

LCRO 143/2012

CONCERNING

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

AND

CONCERNING

a determination of a [South Island] Standards Committee

BETWEEN

MR UJ
Applicant

AND

MR OO
Respondent

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

DECISION

Background

[1] This review relates to the conduct of Mr OO when he acted for Mr UJ. The assertion of Mr UJ is that Mr OO acted in breach of his professional obligations when he signed as 'correct' a Notice of Claim by Mr UJ's wife against property of which Mr UJ was the registered proprietor. Under his signature on that document Mr OO is noted as "solicitor for the claimant". The claimant was Ms UK. It was alleged by Mr UJ that this was in essence a conflict of interest.

[2] It is important to note that this review relates to the second complaint that Mr UJ has made in respect of Mr OO. The first complaint was made in January 2010 and was wide ranging. It was dismissed by the Standards Committee and the Standards Committee decision was upheld on review by this office in March 2012.

[3] The facts surrounding both complaints are that in early 2008, Mr UJ instructed Mr OO to act on his behalf in relation to a property relationship matter involving Mr UJ and his ex-wife (Ms UK). Mr UJ and Ms UK had been married for approximately one year when a dispute arose over the matrimonial property, [Dot]. [Dot] is a small locality in the [South Island]. The property was subject to a mortgage with Bank A.

[4] By the time Mr UJ instructed Mr OO, Mr UJ had represented himself in:

- a. A Family Court hearing in [date in 2007], relating to division of relationship property, in which the Court decided that the property was to be split 65:35 in favour of Ms UK; and
- b. An appeal to the High Court, in [date in 2007], of the Family Court's decision on apportionment of the relationship property. Mr UJ initially acted for himself, but a Barrister, Mr UL, appeared at the hearing. The appeal was only allowed in part, with the matter being remitted back to the Family Court for reconsideration of the shares to be awarded to Mr UJ and Ms UK.

[5] After the second Family Court hearing, the relationship property was ordered to be split 62:38 in favour of Ms UK. Mr UJ instructed Mr OO to appeal that decision and in a decision issued in 2008, the appeal was disallowed.

[6] Mr UJ then instructed Mr OO to lodge proceedings for leave to appeal the earlier High Court decision. Leave to appeal to the Court of Appeal was granted.

[7] By now, Bank A had issued a default notice after Mr UJ failed to make the necessary payments. Mr UJ proposed refinancing and obtained a loan offer from Bank B. In order to obtain the loan to discharge the loan, secured by the Bank A Mortgage, Mr UJ needed [Dot] to be in his sole name. Mr UJ and Ms UK therefore agreed that Ms UK would transfer her ownership of [Dot] to Mr UJ, but the transfer would not be a complete transfer of Ms UK's interest in the property. Mr UJ was to hold the property in trust for himself and Ms UK, pending finalisation of monies due by one party to the other in terms of the Family Court judgment or the outcome of the appeal in the High Court in [date in 2008].

[8] In consideration for the transfer of title to Mr UJ:

- a. Law Firm A were to hold in their trust account \$36,250, in an interest-bearing deposit pending the outcome of the appeal to the High Court;

- b. At the conclusion of that appeal, the sum of \$36,250 and interest was to be paid to Ms UK, unless the outcome was that a lesser amount should be paid;
- c. Mr UJ was to execute an agreement to mortgage the property to Law Firm A, and a caveat was to be lodged to protect the agreement to mortgage. The purpose of this was to enable Law Firm A to use the undrawn portion of the Bank B loan to enable \$9000 costs and any further costs to be paid to Ms UK at the conclusion of the High court appeal;
- d. Ms UK was also entitled to lodge a Notice of Claim against [Dot], pending payment of this sum; and
- e. When all of Ms UK's interest in [Dot] was satisfied by payment of monies due, and all awards of costs, she would withdraw the Notice of Claim.

[9] The terms of the agreement were recorded in a memorandum, which was sent by Mr OO to Mr UJ. Mr UJ made some comments about the memorandum, which was then signed by Mr OO on Mr UJ's behalf.

[10] Although the memorandum was not filed with the court due to an oversight on the part of legal representatives on both sides, title of [Dot] was transferred to Mr UJ, the refinancing occurred, the mortgagee sale was avoided and Ms UK's Notice of Claim was registered, along with the caveat in favour of Law Firm A.

[11] Despite the successful transfer of legal ownership of [Dot] to Mr UJ, a mortgagee sale was later completed by Bank B. This sale resulted in a loss, and Ms UK's Notice of Claim being discharged.

The Complaint

[12] On [date in 2012] Mr UJ made a complaint alleging that:

- a. Mr OO continued to act for him despite the existence of a conflict of interest. Mr UJ claimed that the conflict of interest arose because Mr OO acted at the same time for him and his ex-wife, Ms UK, when lodging a caveat and Notice of Claim under s 42 of the Property (Relationships) Act 1976 with the Registrar of Lands;
- b. As a result of that agreement, mortgage funds deposited in the trust account of Law Firm A were used by Law Firm A and that when the

\$36,250 was transferred to Ms UK's lawyers, the funds were not given to her but were "applied to her benefit";¹

- c. The caveat lodged by Mr OO, on behalf of Law Firm A, was contrary to Mr UJ' interests; and
- d. Mr OO concealed his role in the Notice of Claim, thereby perverting the course of justice before the courts and in relation to the Law Society complaint by Mr UJ.

[13] In the same complaint, Mr UJ also referred to:

- a. The Supreme Court's ruling that there was no evidence to support Ms UK's claim; and
- b. The firm had "refused to account for or return the missing sum transferred from the Trust Account at Law Firm A."²

The Response

[14] In his response to the complaint, Mr OO provided a brief summary of the complex and lengthy relationship property dispute between Mr UJ and Ms UK. Mr OO noted that the document complained of by Mr UJ was prepared by Ms UK's legal representatives and not him, or any other lawyer at Law Firm A. Mr OO pointed out that the legal representatives for Ms UK were specified on the document as the address for service.

[15] Mr OO stated that his certification of the Notice of Claim pursuant to s 42 of the Property (Relationships) Act 1976 was at the specific request of Ms UK's legal counsel and for LINZ purposes only. Mr OO stated that this certification is an everyday occurrence where express authorisation is given prior to charges and discharges and other documentation; where a number of documents are being registered at the same time.

[16] Mr OO's view is that Law Firm A never acted for Ms UK, and that the certification by him of the document was a procedural step that was necessary to protect Mr UJ's desire to have [Dot] transferred to his own name.

[17] Mr OO referred to the High Court judgment of Justice French, in which French J noted that there was no dispute that Mr OO conducted the negotiations and signed with

¹ Complaint to the New Zealand Law Society dated 23 January 2011 at [2].

² Above n1 at [4].

the full authority of Mr UJ. French J also commented that, on the facts, there was no evidence of a causal nexus between the decision that the notice should remain, and the loss that Mr UJ says he suffered when [Dot] was sold by the mortgagee.

Reply by Mr UJ

[18] Mr UJ provided a very lengthy reply to the response, much of which was not focussed on the specific complaint he had made of Mr OO reportedly acting for both him and Ms UK when the document was signed by Mr OO. A significant part of Mr UJ's reply detailed what he saw to be deficiencies in the approach of the courts whose judgments did not favour him.

[19] He acknowledged that the document complained of was prepared by Ms UK's counsel. However, Mr UJ reiterated his view that Mr OO was not entitled to sign the document on his behalf, as to do so undermined Mr OO's loyalty to Mr UJ. Mr UJ maintained that Mr OO was, in effect, acting for Ms UK.

Standards Committee Decision

[20] The Standards Committee considered the complaint and the response of Mr OO and the reply of Mr UJ in detail. The Committee considered the question of whether there was a conflict of interest, as Mr UJ claimed, and concluded that there was no such conflict. The Committee concluded that Mr OO's actions in certifying the document facilitated a transaction that he believed was in Mr UJ's interests; in that it was part of the process necessary to release the funds to enable Mr UJ to obtain sole legal ownership of [Dot] and avoid the impending mortgagee sale.

[21] It concluded that in all of the circumstances it was appropriate that no further action be taken in response to the complaint under s 138(2) of the Lawyers and Conveyances Act 2006.

Application for Review

[22] Mr UJ sought a review of the decision of the Standards Committee. On review Mr UJ reiterated his belief that Mr OO had acted for both him and Ms UK in the same transaction. Mr UJ said that the Standards Committee had found that Mr OO has acted for him and Ms UK at the same time, but had failed to consider the ethical and standards issues that this raised.

[23] Mr UJ said that the Committee had failed to appreciate the conflict in Mr OO certifying that the document was justified, whilst representing Mr UJ in appealing the court decisions on which the interest represented by the documents was based.

[24] Mr UJ further claimed that the Committee had failed to understand that Mr OO, by certifying the document, was certifying that he was acting as the lawyer for Ms UK.

[25] Mr UJ also noted that Mr OO's certification of the document was false and fraudulent, because as Mr UJ's lawyer he would know that there were ongoing appeals about the distribution of the relationship property and that Ms UK's claims were legally unjustifiable.

Response of Mr OO and Law Firm A to Mr UJ's application for review of the Standards Committee decision

[26] Ms OM, Associate at Law Firm B, in her letter of [date in July] to the Legal Complaints Review Officer (LCRO) notes that Mr UJ has persistently made complaints about the conduct of Mr OO and Law Firm A, all without foundation. Ms OM notes that Mr UJ, in his request for a review of the Standards Committee's decision, has reiterated the same points made in the initial complaint and does not appear to have taken into account the Committee's decision and its reasons for reaching that decision.

[27] Ms OM requests that the LCRO confirm the decision of the Standards Committee, but that if the LCRO wishes to enquire further, the right is reserved to call evidence involving common practice.

Reply of Mr UJ to response on behalf of Mr OO and Law Firm A

[28] Mr UJ stated that his application for review was solely in regard to the conduct of Mr OO.

[29] Mr UJ claimed that he is not a persistent complainant, on the basis of making three complaints to the Standards Committee.

[30] Mr UJ also continued to claim that Mr OO's act of certifying the Notice of Claim is evidence of him being retained by Ms UK to represent her legal interests, and/or of fraudulent activity because he was not retained by Ms UK.

Replies of Ms OM to Mr UJ's reply

[31] Ms OM stated that Mr OO did nothing more than certify the LINZ documentation and was effectively on an agency instruction for this discrete point, with the aim of

preventing a mortgagee sale of [Dot]. Ms OM also referred to the Supreme Court decision, saying that the judgment made no criticism of the handling of the matter, as Mr UJ had suggested. Furthermore, Ms OM points out that \$9000 was not taken for legal costs, and that \$4470 security for costs was paid to Mr UJ from funds sourced by Law Firm A.

Analysis and review

[32] At the centre of this complaint is a protracted relationship property conflict between Mr UJ and Ms UK, following the end of their marriage. After a number of court hearings at which he represented himself, Mr UJ retained Mr OO to assist him in the process of concluding this conflict.

[33] On the one hand, Mr UJ believes that Mr OO did not represent his interests when he signed the Notice of Claim, which had been drafted by Ms UK's counsel. He considers that Mr OO was acting for Ms UK at that point and as a result of doing so, a conflict of interest arose.

[34] On the other hand, Mr OO believes that he acted appropriately when he signed the Notice of Claim, seeing it as part of the process required to obtain the necessary funds for Mr UJ in order for him to obtain sole ownership of [Dot], and avoid the impending mortgagee sale. Mr OO has said that he signed the document at the request of, and with authorisation given by, Ms UM, Ms UK's barrister.

[35] The question is whether, by signing the Notice of Claim, Mr OO acted properly and in particular, whether by doing so a conflict of interest arose.

[36] Chapter 6 of the Lawyers: Conduct and Client Care Rules 2008 (the Rules) deals with conflicts of interest. When acting for a client, a lawyer must, within the bounds of the law and the rules, protect and promote the interests of the client to the exclusion of the interests of third parties. Specifically, Rule 6.1 provides that:

A lawyer must not act for more than 1 client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients.

[37] Mr OO has acknowledged that he signed the Notice of Claim as correct for the purposes of the Land Transfer Act 1952. The question is whether by doing so he put himself in the position of acting for two clients, Mr UJ and Ms UK.

[38] Part 9 of the Land Transfer Act 1952 deals with general provisions as to instruments. Section 164 of the Act deals with certifying instruments for dealing with, or affecting, any estate in land under that Act. It specifically provides that the Registrar is not to receive any dealing with an interest in land unless it is endorsed with a certificate that the instrument is correct for the purposes of the Act signed by the applicant, or party claiming under or in respect of the instrument, or by a practitioner employed by that applicant or party. The application to transfer Ms UK's legal interest in [Dot] to Mr UJ needed to be signed as being correct. Mr OO was asked to do this, and authorised to do so, by Ms UM, Ms UK's barrister.

[39] It is unclear on the papers why Mr OO signed the document, rather than a representative from Ms UK's solicitors. It is also unfortunate that the Law Firm A file in relation to this matter is unavailable, having not been able to retrieve it from their previous offices.

[40] However, it appears that Mr OO, when he signed the form had authority to do so on behalf of Ms UK. It may be possible to argue that at that point, when he was signing the document, Mr OO was acting on behalf of both Ms UK and Mr UJ. However, this argument faces some obstacles.

- a. Firstly, Mr UJ has admitted in correspondence that Mr OO had never met Ms UK, received any instructions from her, or issued any engagement documents. It seems unlikely therefore that Ms UK was ever his client.
- b. Secondly, the address for service for Ms UK is recorded on the Notice of claim as at the offices of Law Firm C. This clearly indicates that Law Firm C were acting on behalf of Ms UK.
- c. Thirdly, there is evidence that Mr OO was acting as an agent when he signed the disputed document.

[41] Even if these obstacles could be overcome, Rule 6.1 states that a lawyer cannot act for more than one client "where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients."³ On the facts, it seems that there was less than a negligible risk that Mr OO may have been unable to discharge the obligations owed to Mr UJ and Ms UK. In terms of him certifying as correct the Notice of Claim for Ms UK, this would have involved a minimal

³ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, Rule 6.1.

amount of time. His motive for signing the document was to achieve the best result for Mr UJ, as was in accordance with the instructions that Mr UJ had given to him. On the facts it is difficult to see how him signing the document could have created a negligible, or greater, risk that he could not thereafter continue to discharge the legal obligations that he owed to Mr UJ.

[42] The Committee decided that at no time did Mr OO act for Ms UK. However, it did note that signing the document may not, in retrospect, have been prudent bearing in mind the contentious nature of the situation involving Mr UJ and Ms UK. Certainly, having the document signed by someone other than Mr OO, or anyone from Law Firm A, would have been preferable.

[43] Nonetheless, the Committee decided that as Mr OO was not engaged by Ms UK when he signed the Notice of Claim, or at any other time, and he had authority to certify it as correct, he did not act with an undisclosed conflict of interest. The Committee therefore decided to take no further action pursuant to section 138(2) of the Lawyers and Conveyancers Act 2006.

[44] I consider the reasoning of the Committee to be sound.

[45] For these reasons I am satisfied that the decision of the Standards Committee to take no further action was appropriate.

Significance of this matter being second complaint

[46] I consider that some comment on the fact that this matter relates to a second complaint by Mr UJ against Mr OO in respect of fundamentally the same course of dealing is appropriate.

[47] It is of course important that clients (and others) have a largely unfettered right to complain in respect of the conduct of a lawyer. However, caution must be exercised when those complaints are persistent and repeated. Mr UJ availed himself of the right to complain about the conduct of Mr OO in [date in 2010]. The second complaint was laid nearly two years later after the Standards Committee had dismissed the first complaint (and just before that decision was upheld by this Office).

[48] Section 138 of the Act provides for a number of grounds upon which a Standards Committee might resolve to take no further action. This include where:⁴

⁴ Lawyers and Conveyancers Act 2006 s 138(1)(a).

The length of time that has elapsed between the date when the subject matter of the complaint arose and the date when the complaint was made is such that an investigation of the complaint is no longer practicable or desirable.

[49] In the present case the matters at issue occurred in [date in 2008] and the complaint currently under consideration was made in [date in 2012]. There is value in finality and that a lawyer can take some comfort in complaints not being made about truly historical matters. This of course must be balanced against the seriousness of the conduct complained about. It is for this reason that the powers of the Committee under s 132 are discretionary. In cases such as the present it may well have been open to the Committee to decline to consider this complaint further on the basis of the delay in making the complaint pursuant to s 138(1)(a).

[50] The fact that this complaint is a second complaint about the same course of dealing is also relevant. Certainly the courts are reluctant to allow a litigant to raise in later proceedings a cause of action which might properly have been brought in earlier proceedings as in *Thompson v Ross* [1943] NZLR 712. While the jurisdiction of the Standards Committee and this Office is not bound by the strict rules of issue estoppel or cause of action estoppel in this way given its disciplinary and protective jurisdiction, such considerations are clearly relevant to the exercise of the discretion of the Standards Committee to take no further action under s 138.

[51] For these additional reasons I am also satisfied that the decision of the Standards Committee to take no further action was appropriate.

Conclusion

[52] I have concluded that the conduct of Mr OO was appropriate throughout and he did not breach his professional obligations to Mr UJ in the way he dealt with the matter. I am satisfied that the decision of the Committee was one which was reasonable and open to it and should be confirmed.

Decision

Pursuant to s.211(1)(a) of the Lawyers and Conveyancers Act 2006, the decision of the Standards Committee is confirmed.

DATED this 9th day of April 2013

Hanneke Bouchier
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 UJ as the Applicant
Mr OO as the Respondent
Mr ON as a related person or entity
A [South Island] Standards Committee
The New Zealand Law Society