

CONCERNING

An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of the Waikato Bay of Plenty Standards Committee No.1

BETWEEN

BU

of Auckland

Applicant

AND

YA

of North Island

Respondent

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

DECISION

Background

[1] In April 2002, the Applicant and his former partner entered into a Relationship Property Agreement following their separation in December 2001. The Respondent acted for the Applicant's partner who is referred to by several different names, but is now known as Mrs BV.

[2] In February 2003, the Applicant and his brother were registered as the proprietors of a property at X Road, North Island. The registered proprietors of the property were recorded as "BU and BW".

[3] On 29 January 2004, a Notice of Claim pursuant to s42 of the Property (Relationships) Act 1976 against the Applicant's interest in the property was lodged by the Respondent on behalf of Mrs BV.

[4] A number of attempts were made by the Applicant to have the Notice of Claim removed without ever reaching the stage of a substantive hearing.

[5] One of these attempts had resulted in an Order being made to sustain the Notice of Claim. This was made by Judge Somerville on 7 June 2006.

[6] It was not until the matter was heard by the Family Court that an Order to lapse the Notice of Claim was made. This was made by Judge J P Geoghegan on 5 September 2008.

[7] The Relationship Property Agreement between the Applicant and Mrs BV included a provision whereby a Trust was to be established and known as The AAW Trust. Mrs BV and the children of the relationship were to be the beneficiaries of that Trust. This Trust was to acquire the family home situated at X Road, North Island. In full and final settlement of Mrs BV's entitlement to relationship property, the Applicant was to pay the sum of \$220,000 to the AAW Trust which was to be applied to improving the property and the partial reduction of the mortgage secured over it.

[8] The Applicant issued a cheque for \$220,000 pursuant to this arrangement. The cheque was handed to Mr XZ, the independent Trustee. It was made payable to the "AAW Trust" and crossed. The "bearer" notation was deleted.

[9] For some reason, however, the cheque was not deposited into a AAW Trust account. Instead \$20,000 was deposited into the bank account for the AAW Trust, and the balance was deposited into a joint account held by the Applicant and Mrs BV, recorded on the account as "BX".

[10] In 2003, it seems that concerns were raised as to the nature of the payment made by the Applicant to the AAW Trust, and whether any gift duty issues arose. In March 2003 the Respondent made a file note relating to the issues and the options as to how the payment could be treated.

[11] The "Appointer" in terms of the Trust Deed until 1 December 2011, is the Applicant and Mrs BV. Either of them have the power to remove the independent Trustee, but both of them are required to appoint a new Trustee. There was a default provision, however, if they failed to ensure that the number of Trustees met the minimum number required. In that case, the remaining Trustee had the power to appoint a new Trustee to ensure that this requirement was adhered to.

[12] On 20 March 2003 the Applicant terminated the appointment of Mr XZ as an independent trustee. Contrary to advice received from Mr XY QC (the barrister retained by Mrs BV), she reappointed Mr XZ as the independent trustee. On 4 April 2003, the Respondent wrote to X Bank in the following terms:-

This matter has now been resolved. XZ has been reappointed as the independent trustee. A copy of our letter to AAX advising them of this reappointment is attached for your information.

AAX were at that stage acting for the Applicant.

The complaint

[13] The Applicant's main complaint relates to the lodging of the Notice of Claim. He states that before the Respondent registered the Notice of Claim he was required to have an honest belief based on reasonable grounds that his client had a legitimate claim. His view is that the Respondent could not have had this belief, and was therefore in breach of rule 7.04 of the Rules of Professional Conduct for Barristers and Solicitors which were applicable at the time. Rule 7.04 provides as follows:

A practitioner must make all reasonable efforts to ensure that legal processes are used for their proper purposes only, and that their use is not likely to cause unnecessary embarrassment, distress or inconvenience to another person's reputation, interests or occupation.

[14] In addition, the Applicant characterises the conduct of the Respondent with regard to the reappointment of XZ as the independent trustee, as "deception", as a result of which he alleges Mrs BV and XZ were provided with an opportunity to withdraw monies (presumably from the Trust bank account) and make "non-interest loans" to Mrs BV. He complains that the Respondent's "deceptions in handling the AAW Trust have contributed to me suffering damages in excess of \$200,000."

[15] He alleges that this is a breach of "s11.1" being misleading or deceptive conduct, by which I take it that he is referring to Rule 11.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (Client Care Rules). Rule 11.1 of the Client Care Rules provides that - "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."

[16] The Applicant also alleges that the advice provided by the Respondent with regard to the payment by him to the Trust also constitutes "misleading or deceptive conduct".

The Standards Committee decision

[17] The Standards Committee considered the complaint and decided to take no further action pursuant to s138(2) of the Lawyers and Conveyancers Act 2006. In

doing so, the Committee accepted the explanation of the Respondent in respect of the specific allegations. The Committee recorded these as being:-

- (a) The practitioner registered the caveat as required by Counsel (Mr XY, QC). As a result the practitioner had sufficient honest belief in lodging the Notice.
- (b) The practitioner did not propose the independent trustee complained of. The complainant and his wife wished that person (Mr XZ) to be the independent trustee. The complainant received independent legal advice prior to signing the Trust Deed.
- (c) The practitioner was not a trustee of the Trust nor had any involvement or knowledge of the manner in which the cheque for \$220,000 was handled and therefore could not be held responsible.

The application for review

[18] The Applicant has applied for a review of the Standards Committee's decision. He says that the Respondent has misrepresented the facts and the law, and that the Committee does not understand the law.

[19] He considers that in evaluating the complaint concerning the lodgement of the Notice of Claim, the Committee has applied the wrong test. He refers to a decision of *Simperinghan v Martin* (Court of Appeal) Wellington, CA 5/95, 2 June 1995. He notes that the requirement established by this case is that before lodging a caveat, a solicitor must have an "honest belief" that there is a registrable interest.

[20] With regard to the matter relating to the appointment of the independent trustee, he states that the Respondent had a duty of care to the beneficiaries of the Trust and holds the Respondent responsible for the appointment and reappointment of Mr XZ, who he considers did not meet the standards required for an independent trustee. This differs from the initial complaint, where the Applicant alleges deceptive and misleading conduct.

[21] In the review application, the Applicant makes no mention of the allegations raised in the initial complaint with regard to the banking of the cheque.

[22] He does, however, raise other matters which were not included as part of the initial complaint. These relate to the fact that a trustee company associated with the Respondent's law firm, is now the independent trustee, the amendment of the Trust Deed, and resettlement of the Trust assets.

The applicable law

[23] The cheque issued by the Applicant was dated 18 April 2002 and presumably banked shortly thereafter. Mr XZ was appointed as Trustee in February 2002, and reappointed as independent trustee in 2003. The Notice of Claim was lodged on 29 January 2004.

[24] All of the relevant conduct therefore took place prior to 1 August 2008 which was when the Lawyers and Conveyancers Act 2006 came into force. Section 351(1) of the Lawyers and Conveyancers Act 2006 provides that if a lawyer is alleged to have been guilty of conduct in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982, a complaint about that conduct may be made to the Complaints Service established by the New Zealand Law Society.

[25] Section 112 of the Law Practitioners Act 1982 provided that complaints could be made in respect of conduct that was either –

- (a) misconduct;
- (b) conduct unbecoming;
- (c) negligent or incompetent to such a degree as to reflect on a practitioner's fitness to practice; or
- (d) the practitioner has been convicted of an offence punishable by imprisonment.

[26] Misconduct involves a serious failure of professional standards. The High Court has described misconduct as involving “a range of conduct ...from actual dishonesty through to serious negligence of a type that evidences an indifference to and an abuse of the privileges which accompany registration as a legal practitioner” (Complaints Committee No.1 of the Auckland District Law Society v C, 29 April 2008, High Court, Auckland, Randerson J, Williams J, Winkleman J, CIV 2007-404-4646 at paragraph 33). The definition in s7 of the Lawyers and Conveyancers Act also reflects the law as it stood prior to that Act and defines misconduct as conduct “that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable”. The conduct under consideration here does not approach that degree of failure of professional standards.

[27] Conduct unbecoming in the professional disciplinary arena was discussed in B v Medical Council [2005] 3 NZLR 810. In that case, Elias J stated:

It needs to be recognised that conduct which attracts professional discipline, even at the lower end of the scale, much be conduct which departs from acceptable professional standards. That departure must be significant enough to attract sanction for the purposes of protecting the public ... I accept the submissions of Mr [W] that a finding of conduct unbecoming is not required in every case where error is shown. To require the wisdom available with hindsight would impose a standard which is unfair to impose.

[28] If the conduct complained of does not reach the threshold required by s351(1), then the Standards committee lacks jurisdiction to consider the complaint.

Scope of the review

[29] It is important to recognise that on review, the LCRO may only have regard to matters which were raised in the initial complaint to the Standards Committee. No new complaints may be made at the review stage. In this regard, the issues raised by the Applicant with regard to the Respondent's trustee company, the amendment to the Trust Deed, and the resettlement of the Trust assets, fall outside the ambit of this review.

The Notice of Claim

[30] The Applicant alleges serious misconduct on the part of the Respondent for lodging the Notice of Claim against the title to the property owned by the BU Family Trust without holding an honest belief that there were grounds to do so. He alleges a breach of rule 7.04 of the Rules of Professional Conduct as referred to in paragraph [13] above. A footnote to that rule states that:

A practitioner should not register a Notice of Interest under s42, Matrimonial Property Act 1976, or a caveat under s137 Land Transfer Act 1952, knowing that there is no "registrable interest" on the part of the client to be protected pursuant to either Act, and should make reasonable inquiry from the client as to the existence of any such interest.

This footnote is made with reference to the decision of *Gordon v Treadwell Stacey Smith* (1996) 3 NZLR 281. In that case it was held that before a caveat is lodged, the person doing so must hold an honest belief based on reasonable grounds that the caveator had an interest in the property. The standards to be applied when determining whether an honest belief was capable of being held, are those of a reasonable conveyancing practitioner possessed of the factual material available to the solicitor whose actions are under scrutiny.

[31] In the complaint and application for review, the Applicant incorrectly attributes these statements to the Simperinghan decision (ibid). That case involved a negligence claim against the plaintiff's lawyer for failing to recognise whether a caveatable interest

existed. It does not particularly refer to the test required before lodging a caveat and as such does not provide much assistance in connection with this matter.

[32] The difference between a s42 Notice of Claim and a caveat was discussed by Judge MacCormick in *Williams v Williams and others* (unreported Family Court Auckland 7 April 2004, FP 004/514D/03) referred to by Judge Geoghegan in his decision. At paragraph 13 of that decision, Judge MacCormick states:

It is to be noted that with a caveat the caveator is required to state "how the land, or estate or interest claimed, is derived from the registered proprietor", i.e. the specific basis of the claim to that particular piece of land. With a notice of claim the person giving the notice is merely required to claim an interest, by virtue of his or her marriage and the Property (Relationships) Act 1976, to land in which it is considered the Respondent has a beneficial interest by virtue of some circumstance or other ...A prima facie case of a perceived beneficial interest on the part of the Respondent must be established – but it appears that this is all that is required and that because of the different requirements the cases relevant to the right to lodge and sustain a caveat do not apply. It seems to me that if one has a valid right to lodge either a notice or a caveat in the first place then in the absence of a material change of circumstance, one should have the right to sustain it.

[33] In the light of that statement, I am not at all convinced that the test for lodging a Notice of Claim pursuant to s42 is in fact the same as the test for lodging a caveat, notwithstanding the commentary to rule 7.04. However, my decision does not stand or fall on that particular view.

[34] One of the factors put forward by the Respondent in his defence, is that the decision to register the Notice of Claim was made by Mr XY, QC. The notice of claim was forwarded to the Respondent by Mr XY, prepared and signed. The Respondent therefore acted only to register the notice. This is not, however, an absolute defence for the Respondent. In his text, *Ethics, Professional Responsibility and the Lawyer*, Dr Webb notes at page 451 that –

It will not be an absolute defence to a claim of abuse for a solicitor to claim that he or she relied on that barrister's expertise. Such reliance may be warranted when the material is difficult or the facts complex, but in most cases solicitors are expected to exercise independent judgment in light of their own skill as to whether the claim is well founded. In matters of law and legal practice, legal representatives may not, by relying on the advice of another, divest themselves of their responsibility to conduct litigation responsibly.

[35] In his letter of 21 May 2010 to the Complaints Service, however, the Respondent makes the following points:-

- (a) The registered proprietors of the property were BU and BW.

- (b) The Notice of Claim was against the interest of BU. I observe that because of the requirements of the Torrens system, the title to the property was not recorded as the BU Family Trust, and it is not evident to a person searching the title that the registered proprietors of the property hold it as trustees.
- (c) Mrs BV had reason to believe that relationship property had been used by the Applicant in the purchase of the property.

[36] The Respondent also refers to the fact that in June 2008, Judge Somerville made an interim Order sustaining the Notice of Claim. I place considerable weight on that. To make such an Order, the Judge must have formed the view that there were reasonable grounds at that time for sustaining the Notice of Claim. Otherwise, she would have made an order lapsing the order at that stage. This in itself is sufficient to hold that it was reasonable therefore for the Notice of Claim to have been lodged in the first instance.

[37] However, for the sake of completeness, the other issues raised by the Applicant need to be considered.

[38] The first of these is that the Applicant says that two weeks after the Notice of Claim was lodged, the Respondent was in possession of information to show that the property was purchased by the BU Family Trust. That is presumably the information contained in the affidavit sworn on 17 February 2004 by the Applicant in support of an application for an Order that the notice be removed. Judge Geoghegan noted that affidavit was filed in support of applications which were never the subject of a substantive hearing. As such, therefore, that evidence is untested evidence, and the Respondent was not obliged to accept it as correct.

[39] The Applicant also notes that the Respondent was the author of the relationship property agreement entered into between himself and Mrs BV. He says that, in that Agreement the Respondent "certified that separate property retained by [the Applicant] was held in trust". That separate property cannot have been the X Road property as it was not owned at that stage. The relevance, therefore, of the Applicant's statement is somewhat difficult to comprehend. However, I perceive that he may hold the view that a solicitor's certificate in a relationship property agreement is a certificate that the content of the document is correct. That of course is not the case. The certificate provided by a solicitor to a property relationship agreement is merely that he or she has provided independent advice to the party whose signature has been witnessed by the

certifying solicitor. The agreement is not necessarily conclusive proof of the veracity of the facts contained in it.

[40] The Applicant also alleges that the Respondent was negligent and owed a duty of care to the public at large. In the first instance, I do not consider that the Respondent has such a duty. Even if he did, before any disciplinary action can be taken in respect of that negligence, it must be of such a degree as to reflect on the Respondent's fitness to practice or as to bring the profession into disrepute – (refer s112(c) of the Law Practitioners Act 1982. I do not consider that even if there were a duty of care as argued by the Applicant, that any breach of that duty was such as to meet the requirements of s112(c).

[41] Having considered all of the above I do not consider that the conduct complained of reached the threshold required by s351(1) of the Lawyers and Conveyancers Act. It would therefore have been appropriate for the Committee to determine the matter on the basis that it lacked jurisdiction to consider the complaint. However, following acceptance of the complaint, the Committee determined to take no further action pursuant to s138(2) of the Act.

[42] It could equally have determined to take no further action pursuant to s138(1)(f) of the Act. This provides that the Committee may exercise its discretion to take no further action if "there is in all the circumstances an adequate remedy ...that it would be reasonable for the person aggrieved to exercise." The Applicant seeks to recover losses which he states were caused by the actions of the Respondent. The remedies for a breach of the requirement that caveats be lodged only with reasonable cause is to be found in s146 of the Land Transfer Act 1952. This provides that:

Any person lodging a caveat without reasonable cause is liable to make to any person who may have sustained damage thereby such compensation as may be just.

In my view, the Applicant should have sought to recover the losses which he alleges he has suffered pursuant to that provision.

[43] Finally, I would observe that the Notice of Claim was lodged in January 2004. It was in place at the time the Applicant was negotiating to sell the property. Whether or not that matter was included in the Family Court proceedings referred to in the letter from AAY dated 20 November 2007 is unclear, but there had been ample time for the Notice of Claim to be challenged prior to the attempts to sell the property. In addition, terms could have been included in the Agreement for Sale and Purchase to ensure that the purchaser remained bound by the agreement pending an application to have the

notice removed. If in fact the purchaser did not make a formal offer, then there may very well have been other factors which influenced that decision.

[44] For all of the reasons referred to above I am more than satisfied that the Committee's determination in connection with this aspect of the complaint is correct.

Misleading and deceptive conduct

[45] The remaining matters of the original complaint can be readily disposed of. These were allegations that the Respondent had engaged in misleading and deceptive conduct by writing to X Bank advising that Mr XZ had been reappointed and the issue resolved.

[46] It must be noted that the Client Care Rules did not come into existence until 2008. Consequently, Rule 11.1 was not applicable to the conduct complained of. Whilst that rule echoes the provisions of the Fair Trading Act, that Act contains its own remedies. There was no similar provision in the Rules of Professional Conduct akin to Rule 11.1.

[47] Even if there were, however, the Respondent's conduct cannot be considered to be deceptive or misleading. Mrs BV took steps to reappoint Mr XZ as the independent trustee. The fact that this step was taken contrary to advice provided by Mr XY, does not colour that act with any greater degree of culpability. The Respondent was asked by Mrs BV to provide advice on the matter and to provide a solution for her. He did so and is entitled to do so. The Applicant was at that time represented by AAX and was equally at liberty to write to X challenging the steps taken by Mrs BV. Whether that occurred or not is unclear, and is also immaterial. The actions of the Respondent cannot in any way be considered to be misleading or deceptive.

[48] The final matter raised by the Applicant in his complaint related to the banking of the cheque made payable to the AAW Trust. The cheque was provided to Mr XZ. The Respondent took no part in the process with regard to banking the cheque.

[49] He was asked to provide advice at a later date with regard to gift duty issues, and how the actions which had been taken could be directly recorded and dealt with. He provided that advice as he is obliged to do so. Again, there can be no question of misleading or deceptive conduct.

[50] As noted in paragraph [29] above, the remaining matters outlined in the Applicant's review application were matters which were not included in the original complaint, and cannot be considered in this review.

Summary

[51] It follows from the above that I concur with the determination of the Standards Committee to take no further action in connection with this matter.

Decision

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

DATED this 20th day of April 2011

Owen Vaughan
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:

BU as the Applicant
YA as the Respondent
The Waikato Bay of Plenty Standards Committee 1
The New Zealand Law Society