

**IN THE COURT OF FACULTIES**

**IN THE MATTER OF ROBERT JH WARD, A NOTARY**

**AND**

**IN THE MATTER OF THE NOTARIES (CONDUCT AND DISCIPLINE)**  
**RULES 2011**

**DECISION OF THE COURT**

**INTRODUCTION AND PRELIMINARY POINT**

1. A complaint was made against Mr Ward by the Nominated Notary, Mr Allen, after a complaint was received from Paul Sullivan relating to the way in which Mr Ward had acted for his family.
2. As a result of his investigation into the conduct of Mr Ward the Nominated Notary made the following allegations:-
  - (a) He had represented both parties to a Declaration of Trust without obtaining written consent to act for both sides.
  - (b) Flawed drafting of the Declaration of Trust.
  - (c) He failed to notify the mortgage company, which he represented, as required of material facts relating to the status of the purchaser and the property.
  - (d) Failure to advise that an unsigned Will was invalid.
  - (e) Failure to list the assets on the Will.
  - (f) Failure to advise on the inclusion of a property within the Will.
  - (g) Failure to advise on the consequences of leaving one of their children out of the Will.
  - (h) Ambiguous drafting of the Will.
  - (i) A failure to identify for whom he was acting in respect of the administration of the estate.
  - (j) Acting for parties when there was a conflict.
  - (k) Misleading a party from whom he had accepted instructions as to his entitlement.
3. The Nominated Notary contended that, not only do some of the alleged acts amount individually to serious misconduct because the service provided fell seriously below the standard of service reasonably to be expected of a Public Notary, but also some of the alleged misconduct when looked at collectively amounts to serious misconduct. We agree that a series of connected acts of

misconduct, which in themselves could not be described as serious, may be considered as serious when considered collectively.

4. In that regard the Nominated Notary applied to prove the facts of a hearing against Mr Ward for Notarial Misconduct held in July 2012 and which was not proved to the satisfaction of the Court. He based that application on paragraphs 39-42 of the Guidance for Nominated Notaries issued by the Master of the Faculties pursuant to the Notaries (Conduct and Discipline) Rules 2011 (“the Guidance”).
5. Neither Mr Robinson nor Mr Watt were made aware of the allegations which were brought in that case to avoid any suggestion that their judgment on the instant complaints could have been in any way affected by knowledge of it if we decided not to admit it. The Commissary had to review the judgment of the Court in order to assess whether the application had merit. The parties were given an opportunity to argue the matter in advance of the hearing but Mr Ward objected to that course.
6. Having heard brief submissions from the Nominated Notary we decided that the basis on which it was sought to be adduced did not make the evidence admissible. The Nominated Notary argued that the prior conduct could be added into the mix to prove that the misconduct that he was alleging before this court amounted to “serious misconduct”.
7. In our judgment, and in accordance with the way it is explained in paragraph 39 of the Guidance, a prior unproved allegation cannot be re-enlivened for that purpose and, were it so, there would be a risk that the Court would breach the principle of *autrefois acquit*. Even if we are wrong about that, we could not see how, in a case where there are already a whole series of complaints being made about the conduct Mr Ward, one additional complaint would assist us to come to a conclusion.
8. This is not the right case to lay down our interpretation of the circumstances in which an application should be made to adduce evidence of prior notarial misconduct, whether proved or unproved. We have no doubt that there will be cases where it will be right to apply to adduce evidence where the previous allegation has not been proved but we judge that a Nominated Notary should think long and hard before doing so. There will be cases where the prior complaint will stand out as being, in particular, relevant to an important matter in issue.
9. Although the Commissary read the earlier judgment, no application was made that he should recuse himself. We do not judge that such an application could have succeeded and what knowledge he had of the prior complaint did not affect his ability to try these complaints impartially.

## **BACKGROUND**

10. Mr Ward was admitted as a solicitor in 1972 and retired in 1989. He has practised as a Public Notary since 1979 and intends to retire on 30<sup>th</sup> April 2015.
11. Mr Anthony and Mrs Kathleen Sullivan (“the grandparents”) had three sons, David, Peter and Paul Sullivan (hereinafter referred to by their first names only) and a daughter, Lynda Connors (“Mrs Connors”). Liam Connors was their grandson and Mrs Connors’ son.
12. In 2007 the grandparents decided to move from Luton to live closer to their children. Property prices being higher in Clacton on Sea, they needed additional funds to be able to make the move. The only person willing and able to facilitate this was Liam Connors. He was willing to buy 1 Nightingale Way (“the house”) making use of the proceeds of sale of his grandparents’ home in Luton and taking out a mortgage in his name for the balance.
13. They wanted to execute a Declaration of Trust to ensure that their capital investment returned to them when the house was sold which would happen in any event on their death. Mr Ward acted for both the grandparents and Liam Connors in drafting the Declaration.
14. He acted for Liam Connors in respect of the purchase of the house and in obtaining a mortgage from UCB Home Loans (“UCB”). As is now common, Mr Ward acted for UCB as well.
15. He drafted new Wills for the grandparents which named David, Peter and Paul as the beneficiaries.
16. Mr Ward was appointed by the grandparents to prove the Will and administer the trusts thereof. As a result of dissatisfaction with the way in which Mr Ward was acting, Paul went to Pictons Solicitors for advice. It was that intervention which led to the matter being referred to the Registrar and the appointment of Mr Allen as the Nominated Notary.
17. It is clear to us that Mr Ward sought to give a value for money service to those he represented in this case. There was little by way of funds available to the family and he did his best not to expend them unnecessarily. Whilst that is in itself a virtue we are bound to observe that it may have been one of the causes of the problems that arose in the way he handled their affairs.
18. Before moving on to deal with the areas of complaint, we would like to express our gratitude to the Nominated Notary for the clear way in which he put his case in writing and in questioning Mr Ward during the hearing. We would also pay tribute to the concision of Mr Ward in addressing us and for the polite and

reasoned way in which he dealt with the allegations made as to his professional competence.

19. Whilst there are a number of complaints set out by the Nominated Notary, they can be divided into four parts and we shall address this complaint accordingly. In dealing with the complaints we do not intend to set out a full summary of the evidence, but those parts which were relevant to our decision. We will refer to the documents by tab followed by page number.

#### **THE DECLARATION OF TRUST**

20. We consider that, whatever the parties to the Declaration wanted him to do, Mr Ward should have advised them to seek separate advice. We believe that, had that happened, the subsequent difficulties may never have occurred. We are aware of the benefit of hindsight in these matters and do not make any adverse finding against him in this regard. He accepted that he did not obtain the written consent of the grandparents and Liam Connors to act for both side. On its own this does not amount to serious misconduct but is indicative of a less than careful approach to his work as a Notary.
21. We also note that on 4<sup>th</sup> November 2013, much later in the history of this matter, Pictons wrote to Mr Ward (3/111) and pointed out that a clear conflict had arisen between his client, Liam Connors, and his failure to identify the terms of the trust to the other beneficiaries. In his reply (3/113) Mr Ward wrote "...we were instructed and acted for Liam George Connors and those instructions were assisted and aided by the presence of Mr and Mrs Connors senior".
22. We are unable to understand why Mr Ward used those words when he maintained to us that Liam Connors and the grandparents were his clients, unless, at least by November 2013, he realised that they should have been separately represented.
23. The drafting of the Declaration was seriously flawed. The grandparents gave instructions (3/25) as to what they wanted to achieve; that on both their deaths 70% of the value of the house be withdrawn and shared equally between their four children (later revised when the Will was drafted to omit Mrs Connors). An attendance note (3/27) identified that "Subsequent sale would not increase the percentage aforesaid". A further file note (3/29) read "Please note that any uplift of value will not be reflected in the amount paid back to the grandparents, ie they are putting in about £135,000 but any increase in value on the subsequent sale will not be added to their share".
24. The preamble to the Declaration setting out their intentions (3/31) read:

“...the Beneficiaries **DECLARE** that upon subsequent sale and realisation of the property they will require the original capital investment of...£133,500...to be paid alone including any interest or increase or alteration in the value of the property reached upon subsequent sale”

25. The terms of the Declaration (3/32) require the trustee (Liam Connors) to hold the proceeds of sale on trust, 30% for himself and 70% to the beneficiaries (the grandparents). Paragraph 2 read:

**“IT IS HEREBY DECLARED** that any increase or decrease in the value of the property subsequently realised shall not affect or adjust the proportion allotted to the beneficiaries.”
26. In our judgment the drafting of the Declaration did not follow the express instructions of the parties to it. It may have been that the grandparents sought to reflect the generosity of Liam Connors in taking out a mortgage by allowing him to benefit from the increased value of the property on their death. The way it is expressed could have resulted in him losing any increase in its value.
27. Mr Ward accepted that there was ambiguity in his drafting. We judge that the ambiguity could have had serious consequences for Liam Connors.
28. The Declaration also dealt with responsibility for insuring the property. In the Preamble (3/30) it states that the grandparents will be responsible for insuring the property. At Paragraph 3 of the Deed (3/33) it states that Liam Connors as trustee agrees to insure the property.
29. This is a fundamental error in drafting and adds to our impression that insufficient care was taken in drafting this document.
30. In our judgment the service provided by Mr Ward in drafting this Declaration of Trust taken as a whole fell seriously below the standard of service reasonably to be expected of a Public Notary and this amounts to serious misconduct.

#### **THE MORTGAGE OFFER**

31. Liam Connors applied to UCB for a mortgage. Mr Ward was under a duty to UCB to inform them of certain material facts, and he accepted that in evidence. The CML Lenders’ Handbook at, in particular, paragraphs 59 (12/218), 6.5.1 (12/221) and 7.2-7.3 (12/223) identifies what his duties were.
32. It is submitted by the Nominated Notary that Mr Ward failed to inform UCB about the true position in respect of the following, that:-
  - (a) There was not an assured shorthold tenancy in place.

- (b) The title to the property was affected by the Declaration of Trust.
  - (c) The balance of the funds to purchase the property were provided by his grandparents rather than by him.
- 33. In his answers to questions on this topic, Mr Ward relied on the fact that there was a mortgage broker who would have informed UCB of the true position. We reject that as any defence to these allegations. The duty was on him to provide his client, UCB, with that material information.
- 34. As to the title, he maintained that he had informed his client, UCB, of the position as to the legal title and was not required to inform them of the position in equity. We disagree. The statement in the certificate of title (13/235) that “we have investigated the title to the property, we are not aware of any other financial charges secured on the property which will affect the property after completion...” must require the conveyancer to reveal the Declaration of Trust.
- 35. We consider that each failure is significant; a company providing the mortgage on a buy to let property needs to know that there is a tenant who will provide money from which the mortgage repayments are to be made, the company needs to know where the funds to buy the property came from so as to assess the worth of their client, and the company needs to know where the proceeds of sale are destined in case there is a shortfall in the repayment of the mortgage.
- 36. Whilst the equity in this property was of an amount that his failure to inform UCB about these matters were unlikely to cause any problems for UCB with the mortgage or, had they been revealed, it is unlikely that they would have refused Liam Connors his mortgage, in respect of his client, UCB he nevertheless fell seriously below the standard of service reasonably to be expected of a Public Notary in such a way as to amount to serious misconduct.

#### **THE WILL**

- 37. We do not accept the submissions of the Nominated Notary in respect of his failures to:-
  - (a) advise that an unsigned Will was invalid.
  - (b) list the assets on the Will.
  - (c) advise on the inclusion of a property within the Will.
  - (d) advise on the consequences of leaving one of their children out of the Will.
- 38. Whilst there may be an absence of full attendance notes setting out the advice he gave, we are satisfied that such advice was given in respect of (a) and (d) above and that, bearing in mind the likely value of the estate, in respect of (b)

and (c) we can understand why Mr Ward did not take any steps to list their assets.

39. However, there was an ambiguity in drafting each of the grandparents' Wills and which would have resulted in Valerie Tearle receiving £5,000 on the death of each grandparent to the detriment of the other beneficiaries under the Will, namely, David, Peter and Paul.
40. We consider this to be a fundamental and basic error in drafting and we are very surprised that a Notary with over 30 years experience and a person who was for many years a qualified solicitor should make such an error. We have concluded that he fell seriously below the standard of service reasonably to be expected of a Public Notary in such a way as to amount to serious misconduct.

#### **ADMINISTRATION OF THE ESTATE**

41. The gravamen of the allegation made by the Nominated Notary is that the only person who he could be instructed by in respect of the administration of the estate was Paul, yet he continued to accept instructions from Liam Connors and Mrs Connors who remained his clients. It is clear to us that there was a clear and obvious conflict between Paul on the one hand and his other two clients such that he should not have acted for Paul in respect of the administration of the estate.
42. Mr Ward claimed that he was not acting for Paul although he was providing him with some general advice and thus there was no conflict with his clients. In our view Mr Ward went far further than that and the documentation supports our view that Paul became his client:-
  - (a) 3/80: Paul was asked to provide full details of any assets together with bank statements in support
  - (b) 3/81: an attendance note was completed in respect of a telephone call from Paul and identified that "...he has lots of questions and concerns."
  - (c) 3/84: in a letter to Paul Mr Ward stated "I will then explain the Declaration of Trust to you..."
  - (d) 3/85: in a letter to Mrs Connors he asked her whether she wants them to continue to discuss matters with Paul.
  - (e) 3/86: An attendance note of a conference with Paul and his wife, who the following day sent Mr Ward instructions relating to what was said at the conference (3/87)
  - (f) 3/90-91: Mr Ward wrote to Paul about the estate and included the following paragraph, "Mrs Connors has confirmed that she wishes to apply for a Grant of Probate if it is necessary. Will you so instruct?"
  - (g) 3/92: in a second letter to Paul of the same date he asked Paul to confirm that he and his brothers are in agreement "...so that I can prepare a simple Agreement reflecting your wishes."

- (h) 3/93: in a third letter to Paul he gave advice to Paul that in his view a Grant of Probate was unnecessary.
43. We reject Mr Ward's submission that he was not acting in respect of the administration of the estate with Paul as his client; he took instructions from Paul and gave him advice.
44. Yet again we accept that Mr Ward was motivated to act as he did to save the family costs, but he should not have done so. A failure to recognise the conflict amounts to serious misconduct.
45. We observe that, rather than save them costs he has, as a result of his actions throughout these events, caused money to be expended to resolve the problems he has created.
46. Finally, in his letter dated 6<sup>th</sup> May to Pictons (3/100), Mr Ward made two errors:
- (a) He stated that Liam Connors was the seller of the house and Paul was not entitled to 70% of the net proceeds of sale. Mr Ward said in evidence that he wrote that because Paul was sharing it with his brothers. In our judgment he has overlooked that Paul was acting as executor of the Will and therefore entitled to 70% of the net proceeds of sale.
  - (b) A Declaration of Trust had been advised and not taken up. Mr Ward accepted that this was a mistake which was promulgated in an email dated 4<sup>th</sup> October 2013 (3/106) and finally corrected seven months later in a letter dated 12<sup>th</sup> December 2013 (3/119)
47. We are prepared to accept that there was no deliberate attempt to mislead Pictons. However it provides further evidence, in our view, of the poor standard of service which Mr Ward was providing to his clients.

#### **DETERMINATION AND PENALTY**

48. We were not addressed as to the standard of proof that we needed to reach before finding serious misconduct. Although paragraph 26 of the Guidance suggests that the Court applies the criminal standard of proof, we are by no means convinced that that is the right test bearing in mind the standard applied by other disciplinary bodies. With few exceptions it is the civil standard which is applied, being on a balance of probabilities.
49. However, for the avoidance of doubt whichever of the tests should apply, we all felt sure about the conclusions which we have reached.



50. For the reasons we have set out above we find that Mr Ward’s conduct fell seriously below the standard of service reasonably to be expected of a Public Notary in such a way as to amount to serious misconduct. In coming to that conclusion we have considered Rules 5 and 6 of The Notaries (Conduct and Discipline) Rules 2011.
51. During his closing arguments Mr Ward made a moving plea in respect of any penalty which we might impose. As we have already stated, by the time Mr Ward hears of our judgment he will be within hours of retiring. He explained how the goodwill in his business would be affected were he to be struck off as well as the catastrophic effect it would have on him personally to find himself in that position so close to retirement.
52. We wish to make it clear that, in other circumstances, we would have felt we had no option but to suspend a Notary Public from practice for conduct of the sort we have witnessed here. However, such a course is not practical in the circumstances and we judge that we should take a compassionate view. As a result we have decided that the appropriate penalty is to order that Mr Ward be admonished.
53. Because Mr Ward has indicated his intention to retire on 30<sup>th</sup> April but has failed to notify the Faculty Office of his intention, we will suspend his practising certificate with effect from 1<sup>st</sup> May 2015 and require him to notify the Faculty Office within 28 days of where his notarial records are to be held.
54. Mr Ward will have to pay the costs of the Nominated Notary. Unless and until the Rules are amended we feel constrained not to award the costs of the investigation of this Complaint against Mr Ward. We calculate that the costs incurred in preparing for and presenting this case are as follows:-
- |   |            |
|---|------------|
| 11 <sup>th</sup> October to 20 <sup>th</sup> November 2014:   | £ 1,120.00 |
| VAT on above  | £ 224.00   |
| 21 <sup>st</sup> November 2014 to 22 <sup>nd</sup> April 2015 | £ 5,964.00 |
| VAT on above  | £ 1,192.80 |
| Other Expenses  | £ 93.30    |
| VAT on part of the above                                      | £ 15.06    |
| Costs of Hearing (3 hours at £280)                            | £ 840.00   |
| VAT on above  | £ 168.00   |
| Travel  | £ 1,120.00 |
| VAT on above  | £ 224.00   |
| Total   | £10,961.16 |
55. In addition Mr Ward will have to pay the court costs and we request the Faculty Office to inform us and Mr Ward what they amount to as soon as possible.

56. Before finalising the order for costs we will give Mr Ward 14 days to make any further representations and to make a proposal as to time to pay the costs.
57. We order that the costs of investigation, being £5,000 plus VAT, making a total of £6,000, are to be borne by the Contingency Fund.

His Honour Judge Leonard QC

Mr Andrew Robinson

Mr Ronald Watt.

29<sup>th</sup> April 2015