

CONCERNING

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

AND

CONCERNING

a determination of [City] Standards Committee [Number]

BETWEEN

AR

Applicant

AND

PI

(UB Lawyers)

Respondent

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

Introduction

[1] This review concerns an unusual situation where Ms PI of UB Lawyers complained that a lawyer (Mr AR) failed to comply with his client's instructions (expressed to be irrevocable) to pay funds from the sale of a property to UB Lawyers for her client (SN Limited). It is unusual in that it is not Mr AR's clients who are complaining that he failed to follow their instructions, but a third party.

Background

[2] Mr and Mrs XB were trustees of the XB Family Trust.

[3] The Trust owned a property in [Town].

[4] SN Limited registered a caveat against the title to the property pursuant to a term loan agreement recording an advance by SN Limited to the Trust. The loan was guaranteed by Mr and Mrs XB

[5] The Trust entered into an Agreement to sell the property. Following negotiations between Mr and Mrs XB and SN Limited directly, Mr and Mrs XB signed an authority addressed to Mr AR which read:

AUTHORITY TO MAKE PAYMENT

We Mr XB and Mrs XB authorise and instruct you to pay to SN Limited the balance of the deposit received by you for the sale of our property at [Street Name]. This authority and instruction is irrevocable and remains binding on you until payment has been made as instructed.

Dated this ~~29th~~11 day of ~~June~~ July 2012

Signed by Mr XB

Signed by Mrs XB

10/7/12

[6] This authority was sent by Ms PI to Mr AR on 11 July 2012 with instructions to pay the funds into UB Lawyers Trust Account. On 17 July Ms PI rang Mr AR to confirm he had received the authority and to ascertain why the funds had not been paid.

[7] Mr AR advised Ms PI that he had no intention of paying the funds to UB Lawyers. Ms PI immediately lodged a complaint with the Lawyers Complaints Service. The Complaints Service acknowledged receipt of the complaint on 23 August at which time Mr AR was formally notified of the complaint.

[8] Following the conversation between Mr AR and Ms PI on 17 July, the XB's sent two faxes to Mr AR in which they each instructed him to ignore the authority they had previously signed. These faxes confirmed their earlier verbal instructions to Mr AR.

[9] The revocation of the instructions included a statement from each of them that the previous authority had been given by them in their personal capacities whereas the funds belonged to the XB Family Trust.

[10] Presumably Ms PI copied Mr AR into her complaint as Mr AR wrote directly to her on 20 July. In that letter he advised Ms PI that the authority was not effective because the XB's had signed it in their personal capacities and not as trustees. He also referred to the fact that the [Bank] held a registered first mortgage over the property and it was the bank which held authority as to where the funds should be paid.¹

[11] The mortgage was in default and a Property Law Act notice dated 4 May 2011 had been served on the XB's and a copy provided to SN Limited.

¹ Ms PI alleges (and this has not been denied by Mr AR) that the balance of the deposit was paid by Mr AR to the XB's (presumably as trustees) without reference to the bank. The statement addressed to the Trust dated 9 August 2012 records payment of the sum of \$25,000 to the trustees from the balance of the deposit received (\$55,310.50).

[12] Negotiations subsequently took place between SN Limited, the bank, and the XB's. As a result of which the sum of \$35,000 plus UB Lawyers costs was remitted to UB Lawyers and the caveat was released.

The complaint

[13] The complaint by Ms PI was simply that Mr AR refused to comply with his clients' irrevocable authority. She also complained that Mr AR had been "unhelpful, arrogant and unprofessional".²

The Standards Committee determination

[14] The Standards Committee did not accept Mr AR's submission that there was a difference between the authority being signed by the XB's in their personal capacity, and in their capacity as trustees. It considered that "at worst this was a device used to avoid their repayment obligations to SN Limited".³ It found that the authority provided by the XB's⁴

...constituted an irrevocable instruction irrespective of whether it was signed by them personally or in their capacity as trustees of the XB Family Trust. Mr AR's failure to transfer the balance of the deposit paid by the purchaser to SN Limited amounted to a failure to abide by an irrevocable instruction. A prudent lawyer faced [with] an irrevocable written direction, which played the important part in the transaction described at paragraph 21 below, would have declined to disburse the deposit monies until the dispute as to re-payment was resolved between the parties, or a court direction issued following an interpleader application.

[15] At paragraph 21 of its determination the Committee noted:

The irrevocable direction in SN Limited favour was given for good reason – it secured SN Limited agreement to remove the caveat thereby allowing transfer of the [Street Name] property from the XB's as vendor to the purchaser. The Committee finds that once Mr AR was aware that SN Limited had altered its position in reliance upon the instruction from the XBs, he was bound to carry out that instruction or to take the step described at paragraph 20 above.

[16] Having made these observations the Committee came to the conclusion that Mr AR's conduct constituted unsatisfactory conduct.

[17] However, the Committee noted at paragraph 26 of its determination that "[d]espite having found that Mr AR was obliged to follow the instruction to pay funds to SN Limited' it was "not the appropriate body to consider whether Mr AR is personally liable for SN Limited losses". It did not find that "Mr XB's actions hindered the ability of

² Letter PI to Auckland District Law Society (17 July 2012).

³ Standards Committee determination dated 13 May 2013 at [19].

⁴ Above n 3 at [20].

SN Limited to recover a debt secured over the property at ...”⁵ and declined to order Mr AR to pay the balance of the amount due to SN Limited, being \$20,310.50.

[18] In respect of the finding of unsatisfactory conduct the Committee fined Mr AR \$1,000 and ordered him to pay costs in the sum of \$500 to the New Zealand Law Society.

Review

[19] Mr AR has applied for a review of the Standards Committee determination. The review has been completed on the papers with the consent of the parties.

[20] The Committee’s determination and adverse finding against Mr AR has been based on its view that Mr AR was bound to follow his client’s “irrevocable” instructions. The Committee did not accept there was any difference between the XB’s signatures in their personal capacities and their signatures as trustees. I do not have any issue with the Committee’s conclusion relating to the status of the signatures, but I do not reach the same conclusion that Mr AR was bound to follow the instructions for the reasons that follow.⁶

[21] Because my finding differed from that of the Standards Committee and included reasons that had not been addressed by the parties, a draft decision was issued to the parties for comment. This decision takes those comments into account.

Finding

[22] In focusing on the capacity in which the XB’s had signed the authority, the Committee addressed the reasons put forward by Mr AR for not complying with his clients’ instructions. In doing so the Committee lost sight of the fact that Mr and Mrs XB had withdrawn their authority for Mr AR to make payment, albeit they were expressed to be irrevocable. The reasons why they withdrew their authority are largely immaterial. So too is whether or not Mr XB had an opportunity to remit the funds to UB before the instructions were countermanded. The undisputed fact is that he had not made the payment before the instructions were withdrawn.

[23] In her comments on the draft decision Ms PI advises that when she spoke with Mr AR on 17 July 2012 he stated that he would not comply with his clients’ instructions. She says that her client had spoken to the XB’s on the previous day, and they had

⁵ Question posed by Standards Committee page 4.

⁶ The statements by the Standards Committee in paragraph 20 of its determination are somewhat contradictory. Its finding against Mr AR is that he failed to follow instructions to make payment to UB Lawyers, but it then proceeds to note that a “prudent lawyer would have declined to disburse the deposit monies until the dispute as to re-payment was resolved between the parties ...”

confirmed their instructions to Mr AR. Her position therefore, is that Mr AR was obliged to follow his clients' instructions but failed to do so between 11 July 2012 and receipt of the emails from his clients on 17 July 2012.

[24] This submission proceeds on the basis that Mr AR was obliged to act on the irrevocable authority in circumstances where he considered that Mr and Mrs XB had not properly assessed their obligations. Mr AR's duty was to his clients, not Ms PI's client, and the fact that he deferred acting on the instructions until he had spoken to his clients, does not alter my decision.

[25] There is authority in s138(1)(d) of the Lawyers and Conveyancers Act to decline to take any further action on a complaint if the person alleged to be aggrieved does not desire any action to be taken. Mr and Mrs XB are the persons whose instructions were being ignored and they did not complain. On that basis s 138(1)(d) could be invoked as the reason to decline to take any further action. However, I acknowledge that Ms PI's clients are the persons who are aggrieved by Mr AR's conduct, and they desire that action be taken.

[26] Section 110 of the Lawyers and Conveyancers Act 2006 obliges a lawyer to hold money exclusively for his or her client, such money to be paid to the client or as the client directs. This section expresses one of the fundamental obligations of a lawyer with regard to client funds. This is a specific example of the overall obligation of lawyers to act in accordance with client instructions and if a client chooses to instruct a lawyer to disregard instructions which they have previously acknowledged were irrevocable, a lawyer cannot be compelled to act in contravention of the client's current instructions. It is the client who must take responsibility for breaching any declarations of irrevocability.

[27] Before Mr AR made payment in accordance with the authority, it was withdrawn. Mr AR was obliged to follow his client's current instructions with regard to the funds in his trust account. It was Mr and Mrs XB who were in breach of their obligations to SN Limited by withdrawing their authority. If Mr and Mrs XB were able to successfully show they had been pressured into signing the authority (as was also asserted by Mr AR) they would be able to successfully defend any action against them. This is an issue which would need to be determined by a court.

[28] Mr AR had not assumed any personal obligations to SN Limited. He had not given any undertaking to remit the funds to UB Lawyers. In this regard, the Court of

Appeal judgment in *Cashmere Enterprises Limited v Mathias*⁷ referred to by the Standards Committee is relevant.

[29] In *Cashmere*, Mrs Going irrevocably instructed Mr Mathias to pay a GST refund (which she had directed IRD to pay him) to the vendor of a property which she had purchased and who had provided vendor finance to her. The payment was to be applied in reduction of the vendor finance. In that case, Mr Mathias had prepared the authority and sent it to the vendor following signature by his client.

[30] Mr Mathias received the GST refund but did not pay it to the vendor. The vendor argued that Mr Mathias was personally liable to pay the funds to it but the court held otherwise. Mr Mathias had declined to give any undertaking to pay the funds to the vendor and consequently the vendor was unable to succeed against Mr Mathias on any of the causes of action advanced by it.

[31] Inherent in this judgment is an acceptance that Mr Mathias was not obliged by reason of professional obligations to make payment of the funds to Cashmere Properties Limited against the interests of his own client. In the present case, Mr Singh had specific instructions from his client to ignore the earlier authority.

[32] It is difficult to accept that a lawyer can be required to assert against his or her own clients that he or she is obliged to carry out instructions given earlier by the clients albeit that they are expressed to be irrevocable. If the client chooses to countermand its commitment to a third party, it is the client who must take responsibility for breaking that commitment. A lawyer should not be placed in a position whereby he or she assumes an obligation to act in defiance of his or her current instructions for the benefit of a third party.

[33] It would be a different matter if Mr AR had given an undertaking to remit the funds to UB Lawyers. His instructions from his client would have included an authority for him to give the undertaking and once it was given he would have been entitled to rely on those instructions to resist any attempt by his clients to subsequently alter their instructions. He would also have had the opportunity to advise his clients on the consequences of the instructions and the undertaking.

[34] In the present instance, Mr AR had no duty to SN Limited and was not minded, or required, to set himself against his clients' new instructions.

[35] Mr AR could have held the funds as suggested by the Committee.⁸ In her comments on the draft decision, Ms PI makes the same point. The complaint was

⁷ *Cashmere Enterprises Limited v Mathias* (2002) NZTC 17,634; (2002) 4 NZ ConvC 193,570.

⁸ Above n 3 at [20].

however, that Mr AR had not made the payment to UB Lawyers and that was the basis of the Committee's determination.

[36] I note also that the Committee seemed to have proceeded on the basis that SN Limited had altered its position in reliance on the authority.⁹

[37] I do not understand that to be the case. SN Limited did not withdraw its caveat in reliance on the "irrevocable instructions" and when Mr AR declined to pay UB Lawyers an alternative agreement was reached and the caveat withdrawn in exchange for payment of the agreed amount.

[38] Even if the Committee's understanding was correct, my decision would not be altered.

[39] This eventual agreement as to the payment of the funds was reached in discussion with the mortgagee. In her comments on the draft decision, Ms PI submits that Mr AR should not have released the balance of the deposit to his clients as the mortgagee had first priority to the funds. That is a proposition that is outside of the issues raised in this complaint, and Mr AR's duty to the bank would depend on the instructions (if any at that stage) from the bank.

[40] Finally, I mention the allegation of rude and discourteous behaviour. Ms PI has referred to such behaviour being overheard by other members of her office but has not produced any corroborating statements.

[41] For his part, Mr AR denies the allegations.

[42] The Standards Committee did not refer to that aspect of the complaint in its determination. My sense is that this aspect of the complaint was very much a secondary matter and is difficult to prove. In the circumstances I make no finding on this aspect of the complaint but consider that further action is unwarranted.

Summary

[43] It follows from my comments above that I do not agree with the determination of the Standards Committee. Its determination is based on the issue argued by Mr AR that the authority was unenforceable as it had been signed by the XB's in their personal capacities.

[44] For my part, I consider the fundamental issue is that the declaration of irrevocability was made by Mr and Mrs XB, and if they chose to disregard their

⁹ Above n 3 at [21].

obligation and instruct Mr AR to act differently, then any action lies against Mr and Mrs XB. Mr AR had not assumed any personal obligations to make the payment and was obliged to follow his clients' instructions.

Decision

1. Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee is reversed.
2. Pursuant to s 152(2)(c) of the Lawyers and Conveyancers Act 2006 no further action is required to be taken in respect of this matter.

DATED this 10th day of October 2014

O W J 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:

Mr AR as the Applicant
Ms PI as the Respondent
[City] Standards Committee
The New Zealand Law Society