent legal advice and/or ensuring that she did take independent legal advice and/or disclosing the nature of your involvement in LFS Limited.
(c) Between August 2008 and December 2008 you (and the trustees of your Family Trust) personally borrowed up to the sum of $550,000 from your clients Mr and Mrs W without referring them for independent legal advice and/or ensuring that they obtained independent legal advice and/or disclosing the full nature of your involvement in the borrowing.

These charges and particulars either separately or cumulatively amount to misconduct.

[31] As can be seen, there are three examples that are said cumulatively to amount to professional misconduct. The practitioner elected to plead to each

separately entering a guilty plea to the alternative of unsatisfactory conduct in respect of Particular 6(a) and denying both the Particulars 6(b) and 6(c).

[32] The circumstances referred to in Particular (a) relate to a default in proper trust account recording over the Christmas holiday period. This was identified by the auditor, Mr Lewis, in 2009 and immediately rectified. We do consider that this was a relatively isolated oversight which is less serious than the other aspects of this Charge.

[33] Particular (b) involved the purchase by a client Ms R of a $100,000 mortgage held by a financial services company of which the practitioner was the sole shareholder and director. There is no documentary evidence that the client was aware that she was purchasing this mortgage from Mr Johnston or his solely owned company. However, in evidence, he said that this had been conveyed in discussions between them.

[34] Once again there is a huge blurring of professional boundaries and a solicitor/client conflict arising. This client also swore an affidavit in support of Mr Johnston, despite having subsequently received independent legal advice to the effect that Mr Johnston had failed in his fiduciary obligations to her and that had she suffered any loss he would be personally liable to her. She deposed that she still considered Mr Johnston to be an “honest and responsible person with the highest integrity”. It would seem from her affidavit that she had not been invited to have independent advice but she deposes that had this been offered to her she would not have taken advantage of it. She was confident Mr Johnston would not have acted in a manner detrimental to her welfare.

[35] Notwithstanding this rosy view of the matter, it became apparent from the evidence that Mr Johnston had not advised Ms R that at the time of the transfer of the mortgage to her, the mortgagor TH Limited was in default in respect of other borrowings.

[36] This is a serious default and could have had very unfortunate consequences for the client. In respect of the advance from the McG estate to this same borrower TH Limited Mr Johnston has experienced considerable difficulty in recovering the funds.

[37] When asked by the Chairperson in the course of the hearing whether he had any interest in TH Limited Mr Johnston said that he had not. It was only after counsel for the Standards Committee pointed to the shareholding in the name of his firm's trustee company jointly with another party that he acknowledged he had forgotten this. There is thus a compounding of the conflict of interest in this instance.

[38] As indicated in respect of the Ws borrowings, the view of the client cannot be determinative of the standards of ethics imposed upon the practitioner.

[39] Mr Johnston personally benefited from the taking over of this mortgage and it is a matter which clearly falls within Rule 1.03.

[40] Particular 6(c) is in a similar category. It relates to a further advance from Mr and Mrs W and this advance occurred after 1 August 2008. Because of that we consider this to have been a separate event which gives rise to a further finding (rather than it being a continuation of a course of events subject to an earlier finding).

[41] The practitioner had been warned twice by the Law Society auditor, Mr Lewis, on the issue of conflict despite Mr Johnston's assertion in his affidavit in response that:

> "I have over the years had my records audited by auditors employed by the Law Society on a regular basis and although I cannot speak for the auditors, I can say that other than with respect to the issues that have arisen in this case, no questions have been raised about the way in which I have been recording and documenting these transactions for and on behalf of client."

[42] Mr Lewis responded to this assertion by providing copies of letters which he had written on 16 August 2002 and 16 August 2004 to the practitioner.

[43] In the 2002 letter, when discussing an advance which was in arrears, Mr Lewis said this:

> "While you state you were satisfied with the level of security, the decision to authorise the advance is the investor's. My view is that the poor interest payment performance in relation to the previous advance is a significant factor that should have been passed on to the new investor, to enable him to make a more informed decision."

[44] In 2004 in commenting on another advance it was said:

> "On several occasions, the mortgage has been sold from one of your clients to another while it was in arrears and I have seen nothing to indicate that the purchaser was aware that the mortgage was in arrears at the time of purchase, although you assure me that this was the case."

[45] And later:

> "This is a situation where I fear you have a real conflict of interest as you are a part-owner of the property which Mr A has offered his share as security for the loan."

[46] There was also another comment which we will not record for the sake of privacy of the client but indicated a further complication of the conflict:

> "... It is my view that you should have insisted on him receiving independent legal advice before he proceeded with this advance and also put him in the picture completely in relation to the arrears of interest payments, and the relative history and connections."

[47] In the same letter it is pointed out:

> "... You are in the situation of being the solicitor also acting for both parties in a transaction" (this being a family matter)

[48] And in relation to yet a further advance:

> "Mr B's company is the S Group in England and I understand that you and at least one of your staff members and perhaps other family members are perhaps shareholders in this company. You may wish to consider arranging for another firm to take enforcement action in relation to these advances."

[49] Mr Lewis made further comments about the lending practices of the firm. He recorded that with a total mortgage book of $1.5 million there appeared to be arrears in excess of $990,000. Later in the letter he says this:

> "You advised me that in most cases you arranged for independent legal advice to be given to the borrower. I query the wisdom of this as it is the lender who is taking the risk and surely it is the lender who needs the independent advice so they can make an informed decision whether to go ahead with the advance or not, particularly where you have a close relationship with the borrower."

[50] And further:

> "I appreciate your borrowing is mainly from family members and because of your close relationship with them, they do not require independent legal advice, but it is my duty to point out this provision (Regulation 6) to you for your contemplation."

[51] We consider that cumulatively Particulars (a), (b) and (c) constitute professional misconduct. We consider that the practitioner has fallen into very serious error and in two of these Particulars this has involved transactions where there is a personal benefit to him. Whilst this stopped short of dishonesty it is seriously reprehensible conduct. We consider that it is certainly behaviour which "evidences an indifference to and an abuse of the privileges which accompany registration as a legal practitioner".[5]

Summary of Findings

Charge 1

Misconduct in professional capacity (LPA penalties apply)

Charge 2

Misconduct in professional capacity (guilty plea) (LPA penalties apply)

Charge 3

Dismissed

Charge 4

Unsatisfactory conduct

Charge 5

Unsatisfactory conduct

Charge 6

Misconduct in professional capacity (LCA penalties apply)

[5] *Complaints Committee No 1 of the Auckland District Law Society v C*, see n1 above.

[52] It will be noted that reference is made to the transitional provisions of sections 351 and 352 in respect of the first two charges because the conduct complained about occurred before the commencement of the LCA, that is 1 August 2008, the penalty provisions are those which would have been available under the LPA.

Penalty

[53] The Standards Committee seek a period of suspension, censure and payment of costs. They also seek publication of name.

[54] Counsel for Mr Johnston resists suspension, argues for censure, fine, costs and suppression of name. In support of his submissions Mr Waalkens has produced to the Tribunal eight character references for Mr Johnston from respected members of the profession and members of the community alike. They speak to his hardworking nature, high standing within the Samoan community, courtesy and genuine interest in his clients.

[55] In professional disciplinary matters the authorities make it clear that there are a number of purposes in the sanctioning process:

(a) Protection of the public.

(b) Maintenance of the professional standards of legal practitioners (and as a subcategory of this demonstration to the public that such standards are maintained).

(c) Punishment (to a certain degree).

(d) Rehabilitation.

[56] On the second day of the hearing, in making submissions in mitigation of penalty on behalf of Mr Johnson, Mr Waalkens advised the Tribunal that as a consequence of these proceedings Mr Johnston had decided to stop providing client-to-client lending services. It was indicated that the existing mortgage book needed to be managed to conclusion or disposal. The Tribunal was informed that in any event if refinancing of existing loans were required the clients on either side of the transaction would be referred to other practitioners. He has since provided an

undertaking to the Tribunal to confirm that he has ceased client-to-client lending services.

[57] We were asked to take this very serious step as a reflection of the insight Mr Johnston had into the problems which had led to these proceedings.

[58] The Tribunal has been powerfully influenced by this concession on Mr Johnston's part. By electing to give up his loan book he has, in our view to a very great extent, met the first purpose of the sanctioning process, that is, protection of the public. We note the decision of Keane J in *A v Professional Conduct Committee*,[6] which related to a physician. His Honour, in discussing consideration of whether to impose suspension or cancellation of registration, referred to five principles derived from the authorities:

> "[81] First, the primary purpose of cancelling or suspending registration is to protect the public, but that 'inevitably imports some punitive element'. Secondly, to cancel is more punitive than to suspend and the choice between the two turns on what is proportionate. Thirdly, to suspend implies the conclusion that cancellation would have been disproportionate. Fourthly, suspension is most apt where there is 'some condition affecting the practitioner's fitness to practise which may or may not be amendable to cure". Fifthly, and perhaps only implicitly, suspension ought not to be imposed simply to punish."

[59] His Honour went on to point out that a Tribunal must also pay attention to the rehabilitation of a practitioner.

[60] Finally the factor of protection of the public is also important when considering publication and it can be said that in many cases publication of a practitioner's name may then preclude the need for suspension in order to protect.

[61] We consider that the step taken by Mr Johnston to change the nature of his practice goes a long way to avoiding future conflicts either between himself and clients or client-to-client. We also accept his assurance that these proceedings have had an enormous impact on him and will change the way he approaches any perceived conflict in the future. We do have some residual concerns about his ability to identify conflicts as soon as they arise or can be foreseen but we consider that this can be addressed by means other than suspension.

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[6] HC Auckland, CIV-2008-404-2927, 5 September 2008.

[62] We recognise that as a sole practitioner, the consequences of suspension are much worse than for someone whose partners can continue the practise. Mr Johnston's employees and his clients would also suffer the consequences of suspension.

[63] For all of these reasons although this was a finely balanced matter Mr Johnston's belated steps to dispose of his "loan book" have tipped the balance away from suspension, which would otherwise have been imposed.

Censure

[64] To reflect the displeasure of the Tribunal and of the legal profession as a whole, Mr Johnston is censured on each of the Charges 1, 2, 4, 5 and 6.

Fine

[65] We consider that there must be a fine to reflect the seriousness of this offending. In respect of the two charges under the LPA - on Charge 1 Mr Johnston is fined $3,000 (of a maximum of $5,000) and on Charge 2 he is fined the sum of $4,000 (of a maximum of $5,000). In respect of Charge 6 we also propose to impose a monetary penalty, and under the new Act the maximum fine is $30,000. Having regard to the totality of the offending contained within Charge 6 we impose a fine of $6,000.

Further orders

[66] (a) Pursuant to section 106(4)(g) of LPA, Mr Johnston is to make his practise available for inspection as required.

(b) Pursuant to section 106(4)(g) of LPA, Mr Johnston is to make his practise available for inspection as required.

(c) Pursuant to section 156(1)(l) of LCA, Mr Johnston is to take advice from a nominated person in relation to the management of his firm. (Mr R

Eades has been nominated by the practitioner and is approved by the Tribunal.)

(d) Pursuant to section 156(1)(m) of LCA, Mr Johnston is to undertake education as follows:

He is to attend the "Trust Account Supervisor Course and Assessment" to be held in Hamilton in June 2011.

Suppression

[67] Despite having acknowledged a number of the charges, albeit some at lower levels, counsel for the practitioner seeks permanent suppression of his name. This is opposed by the Standards Committee. While section 240 of the LCA provides jurisdiction to prohibit publication of names or identifying details, it is accepted by the practitioner that the starting point is one of openness.

[68] It is the view of the Tribunal that public protection requires not only knowledge of the disciplinary process, and the circumstances of misconduct, but in most cases also the identity of the practitioner. Without this, people cannot make informed choices about their professional advisers.

[69] Mr Waalkens submitted that there was sufficient public protection achieved by the closure of the loan book previously operated by the practise. He also submitted that deterrence of other legal practitioners is achieved by recounting the circumstances of the misconduct.

[70] We consider the concerns raised by the evidence and by our findings cover a far wider range of legal practice than merely the lending operation. This view is reinforced by the 2009 decision of the Legal Complaints Review Officer ("LCRO"), which was provided to us late in the course of the hearings.

[71] It is clear that the practitioner has had the benefit of suppression on two earlier occasions (albeit one quite historical). We consider that other practitioners are entitled to know the identity of a colleague who has been found wanting, and with whom they may have to deal professionally.

[72] We were provided by counsel for the practitioner with many references which referred to his good character and standing, particularly in the Samoan community and the local West Auckland community. Some of these references raised concerns about the impact of publication of his name on the organisations in which he has a leadership role.

[73] We have had regard to the embarrassment not only to Mr Johnston but his family, and in particular his children. This, unfortunately, will always be the case in professional disciplinary matters.

[74] The very significant impact publication will have on his standing in the Samoan community is acknowledged and has been taken into account in assessing penalty and mitigating what might have been a more serious response. Indeed we have referred under the heading of suspension to the process of publication meeting, to a large extent, the public protection purpose of sentencing and thereby avoiding having to impose suspension.

[75] In terms of impact on community organisations, we consider that Mr Johnston can ameliorate that by taking steps personally, perhaps by concluding his public involvement with the organisation.

[76] We propose to accede to the request of his counsel to extend interim suppression for a period to enable him to inform relevant people. We consider 14 days will be sufficient for this purpose.

[77] It is recognised that there may well be a negative impact on his practise as a result of publication. We do not consider in this particular case that such considerations outweigh the public interest in openness.

[78] The Law Society having incurred costs in excess of $33,000 seek an order against the practitioner for reimbursement of all or part of these costs.

[79] The Tribunal costs pursuant to section 257 amount to $14,500. An order must be made pursuant to section 257 LCA against the New Zealand Law Society for reimbursement of these costs. The Society also seeks reimbursement to them of any such order under section 257.

[80] In assessing costs we consider we must recognise that the practitioner has paid the cost of his own counsel. We consider that he must be given credit for

engaging competent representation and for entering his pleas at an early date. This has considerably shortened the hearing itself and thus saved both the Society and Tribunal costs. We consider practitioners ought to be encouraged to participate in the disciplinary process in an effective and appropriate manner. We consider that credit ought to be given to him in assessment of costs and sentencing generally for the responsible manner in which he has conducted these proceedings, for his acknowledgements and apologies in his evidence in relation to his wrongdoing. We also take into account his considerable sacrifice in giving up the part of his practise which relates to lending. As indicated earlier this has tipped the balance away from suspension but we also consider it ought to be taken into account in respect of costs, as must the overall cost to the practitioner of the fines imposed upon him.

[81] Counsel for the practitioner advised the Tribunal that his client was in a position to pay a fine. In the absence of other financial information, we assume he is in a position to pay financial penalties and costs orders. We award reimbursement of the sum of $10,000 pursuant to section 249 against the practitioner. Further we order costs in favour of the Standards Committee in the sum of $20,000 against the practitioner pursuant to section 249.

DATED at AUCKLAND this 13th day of May 2011

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Judge D F Clarkson
Chairperson