NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2014] NZLCDT 51
LCDT 006/14

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**WAIKATO BAY OF PLENTY STANDARDS COMMITTEE 1** Applicant
AND	**HELEN MONCKTON** Practitioner

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Ms R Adams
Mr G McKenzie
Mr K Raureti
Mr P Shaw

HEARING at Hamilton District Court

DATE OF HEARING 6 and 7 August 2014

COUNSEL

Mr M Hodge for the Standards Committee
Mr M Harris and Ms O de Pont for the Practitioner

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL
(On Penalty)

[1] In early October 2011 members of the S family were horrified to find that a property, which they understood was a family trust property, had been transferred into their sister's sole name (Dr S).

[2] This had come about as the result of the efforts of Helen Monckton to rescue the purchase of another property by Dr S.

[3] The manner in which this occurred and the series of transactions undertaken, form the basis for the charge of negligence against Mrs Monckton.

[4] Mrs Monckton pleaded guilty to this charge at the conclusion of the evidence and therefore this decision deals only with the penalty to be imposed on her as a consequence.

[5] The issues which bear on the determination of that penalty are:

1. How serious was the conduct on the continuum of negligent behaviour?

2. Was there evidence this was indicative of Helen Monckton's practice; or did it seem to be an isolated incident?

3. Was the conduct so serious that a period of suspension ought to be imposed?

4. What other orders ought to be imposed to reflect the purposes of the Lawyers and Conveyancers Act 2006 ("LCA")?

Background

[6] In late August 2011 Helen Monckton was instructed by a new client, Dr S, who had signed an agreement to purchase a residential property in Dinsdale. Various conditions were included in the agreement: finance, solicitor's approval and a satisfactory LIM report. These had to be satisfied by 12 September.

[7] Dr S advised that she had arranged finance with her bank. She also emphasised how keen she was on the property, for reasons she described as spiritual and environmental, relating to its location. Dr S's interest in a piece of bush near the property required Mrs Monckton to make further inquiries and to seek an extension of the "unconditional" date. The LIM report also produced some concerns for Mrs Monckton and she cautioned her client to think carefully about the purchase before proceeding to declare it unconditional.

[8] Around this time Dr S told Mrs Monckton she and her father owned a property in T Street, which she thought had been vested in a family trust. She told Mrs Monckton that she wished to purchase this property outright.

[9] Dr S was purchasing the Dinsdale property with 100% finance, but Mrs Monckton says that she did not turn her mind to that issue and therefore was unprepared for what occurred, namely a very late insistence by the bank on collateral security for their mortgage. This came some two days before the proposed settlement date.

[10] To salvage the situation Mrs Monckton suggested to Dr S that the bank mortgage over T Street be discharged and that property be transferred into her sole name in order that it could be used as collateral security for the Dinsdale purchase. The other registered owner of T Street was Dr S's father and Dr S told Mrs Monckton he was suffering from dementia and his affairs were managed under a power of attorney by two of her sisters. Thus it was arranged that one of the attorneys sign on behalf of Dr S's father, that he resign as a trustee and transfer the property into Dr S's name. However Mrs Monckton was aware that if the property were in fact a trust property, rather than simply being owned by Dr S and her father in their personal capacities, there may well be beneficiary interests undermined. She sought to prevent this by registering a caveat against the title by the 'attorney', who in fact was not even a beneficiary. The family are still to agree how the property interests are to be sorted out, despite some acknowledgments made by Dr S in her evidence.

Issue 1

[11] Mrs Monckton made a number of serious errors. One, she relied on her client's assurance that her father lacked capacity, without seeking any medical evidence to

verify this. She appeared to be swayed by the fact that her client was an academic with a doctorate. The second error was that she did not carefully examine the power of attorney to ascertain that it ought to be exercised jointly by two sisters and that it could not deal with property which Dr S's father owned as a trustee. The next error was that she was aware that a brother in the family had been appointed as a trustee but she accepted her client's assurances that he was being kept apprised of the situation and had no difficulties with it, rather than checking this with him or his lawyer.

[12] She did not ensure that her client and the attorney who was executing documents were fully apprised of the ramifications of the various conflicts of interest. Furthermore she did not advise the bank to review its security position in the light of the uncertainties over T Street and its ownership. She had a caveat executed by the attorney, with the sensible intention of protecting the interests of the beneficiaries. That sister (attorney) was not in fact a beneficiary of the trust which had owned T Street prior to these dealings.

[13] Quite properly, after cross-examination of Mrs Monckton and Dr S, Mrs Monckton reflected on the matter overnight and accepted that in combination these errors amounted to negligence and entered her guilty plea on the morning of the second day of the hearing.

[14] We regard the number of errors, the consequences, which have meant that this family has a difficult mess to unwind and has not yet done so some two years further on, together with the numerous duties which the practitioner failed to fulfil, constitute relatively serious negligence.

Issue 2

[15] We are satisfied having heard from the practitioner and having considered the affidavit of Mr Scotter, who has provided second opinion and senior advice to her on many occasions, that this series of errors is entirely out of character for this practitioner. The context of time pressure, and pressure from her client can be taken into account. We accept that Mrs Monckton is normally an extremely careful practitioner who generally refers to other lawyers, matter which are beyond her area of expertise. When necessary she takes advice from senior practitioners. She is

also a practitioner who works hard for her clients and takes her responsibilities to them seriously.

Issue 3 - Is suspension required?

[16] We consider that the level of negligence in this case was so serious that any penalty short of suspension would not properly fall within the principles of penalty imposition which must be observed by the Tribunal, and the purposes of the Act[1]. Those purposes include the maintenance of public confidence in the provision of legal services by upholding high professional standards, and in addition the protection of the public.

[17] We do not consider that the public requires protection from this practitioner but deterrence is required in a general sense as well as in a specific sense. The purposes of penalty were discussed in the *Daniels*[2] decision:

> "A suspension is clearly punitive, but its purpose is more than simply punishment. Its primary purpose is to advance the public interest. That includes that of the community and the profession, by recognising that proper professional standards must be upheld, and ensuring there is deterrence, both specific for the practitioner, and in general for all practitioners. It is to ensure that only those who are fit in the wider sense to practice are given that privilege. Members of the public who entrust their personal affairs to legal practitioners are entitled to know that a professional disciplinary body will not treat lightly serious breaches of expected standards by a member of the profession."

[18] However we also remind ourselves that *Daniels* referred to the intervention which was the least restrictive in order to achieve the disciplinary purposes[3].

[19] With that in mind and taking into account the mitigatory factors we determined to suspend the practitioner for one month only, rather than a somewhat longer period which might have been appropriate for a practitioner with, for example, previous disciplinary findings against her.

[20] The mitigating factors are that this practitioner has had a 34-year unblemished record of service to the public. She is also involved in various charitable

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[1] Lawyers and Conveyancers Act 2006.
[2] *Daniels v Complaints Committee of the Wellington District Law Society* [2011] NZLR 850 at para [24].
[3] See note 2 at para [22].

undertakings thereby giving back to her community. She is entitled to credit for these factors.

Issue 4

[21] We determined that, having regard to the hurt suffered by the other family members including a sense of exclusion and loss of mana, that the practitioner ought to make a written apology to them. She had apologised verbally during the hearing but we considered this ought to be delivered in a more formal manner.

[22] In addition Mrs Monckton has agreed to undertake training in relation to some of the areas in which she erred. At the conclusion of the hearing when announcing our orders we delivered a formal censure to her. Finally the practitioner was directed to pay costs to the Standards Committee as specified by counsel for the Standards Committee and approved by the Tribunal in due course. She was further directed to repay the s 257 Tribunal costs which were, as they are required to be, ordered against the New Zealand Law Society.

[23] We accept the joint submission of counsel that some guidance on rectification is of assistance. For this reason we have adopted portions of their Joint Memorandum to the Tribunal on this subject, as Appendix 1 to this decision.

Summary of orders

1. The practitioner is Censured.

2. The practitioner is suspended from practice for one month from 1 September 2014.

3. The practitioner is to pay costs to the Standards Committee as specified by counsel for the Standards Committee and approved by the Tribunal in due course. These costs have been seen and are approved.

4. The New Zealand Law Society is to pay the costs of the Tribunal in the sum of $7,765, pursuant to s 257.

5. The practitioner is to repay the New Zealand Law Society the s 257 Tribunal costs in the sum of $7,765, pursuant to s 249.

6. Pursuant to ss 156(1)(h)(ii) and 242(1)(a) the Tribunal orders Mrs Monckton to pay $10,000 as a contribution to legal expenses to be incurred by the S family in instructing a solicitor of their choice to carry out steps by way of relief from the errors and omissions of Mrs Monckton in the transactions which are the subject of these proceedings. These funds are to be paid by Mrs Monckton to the trust account of [Beattie Rickman, Barristers and Solicitors, Hamilton] to be used exclusively for this purpose. The reasonable costs and expenses of the firm in administering the fund may be deducted from it. In the event the legal costs incurred for this purpose are less than $10,000 the balance is to be refunded to Mrs Monckton.

7. The practitioner is to provide a written apology to the complainant, pursuant to s 156(1)(c).

8. The practitioner is to undertake training as set out in the Standards Committee submissions of 5 August 2014, pursuant to s 156(1)(m).

DATED at AUCKLAND this 29th day of August 2014

Judge D F Clarkson
Chair

Appendix 1

Agreed process for rectification

[1] It was common ground at the hearing that Mr K S has lost the capacity to discharge his duties as a trust of the KTAF Trust. Given this, it would appear to be appropriate to identify a replacement trustee for Mr S. Dr S confirmed at the hearing her willingness to step aside as a trust of the KTAF Trust (which would also require title to the T Street property to be vested in the new/continuing trustees).

[2] It was also accepted at the hearing that the power of attorney did not authorise Ms Y to act on her father's behalf in relation to trust property. This would render his purported "resignation" legally ineffective. However, Mr K S could be replaced as trustee by Dr S and the other co-trustee, Mr A S, utilising the power under s 43(1)(f) of the Trustee Act 1956. Dr S could then retire as trustee of the KTAF Trust. (In the absence of agreement as to the replacement of Mr K S as trustee, the High Court could appoint a replacement under s 51 of the Trustee Act.)

[3] Once the "new" trustees of the KTAF Trust are in office, it should be fairly straightforward to transfer legal title in the T Street property from Dr S to them. Ms Y would have to consent to the removal of the caveat she currently holds. Given her evidence at the hearing, this should not present any difficulty and the legal work required to effect the withdrawal of the caveat is minimal.

[4] Counsel respectfully suggest that identifying steps of this nature in the judgment will provide useful guidance not only to the S family but to the practitioner(s) involved in carrying out the legal work, and the practitioner who is appointed to hold the $10,000 and meet claims against that fund. Guidance from the Tribunal will help ensure that the fund is applied appropriately, and that claims are not made against it, for legal work beyond that required to unwind, so far as practicable, the steps taken by Mrs Monckton in 2011.