

CONCERNING

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of [Area] Standards Committee [X]

BETWEEN

JB

Applicant

AND

ZT (NEE [VH]) and UM

Respondents

DECISION

The names and identifying details of the parties in this decision have been changed.

Introduction

[1] Mr JB has applied for a review of the determination by [Area] Standards Committee [X] (the Committee) to take no further action in respect of his complaints about Mr UM and Ms VH,¹ a partner and employed solicitor at [Law Firm 1].

[2] A review hearing took place in Auckland on 28 November 2017 attended by Mr JB, Mr DR and Mr UM. Mr DR represented both Mr UM and Ms ZT.

[3] At the hearing, Mr DR provided written submissions. Paragraphs [2] to [7] inclusive are reproduced here as they provide a succinct background to the events that occurred and Mr JB's complaints:

2. The complaints related to the 2013 mortgagee sale of a property formerly owned by the applicant (**Mr JB**) on which [Law Firm 1] advised its client [GHI Bank] (the **Bank**).

3. The two complaints effectively relate to the same issues and can be considered as a single complaint against two individuals.

¹ Ms VH is now Ms ZT and will be addressed accordingly in this decision.

Background

4. In 2012 the Bank instructed [Law Firm 1] to take bankruptcy proceedings against Mr JB. Mr JB was duly bankrupted on [date]. The Bank held a mortgage over the property located at [address], also known as [address] (the **Property**).

5. In 2013 the Bank instructed [Law Firm 1] to act on the mortgagee sale of the Property. The Bank appointed [ABC Limited] (trading as [real estate agent]) (the **Agent**) as its real estate agents in respect of the mortgagee sale.

6. Mr JB raised the following issues relating to the mortgagee sale, each of which is paraphrased from his NZLS complaint:

- (a) he alleges that a letter provided by [Law Firm 1] to prospective purchasers prior to auction was misleading and deceptive; and
- (b) he alleges that a term inserted into the particulars and terms of sale by auction regarding a lease of adjacent road reserve land was misleading and deceptive.

7. Mr JB considers that Mr UM and Ms ZT breached the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) rules 2008 by way of the alleged misleading and deceptive conduct.

[4] The alleged misleading aspects of the 10 April 2013 letter were:

The Property is not located on the corner of [address]. The land on the corner of [address] shown on SO Plan XXXXX as areas A, B and C was taken for a legal road but are not a formed legal road.

At present there is a lease between the [X] City Council and the mortgagor in respect of areas B and C (the **Lease Land**). The Mortgagee has received advice from [X] City Council that the landlord under the lease is now [transport agency], and that [transport agency] intends to cancel the lease with the mortgagor, and is prepared to negotiate entry into a new lease of the Lease Land with the new owner of the Property ...

[5] The clauses inserted into the auction terms and conditions which Mr JB alleges were misleading and deceptive were:

28.2 This agreement is conditional upon the Purchaser:

- (a) upon cancellation by [transport agency] of the Lease, the Purchaser entering into the New Lease with [transport agency] for the Lease Land, on terms satisfactory to both the Purchaser and [transport agency]. The Purchaser agrees to negotiate the terms of the New Lease in good faith; or
- (b) providing written notice of the Purchaser's intention to waive the right to enter into the New Lease as set out in clause 28.2(a) above.

28.3 This clause 28 is inserted for the sole benefit of the Purchaser. The Vendor makes no representations or warranties regarding the New Lease or any other arrangements that may be entered into between the Purchaser and [transport agency]

[6] In the course of the review hearing Mr JB also alleged that Ms ZT's advice to the agent during the course of the auction that the house on the property was the property of the landlord was also misleading and deceptive. This allegation has not been addressed in this decision because it was not a matter raised by Mr JB in his complaint.

[7] The basis of Mr JB's complaints is that even if XX had the ability to terminate the lease it had not expressed its intention to do so as stated in the letter. Mr JB disputes XX had the ability to terminate the lease on the grounds of his bankruptcy because he had assigned the lease to [XYZ] Limited.

[8] Mr JB asserts that Ms VH and Mr UM had breached rule 11.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

The Standards Committee determination

[9] The issue raised in Mr JB's complaint to be addressed was recorded by the Committee as: "Was Ms VH or Mr UM's conduct misleading or deceptive or in breach of any of their professional obligations?"²

[10] The Committee referred to r 11.1 of the Rules which provides:

A lawyer must not engage in conduct that is misleading or deceptive or likely to mislead or deceive anyone on any aspect of the lawyer's practice.

[11] It referred to Mr JB's submissions:³

He says there were a number of known defects with the property, which Mr UM and Miss VH attempted to withhold. He also says that they prevented the agents from providing information to prospective purchasers that he had prepared in relation to issues with the property. Mr JB says his allegations have been proven correct as [transport agency] has confirmed that it did not intend to cancel the lease and has accepted the assignment of the lease to XYZ.

...

The Standards Committee considered Miss VH and Mr UM's conduct in relation to the sale of the property. It considered the content of the letter and was satisfied that it included repeated cautions that it did not constitute comprehensive advice and reiterated the need for prospective purchasers to obtain independent legal advice.

The Standards Committee also considered the Deed of Assignment of Lease provided by Mr JB and noted that the copy provided did not include any endorsement of the Landlord's consent. The Standards Committee found there was insufficient evidence of any misleading or deceptive conduct by Miss VH or

² Standards Committee determination, 15 November 2013 at [9].

³ At [10] and [13]–[14].

Mr UM either in respect of the lease, or of any other breaches of their professional obligations.

[12] Having made these observations, the Committee determined that no further action was necessary or appropriate.

Mr JB's application for review

[13] Mr JB's application for review consisted of attachments comprising his complaints and the material provided to the Committee.

[14] The role of this Office on review "involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination".⁴ The lack of specificity in Mr JB's application as to the matters he was particularly concerned about did not assist, but nevertheless, as required, all of the available material has been considered and the view reached in this decision is an independent opinion based on the content of the Committee file and on the material received from the parties on review.

Delegation

[15] This review has been undertaken by Mr Vaughan acting as a delegate duly appointed by the Legal Complaints Review Officer (LCRO) pursuant to cl 6 of sch 3 to the Lawyers and Conveyancers Act 2006. The LCRO has delegated Mr Vaughan to report to me and the final determination of this review as set out in this decision is made following a full consideration of all matters by me after receipt of Mr Vaughan's report and discussion.

Review

Rule 11.1

[16] Mr JB's complaint was based on an application of r 11.1 to the content of the letter provided by Ms ZT, which was initially dated 21 March 2013, but updated and recirculated on 10 April 2013. The primary matters Mr JB objected to were the statements relating to the lease as set out above.

[17] The Committee seemingly accepted that r 11.1 had direct applicability to the advice provided by a lawyer, and that it must not be "misleading and deceptive". Its determination to take no further action was made with reference to the "repeated

⁴ *Deliu v O'Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

cautions” in the letters dated 21 March 2013 and 10 April 2013 “that [they] did not constitute comprehensive advice and reiterated the need for prospective purchasers to obtain independent legal advice.”⁵

[18] However, the rule relates to “any aspect of the lawyer’s practice” and is directed at the administration and conduct of a lawyer’s practice. It replaces more specific rules relating to such matters as a firm’s name, its letterhead, and advertising.⁶

[19] With reference to the rule and to specific provisions of the Act⁷, the authors of the text *Ethics, Professional Responsibility and the Lawyer* say:⁸

With that foundation it appears that there is no longer any need for specific rules on matters such as advertising, firm names, and letterheads.

With respect to advertising, the Lawyers and Conveyancers Act 2006 creates offences for misleading descriptions of non-lawyers or lawyers claiming to have particular expertise.

[20] Mr JB has made frequent reference to the commentary to the rule which says: “These words are identical to those used in the Fair Trading Act 1986”. The “words” referred to are “misleading or deceptive or likely to mislead or deceive”.⁹ That reference does not affect the substance of Mr JB’s complaint, which is that the lawyers had breached the rule by making misleading or deceptive statements about [transport agency]’s intentions.

[21] If, as Mr JB alleges, Ms ZT was making statements that had no foundation in the truth, then any person detrimentally affected would have remedies in tort for misrepresentation or other legal remedies. The remedy is not to be found in a complaint based on a breach of r 11.1.

[22] However, there are other provisions in the Act that would apply to such conduct and it is appropriate to consider the substance of Mr JB’s complaints.¹⁰ At the hearing, Mr DR also expressed a preference, and willingness, to engage in a consideration of the allegations.

⁵ Standards Committee determination, above n 2 at [13].

⁶ *Rules of Professional Conduct for Barristers and Solicitors* (7th ed, New Zealand Law Society, Wellington, 2008) rr 2.01, 2.02

⁷ Ss 22 and 23

⁸ Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at 404.

⁹ Fair Trading Act 1986, s 9.

¹⁰ For example, “unprofessional conduct” or “conduct unbecoming” — Lawyers and Conveyancers Act 2006, s 12(b).

The letter of 10 April 2013

[23] In the letter of 10 April 2013, Ms ZT said:

The Mortgagee has received advice from [X] City Council that the landlord under the lease is now [transport agency], and that [transport agency] intends to cancel the lease with the mortgagor, and is prepared to negotiate entry into a new lease of the Lease Land with the new owner of the Property

[24] Mr JB asserts that XX advised him it had no intention of terminating the lease but has not provided anything from XX which confirms his assertions.

[25] In a letter to the Lawyers Complaints Service dated 27 September 2013 Mr UM advised:

At all relevant times, we were advised by [transport agency] that its intention was to cancel the existing lease between Mr JB and itself, and that [transport agency] would enter into a new lease with the ultimate purchaser of the Property. In early April 2013 we were advised by [transport agency] that it had instructed its solicitors to prepare an appropriate notice of termination, which was served on the Official Assignee.

[26] Mr UM went on to advise that the firm had “a full record on file of correspondence clearly setting this out”. He did not include copies of the correspondence “due to the legal privilege that attaches to that correspondence”. However, he offered to provide copies to the Committee “on the basis that it will not disclose that correspondence to any other party”. The Committee did not avail itself of that offer.

[27] Section 208 of the Lawyers and Conveyancers Act 2006 provides:

208 Disclosure of evidence and information to parties

(1) Subject to subsection (2), all evidence and information received or ascertained under section 207(1) must be disclosed to every party, and every party must be given an opportunity to comment on it.

(2) Where, in the opinion of the Legal Complaints Review Officer, there is good reason for not disclosing to every party any evidence or information received or ascertained under section 207(1) or for withholding from a party some of the evidence or information so received or ascertained, the Legal Complaints Review Officer may, as the case requires,—

- (a) refuse to disclose that evidence or information to that party; or
- (b) give that evidence or information to that party after the Legal Complaints Review Officer has made to it such deletions or alterations as he or she considers necessary.

(3) If, under subsection (2), the Legal Complaints Review Officer takes, in respect of any party, either of the actions referred to in subsection (2), the Legal

Complaints Review Officer must give to that party the reasons for the action taken by the Legal Complaints Review Officer.

[28] [Law Firm 1] did not act for XX and therefore the correspondence between [Law Firm 1] and XX does not attract privilege on the basis of being correspondence between a lawyer and his/her client. However, the correspondence from XX was addressed to [Law Firm 1] and XX would not have expected it to be passed on to Mr JB. In addition, it is not necessary to provide copies of the correspondence to Mr JB to enable the specific advice on which [Law Firm 1] relied to be confirmed. For these reasons, the correspondence will not be provided to Mr JB. All that is required is to record the various statements made by each party:

Email XX to VH (3 April 2013) 9:36

...

[XX] has the ability to terminate the existing lease and is prepared to enter into a new lease.

...

Email VH to XX (3 April 2013) 2:27 pm

...

... we would like for the agents to be able to advise interested parties that, should they be successful in purchasing the property, they will have an opportunity to enter into a lease with the Council for the "corner" of [address]. Please can you confirm that [transport agency]'s intention is to cancel the current lease with Mr JB, and enter into a new lease with the new owner?

...

Email XX to VH (3 April 2013) 15:20

...

I can confirm that [transport agency] (XX) will enter into a new lease with the new owners ...

...

Email XX to VH (7 April 2013) 14:19

...

... the lease to Mr. JB is terminable in the event he is bankrupted or insolvent ...

...

Email VH to XX (8 April 2013) 5:30 pm

...We can confirm that Mr JB was declared bankrupt on 14 May 2012 ...

...

Email XX to VH (9 April 2013) 14:37

...

I have instructed [Law Firm 2] to prepare and [sic] appropriate notice of termination of lease to the Official Assignee ...

...

I will confirm to you when the notice of termination has been served.

Email VH to XX (9 April 2013) 3:28 pm

Thank you for confirming that XX will begin the process to terminate the lease with Mr JB ...

... we have amended our terms and conditions for auction to make any sale conditional upon the purchaser successfully entering into a new lease with [XX],

or waiving their intention to do so. Are you happy for us to now circulate these terms and conditions to interested parties? ...

Email XX to VH (12 April 2013) 15:02

...
... we have asked [Law Firm 2] to re-issue a default notice under the PLA to the OA on the basis that no consent to the assignment was obtained ...

[29] At one stage a lawyer for a prospective purchaser wrote to [Law Firm 1] pointing out that while XX “may well intend to cancel the lease”, it had been assigned by Mr JB to [XYZ] Limited. As a result, the auction was postponed to allow for the issue to be considered. File notes of telephone discussions between Ms ZT and the XX officer noted that XX had not consented to the assignment. To address the uncertainties that could have arisen through this issue, the terms and conditions of the auction included the clauses recorded in [5] above.

[30] The Bank subsequently entered into an Agreement to sell the property to Mr JB’s neighbour which contained the clauses, but no new lease was entered into between the purchaser and [XX]. That has no relevance to this decision.

[31] Mr JB argues that while XX may have had the “ability” to terminate the lease (which he disputes), it did not necessarily mean it “intended” to terminate the lease as stated by Ms ZT in her letter of 10 April 2013. However, the correspondence from XX clearly evidences an “intention” to terminate the lease and to enter into negotiations with the successful purchaser at auction. XX had taken preparatory steps to enable it to do so by serving the Property Law Act notice on the Official Assignee in bankruptcy.

[32] The lawyers’ statements were not misleading. They were based on the correspondence from XX in which XX made clear its intentions to co-operate with the Bank to facilitate the sale of the mortgaged property.¹¹

Conclusions

[33] The Committee was correct to determine that no further action was necessary or appropriate in respect of Mr JB’s complaints but the reasons for this decision on review differ somewhat from the reasons provided by the Committee. In this decision, the reason for taking no further action is that r 11.1 is directed to the business aspects of a lawyer’s practice. However, even if the application of the rule is not limited in that way, a consideration of the correspondence between XX and [Law Firm 1] reveals that the content of the [Law Firm 1] letter 10 April 2013 correctly records [XX]’s proposals with regard to the lease.

¹¹ It is pertinent to note that access to the mortgaged property was only possible through the leased land.

Decision

[34] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee is confirmed, but modified in the following manner:

- (a) Rule 11.1 of the Conduct and Client Care rules refers to the conduct of a lawyer in the administration of the lawyer's business and not to legal advice provided in the course of acting for a client;
- (b) Even if the application of the rule is not limited in that way the statements made by Ms ZT in the letters dated 21 March 2013 and 10 April 2013 correctly reflected the intentions of XX as communicated by XX to her; and
- (c) Whether or not the lease had been validly assigned does not affect the validity of the content of the letters.

DATED this 15th day of December 2017

D Thresher
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr JB as the Applicant
Ms VH and Mr UM as the Respondents
Mr DR as the Respondent's representative
[Area] Standards Committee [X]
The New Zealand Law Society