

**LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE**

[2020] NZLCRO 91

Ref: LCRO 10/2020

CONCERNING

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

AND

CONCERNING

a determination of the [District]
Standards Committee

BETWEEN

EJ

Applicant

AND

HP

Respondent

DECISION

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

Introduction

[1] Mr EJ has applied for a review of a decision by the [District] Standards Committee to take no further action in respect of his complaint concerning conduct on the part of Ms HP of [ABC] Lawyers (the firm).

Background

[2] Mr EJ and his former partner, Ms TS, have two daughters. Mr EJ and Ms TS separated and discussed what arrangements they might make with respect to the division of their property. Mr EJ instructed Ms HP to act for him in documenting a Relationship Property Agreement. Agreement was reached in principle that Ms TS and the younger daughter would remain living in the former family home. Other items of relationship property were divided up by agreement.

[3] Mr EJ and Ms TS discussed establishing a family trust. Mr EJ wanted that to be for the benefit of their daughters.

[4] In November 2013 Mr EJ and Ms TS sold a property and the sale proceeds were held to their joint instruction by an independent lawyer, Mr BL. By February Ms TS's lawyer had indicated a reluctance on Ms TS's part to obtain a formal valuation of the former family home. To encourage Mr EJ towards settlement, Ms TS through her lawyer referred to the trust she and Mr EJ had discussed, and its key terms, which included:

1. The trustees are [Ms TS] and [Trust Company] as an independent trustee;
2. The final beneficiaries are [the daughters];
3. The discretionary beneficiaries are [the daughters and Ms TS];
4. The trustees do not have the power to add or remove persons from the list of beneficiaries;
5. [Ms TS] as trustee can appoint a replacement independent trustee.

As a result of having locked in the persons who can be beneficiaries, I hope that we have removed the incentive to further restrict the trustees powers. The balance of the terms would be those which you normally expect to a family trust of this nature.

[5] Ms HP passed that correspondence on to Mr EJ and told him:

...you are effectively giving up your right to also be a discretionary beneficiary of the trust. It is difficult to value that right, but taking [the family home] out of the equation, you are receiving a larger share of the relationship property which may effectively balance things out.

[6] On 21 February 2014 Mr EJ contacted Ms HP saying he thought everyone was "getting mixed up". Ms HP explained the mechanics of the proposed arrangement, if the trust proposed by Ms TS was involved:

...it is he and [Ms TS] who are each transferring their share to the family trust. That trust will owe them money which they will then need to forgive.

[7] By 6 March 2014 Mr EJ was experiencing some financial pressure. He wanted Ms TS to agree to Mr BL releasing some or all of the sale proceeds as an interim relationship property settlement. Ms TS preferred to finalise her entire arrangement with Mr EJ before she would agree to any distribution of the sale proceeds. Ms TS's lawyers sent through a draft trust deed modelled in part on the key terms referred to above. It also extended the pool of potential discretionary beneficiaries beyond that contemplated in the key terms above, to include any Trust set up for any beneficiary. As the only named settlor, Ms TS was to have the power to control the appointment and removal of trustees. Mr EJ had no formal status under the draft deed as a settlor, trustee, or beneficiary.

[8] Ms HP sent Mr EJ a copy of the proposed trust deed and some notes on it by email on 11 March 2014. Ms HP's email does not go into a great deal of detail about the draft trust deed, although she did mention that the independent trustee:

acts as a check and balance on [Ms TS] to ensure that she is not doing as she wishes with the trust property.

[9] She also said:

the beneficiaries are fixed, meaning that no other person can be appointed a beneficiary of the trust.

[10] Ms HP sought confirmation from Mr EJ that he was happy with the trust deed and invited him to ask any questions he may have had so the documents could be signed and he could have his share of the sale proceeds out of the relationship property pool.

[11] The next day Ms HP sent an email to Ms TS's lawyer confirming Mr EJ was "happy with the trust deed that your firm has drafted". Ms TS's lawyer confirmed he would prepare the documents and Ms TS would establish the trust so Ms TS could immediately transfer her agreed share of the relationship property to it.

[12] Ms TS's lawyer produced a draft relationship property agreement and sent a copy to Ms HP. Ms HP sent that on to Mr EJ on 21 March 2014 with some comments, including that it "does not seem to accord with our understanding of the arrangement reached between you and Ms TS". She identified a number of concerns over the arrangements, including that Mr EJ had no guarantee Ms TS would transfer any property to the trust.

[13] Apparently to allay concerns regarding the transfer of the former family home to Ms TS's trust, Ms TS's lawyer provided undertakings.

[14] On 25 March 2014 Ms HP spoke to Mr EJ and sent him an email attaching further documents to record and give effect to his arrangements with Ms TS. Ms HP says:

You have advised that despite the separation and relationship property agreement not recording the transfer of the [former family home] to the Trust that you wish to sign the agreement. We have advised you of our concern in this regard.

[15] Mr EJ and Ms HP met. Ms HP says Mr EJ did not instruct her:

To liaise further with [Ms TS's lawyer]. In fact, Mr EJ's position was that the matter had dragged on too long so far and that he did not want to incur any further legal fees by instructing [Ms HP] to do any further work on the matter. He just wanted to sign the documentation and have the matter done with. [Ms HP] particularly recalls this as [she] expressed concerns to Mr EJ that he could come to regret that decision in the future and that legal fees now could save problems in the

future. Mr EJ was very clear that he wished to sign the documentation regardless of these concerns.

[16] Ms TS says Mr EJ accepted a compromise that did not accord with what he had initially wanted, and he did not instruct her to provide a gift to his daughters. Ms HP says:

...the structure of the settlement never comprised a gift to a trust, rather it comprised a gift to Ms TS (as recorded in the email to Mr EJ of 25 March 2014).

[17] On 27 March 2014 Ms HP sent executed documents back to Ms TS's lawyer and asked Mr BL to release the sale proceeds to Mr EJ's account. It took two or three more weeks to finalise matters, but Mr EJ got the sale proceeds from Mr BL and Ms TS transferred the former family home into her trust.

[18] However, what followed Mr EJ's relationship property settlement did not fulfil his expectations. He was not satisfied with the way Ms TS operated the trust and did not consider his daughters were getting the benefit of the money he had given away.

[19] By July 2017 Mr EJ had instructed new lawyers concerning the "inequality of relationship property to be vested in trust for his daughters". They requested the firm's entire file. They had questions about Ms TS's trust, referred to Mr EJ's "naiveté", and described themselves as mystified by the "gifting and settlement process that was allowed to occur". Mr EJ's new lawyers say:

It is hard to see how [Mr EJ] could possibly have understood what was happening and why any gift to [Ms TS] was necessary.

[20] The problem they identified was the possibility that the arrangements Mr EJ and Ms TS had agreed to enter into:

Could divert his entitlement to benefit a total stranger.

[21] Mr EJ wanted Ms TS to rearrange her trust so he could recover some control over the money he had given away.

[22] Ms HP's firm's response, headed "without prejudice", is dated 11 October 2017. The firm says that at a meeting on 24 March 2014 Ms HP advised Mr EJ against entering into the agreement and:

offered to go back to [Ms TS's] lawyers to see whether changes could be made, including to the trust deed. [Mr EJ] did not want the firm to do so and signed with full knowledge of the terms and their effect, and despite the concerns that had been expressed to him".

[23] The firm did not accept that Mr EJ did not understand the terms of Ms TS's proposed trust and says that at the time the agreement was negotiated, Ms TS would not have agreed to any other arrangement. The firm adds:

Ms HP advised [Mr EJ] that if [Ms TS] was a beneficiary of the trust this would not be in line with [Mr EJ's] entitlement under the Property (Relationships) Act 1976 and if [Mr EJ] was not a trustee he would have no involvement in the trust, nor any control. Prior to signing, [Mr EJ] was also advised on the terms of the agreement (including the trustee structure and [Ms TS's] status as a beneficiary and trustee) and its implications.

[24] Mr EJ instructed his new lawyers to prepare advice on his position and was provided with a draft letter from Mr GW in which he explains that Mr EJ's daughters as disappointed beneficiaries might perhaps have had a claim against the firm. In his opinion, Mr GW says that as against the trustees of the trust, Mr EJ's daughters as beneficiaries have a "deferred right at most, and that right will not be damaged if [Ms TS and any other trustees act] within the terms of the trust".

[25] In May 2019 Mr EJ made a complaint to the New Zealand Law Society (NZLS) alleging negligence on the part of Ms HP.

The complaint and the Standards Committee decision

[26] Mr EJ's complaint is accompanied by a copy of Mr GW's legal opinion, in which Mr GW expresses the view that Mr EJ has a "solid foothold for the argument", that there is "clear evidence of negligence" in respect of Ms HP's advice. His opinion concludes:

As to remedy, EJ is particularly upset at the legal fees he has incurred as a consequence of [the firm's] erroneous advice. In my opinion, a full refund would fall within the Committee's compensation jurisdiction. The Committee can also censure, reprimand and command an apology.

[27] The firm says Ms HP competently advised Mr EJ and he made his own choices against her advice.

[28] The parties provided documents in support.

[29] The Committee considered the materials and did not consider that further action was necessary or appropriate in response to Mr EJ's complaint. It determined his complaint accordingly pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act).

Application for review

[30] Mr EJ filed an application for review on 14 January 2020. He would like someone else, preferably Ms HP or the firm, to cover the costs he incurred in having the

trust documents amended. He remains unhappy with the way the trustees (including Ms TS) have exercised their discretion in relation to his daughters as beneficiaries, and considers the arrangements he entered so conflicted with his interests that Ms HP should simply have refused to act on his instructions.

[31] Mr EJ says in his application for review that he was aware he was handing over control to the trust, and that he had instructed Ms HP that he wanted the trust to exclusively benefit his two daughters. What followed Mr EJ handing over control of his share in relationship property (to Ms TS) did not accord with Mr EJ's instructions to Ms HP, or with Mr EJ's expectations.

[32] Ms HP's response includes the following succinct explanation of her position:

- (a) The proposed terms of the trust were presented to Mr EJ on at least three occasions prior to the meeting of 26 March 2014.
- (b) Mr EJ indicated to the writer that he was happy with the proposed terms of the trust and did not require further advice on those terms.
- (c) Mr EJ was advised against signing the separation and relationship property agreement and associated documentation that would result in the property being transferred to the proposed trust.
- (d) At the meeting on 26 March 2014 Mr EJ was advised that, by signing the documents which would lead to the transfer of the property to the trust, he was giving up control of that asset to Ms TS to do what she liked and it was suggested that negotiations continue to see if changes could be made to the documentation including the trust deed.
- (e) At that same meeting Mr EJ indicated that he did not want any further legal fees to be incurred as a result of taking the negotiations further. [The firm] was not instructed to conduct any further negotiation. Mr EJ made it clear that he understood the concerns but wished to sign the documentation regardless.

Strike out – s 205(1)

[33] On reading the materials that are available on review, it became apparent to me that Mr EJ's application for review, like his complaint, disclosed no reasonable cause of action under the Act. The parties' consent is not a prerequisite to an application for review being struck out. Strike out is a matter for the LCRO's discretion pursuant to s 205(1)(a) of the Act which says:

- (1) The Legal Complaints Review Officer may strike out, in whole or in part, an application for review if satisfied that it—
 - (a) discloses no reasonable cause of action;...

[34] This review has been determined pursuant to s 205(1)(a) of the Act.

Nature and scope of review

[35] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:¹

... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to “any review” ...

... the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[36] More recently, the High Court has described a review by this Office in the following way:²

A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO’s own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee’s determination.

Discussion

[37] Mr EJ says in his application for review, as he said in his complaint, that he made:

a gift into trust which I understood would be for my daughters. I knew I would have no control of the money...

[38] He then goes on to record all his grievances about what happened to the money he had gifted, how it was managed, how it was not distributed as he would have liked, how all of those things happened in a manner that was contrary to the agreements he thought he had reached with Ms TS. He cannot see how any of this benefits his daughters. Worse still, he says he has lost his relationship with them because of events that occurred after he had given his money away.

¹ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

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

[39] Mr EJ then seeks to sheet home his grievances in the form of a professional standards complaint against Ms HP and the firm based on her advice to him being inadequate.

[40] The difficulty Mr EJ's argument faces is that he knew before he gave away \$206,563 that whoever he gave it to would assume control of the money, and conversely Mr EJ lose control over it.

[41] None of that prevents Mr EJ from arguing that the money he gave away to Ms TS was imprinted with a trust to be exercised to benefit his daughters. The problem for Mr EJ is that the paperwork does not unequivocally support the arguments he subsequently wished to raise. The more practical side of the problem is that Mr EJ's daughters have received no immediate benefit, although that is a matter for the trustees.

[42] Ms HP's comments on the draft trust deed Ms TS's lawyers provided were not entirely correct, to the extent they were incomplete. For example, she did not say in her email dated 11 March 2014 that the check and balance provided by an independent trustee was only effective as long as Ms TS did not exercise her power to remove the independent trustee and appoint someone else who might be more malleable than a professional trustee company. Ms HP also did not highlight that the pool of discretionary beneficiaries identified in the draft trust deed was not what Mr EJ was hoping for. It matters little because having given money away, Mr EJ must trust the recipient in what follows the gifting.

[43] Everything else flows from Mr EJ ceding control over the money. No control means exactly that: no control. One would not give any other gift, birthday present, flowers, whatever, then expect to control it, direct how it is used, take it back, use it oneself etcetera. That is not how giving, or gifting, work.

[44] Having read and considered the materials I agree with Mr GW's legal opinion to the extent that Mr EJ has a foothold for an argument that he has an argument. Mr GW refers to the issue of control towards the end of page four of his opinion. It is not a particularly firm foothold though because of Mr EJ's concession that he knew he would be relinquishing control of the money before he gave it away. That undermines his position, and the legal arguments to which Mr GW refers. The rest is by the by. Whoever it is to, and whatever happens to it next, a gift is a gift.

[45] As an observation, it would be rare for a client to have not so much as a foothold for an argument after settlement, no matter how comprehensively and carefully advised the client had been. That cannot be the test of whether the lawyer gave competent advice.

[46] According to Ms HP's evidence, the arrangements Mr EJ agreed to went against her advice. While Mr GW has picked up on some details in the trust documents, Mr EJ's post-settlement experiences are a fairly clear demonstration that Ms HP's concerns had a valid basis.

[47] There is nothing in the materials that satisfactorily demonstrates Ms HP did not meet her obligations to Mr EJ. Mr EJ's argument that Ms HP and/or the firm breached her/its duty of care to him is unsustainable on the present facts. The Committee considered further action on Mr EJ's complaint was not necessary or appropriate. I agree, and would go further. On the facts, Mr EJ's application for review, like his complaint, discloses no reasonable cause of action under the Act, because a reasonable cause of action should be based on fact. The fact is Mr EJ knew he was giving away control of his money.

[48] The whole of Mr EJ's application for review is struck out pursuant to s 205(1)(a) of the Act on the basis that it discloses no reasonable cause of action under the Act. The Committee's decision is unaffected.

Decision

[49] Pursuant to s 205(1)(a) of the Lawyers and Conveyancers Act 2006 as Mr EJ's application for review discloses no reasonable cause of action the whole of it is struck out.

DATED this 10th day of JUNE 2020

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 EJ as the Applicant
 Ms HP as the Respondent
 AD, RJ, NV & MK c/- [XY] Law as related persons
 [District] Standards Committee
 New Zealand Law Society