

LCRO 202/2016
LCRO 6/2017

CONCERNING

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

AND

CONCERNING

a determination of the [Area] Standards Committee [X]

BETWEEN

JI

Applicant

AND

ZY

Respondent

DECISION

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

Introduction

[1] Mr JI has applied for a review of a decision by the [Area] Standards Committee [X] which determined there had been unsatisfactory conduct on the part of Mr JI for his failure to recognise and protect Ms ZY's right to claim an interest in land registered in the names of her husband, Mr WV, and his mother, Mrs XU. The Committee censured Mr JI, ordered him to apologise to Ms ZY, and to pay a fine of \$2,500 to the New Zealand Law Society (NZLS) and compensation of \$6,000 to Ms ZY.

Review issue

[2] The question considered in this review is whether Mr JI owed Ms ZY an ongoing duty of loyalty.

Background

[3] In September 2013 Ms ZY and Mr WV bought Property 1 subject to a

mortgage in favour of [Bank].¹ Mr BA of Mr JI's firm acted on the transaction (the 2013 matter). The 2013 matter is the only matter in which Mr JI's firm has acted for Ms ZY.

[4] Before Mr JI's firm acted in the 2013 matter, a number of events had occurred in which Mr JI and his firm played no part:

- (a) On 10 February 2006, Ms ZY had married Mr WV.²
- (b) On 24 July 2006, Mr WV and Mrs XU had signed a deed according to which Mrs XU had asked Mr WV to purchase Property 2, certificate of title reference NAXXX/XX (Property 2), on trust for Mrs XU, and recording the terms on which Mr WV was to hold that asset for Mrs XU's benefit as the only named beneficiary.
- (c) On 19 September 2006, unencumbered freehold title over [property 2] was transferred into Mr WV's sole name.
- (d) On 4 December 2014, Mrs XU agreed to purchase [Property 3] certificate of title NA XXX/XXX (Property 3) at auction.

[5] On or about 8 December 2014, Mr JI's firm received the agreement for sale and purchase of [Property 3] and confirmation that Mrs XU had paid a deposit. Mr JI's firm then settled the purchase on 14 January 2015 and title was transferred into the names of Mr WV and Mrs XU subject to a mortgage securing a loan by [Bank] to Mr WV and Mrs XU for part of the purchase price.³

[6] On 28 April 2015, Mr JI made a note recording his discussions with Mrs XU and Mr WV over the purchases of [Property 2, Property 3] and a contribution apparently made by Mrs XU to the purchase of [Property 1]. Mr JI advised, and his firm prepared various documents to give effect to an agreement between Mrs XU and Mr WV that a trust would be created, and [Property 2] and [Property 3] would be held by the trustees of that trust.

[7] Transfer of [Property 2] and [Property 3] proceeded on 25 May 2015. Mrs XU supplied the whole amount of the purchase price to enable the WV and XU Trust's purchases to proceed. Mr JI's firm discharged the mortgage over [Property 3] then transferred unencumbered freehold title over [Property 2] from Mr WV, and [Property 3]

¹ Mortgage XXXXXXXX.X.

² NZ marriage certificate, ZY and WV, dated X March 20XX.

³ Mortgage XXXXXXXX.X.

from Mr WV and Mrs XU, to the Trustees of the WV and XU Trust: Mr WV, Mrs XU and KO Trustees Ltd. Mrs XU immediately forgave the entire debt.

[8] By 2 June 2015, Mr JI had received a request from STI Law (STI) by fax advising that Mr WV and Ms ZY had separated, and seeking to uplift files relating to matters on which he had acted for Mr WV and Ms ZY.⁴

[9] On 2 June 2015, Mr JI replied to STI to the effect that the firm had only acted for Ms ZY on the purchase of [property 1] in 2013, and not in any other matter. Ms RM of STI replied, attaching copies of titles to trust property recording Mrs XU, Mr WV and KO Trustees Ltd as registered proprietors, and asking Mr JI to confirm whether or not he was acting or had acted for any of those parties.

[10] Ms ZY registered notices of claim to interests in [Property 2] and [Property 3] pursuant to s 42 of the Property (Relationships) Act 1976.

[11] Mr JI does not appear to have replied to STI immediately, but by 4 June 2015 he had received instructions from Mrs XU to act again on her instructions. Mr JI wrote to STI requesting Ms ZY's consent to him acting for Mrs XU in relation to a matter involving Mr WV and Ms ZY, and presumably having the potential to affect Mrs XU's interests in WV and XU Trust property.

Complaint

[12] On 8 June 2015, Ms ZY made a complaint to the NZLS. The substance of Ms ZY's complaint is that Mr JI acted against her interests despite being prohibited from doing so by the rules that regulate lawyer conduct where there is a conflict between the interests of clients.

[13] Ms ZY wants Mr JI to pay all her "financial losses from his unprofessional conduct", which includes an estimated \$20,000 she anticipates having to spend pursuing the interest she claims in trust property.

Mr JI's Reply

[14] Mr JI confirmed his firm had only acted once for Ms ZY in 2013 when she and Mr WV purchased [property 1]. He says he was not personally aware of the relationship between Mr WV and Ms ZY until May 2015, and did not become aware of their separation until 2 June 2015 when he received a fax from STI to that effect.

⁴ The parties have not provided a copy of that fax.

[15] Mr JI confirmed he had acted on instructions from Mrs XU and Mr WV in May 2015, in setting up the WV and XU Trust “for Mrs XU” and transferring [Property 2] and [Property 3] into the trustees’ names.

[16] STI contended by transferring property into the WV and XU Trust, Mr JI had acted in a manner that was contrary to Ms ZY’s interests in breach of r 6.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), and hindered her ability to claim to an interest in relationship property. STI submits that Mr JI should have obtained Ms ZY’s informed consent to the transfer of [property 2] and [property 3] before either property was transferred to the WV and XU Trust, and conveyed the sense of injustice felt by Ms ZY, and her belief that Mr JI has abused her trust.⁵ It is implicit in the correspondence that Ms ZY’s view was that she did not stand to benefit from the trust.

[17] The Committee notice of hearing records that its inquiry was focussed on:⁶

The possible conflict of interest due to Mr JI having acted for both Mr WV and Ms ZY in September 2013 when Mr WV and Ms ZY jointly purchased the property[1] situated at [address] and subsequently appearing to have acted for Mr WV in transferring the property[2] at [address] in a way that potentially compromised and detrimentally affected Ms ZY’s relationship property claim.

Standards Committee decision

[18] The Committee’s concerns included Mr JI not having checked whether he had acted for Ms ZY before acting for Mr WV and Mrs XU without regard to her interests. The Committee noted, that in 2015, Mr JI knew or should have known Ms ZY had been a client of the firm in 2013, and considered r 6 of the Rules which requires a lawyer to protect and promote the interest of clients, and the continuing obligation on a lawyer to protect client confidentiality under r 8.1. The Committee considered Mr JI owed Ms ZY continuing duties of “loyalty and confidentiality” in 2015, and having identified a conflict, should have declined to act for Mr WV, Ms XU or Ms ZY.⁷ In failing to do so the Committee considered Mr JI denied Ms ZY the opportunity to establish any claim she may have had to [property 2] or [property 3].

[19] The Committee concluded that Mr JI’s conduct had fallen short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer, and recorded its determination that there had been unsatisfactory conduct on his part.

⁵ Letter STI to New Zealand Law Society, 14 July 2015

⁶ Standards Committee Notice of Hearing of Complaint (23 July 2015) at 1.

⁷ Standards Committee determination (4 August 2016) at [26].

[20] The Committee determined that Mr JI's conduct had been unsatisfactory pursuant to s 12(a) of the Lawyers and Conveyancers Act 2006 (the Act), and imposed orders pursuant to s 156 (1) of the Act. Mr JI was censured, ordered to apologise to Ms ZY, pay a fine to the NZLS of \$2,500, and, in a subsequent decision, to pay compensation of \$6,000 to Ms ZY pursuant to section 156(1)(d) for anxiety and distress caused by Mr JI's conduct.

Application for review

[21] Mr JI has applied for a review of both decisions. In relation to the first decision, Mr JI's grounds for review relate primarily to the relationship property issues identified by Ms ZY in her complaint rather than any professional standards issues. Mr JI also contends \$6,000 is more than he should be required to pay, given the invoices Ms ZY has provided in support of her claim.

[22] Ms ZY made no comment.

Review hearing

[23] Mr JI attended a review hearing by telephone on 19 September 2017. Ms ZY was not required to attend, and did not exercise her right to do so.

Nature and scope of review

[24] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:⁸

... 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.

⁸ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

[25] More recently, the High Court has described a review by this Office in the following way:⁹

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.

[26] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

- (a) Consider all of the available material afresh, including the Committee's decision; and
- (b) Provide an independent opinion based on those materials.

Analysis

[27] The first point to note relates to the extent of Mr JI's obligation of loyalty to Ms ZY, who was a former client after the 2013 matter was completed. In *Morpeth v Ramsey*, the Legal Complaints Review Officer said that "while there is not generally an ongoing duty of loyalty on the part of a lawyer to a former client, there is an ongoing duty of confidence".¹⁰ Although that decision related to conduct that occurred before the Act and Rules came into effect, the position under the present Rules remains the same. Rule 6.1, for example, refers to a matter and a client, not any matter and any client or former client.

[28] Although Ms ZY may have communicated with Mr JI and others at his firm from time to time, the firm had only acted for her (and Mr WV) in 2013, and had not acted for her since in relation to any other matter, including the formation of the Trust and the transfer of property into it. There is no evidence of Ms ZY having conveyed confidential information or of any particular confidence having been betrayed. There is no evidence there was any confidential information on the WV and ZY joint file. Ms ZY's name appears on the title to Property 1, and there does not appear to be any other reason that suggests her interest in that property was confidential to her.

⁹ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

¹⁰ *Morpeth v Ramsey* LCRO 110/2009 (12 November 2009) at [26].

[29] As there is generally no ongoing duty of loyalty that accompanies the ongoing duty of confidence, Ms ZY's expectations of Mr JI were misplaced. While Mr JI could not betray her confidence with impunity, that is not the allegation. Ms ZY was Mr JI's former client in May 2015, not his client. In the circumstances, he did not owe her an ongoing duty of loyalty and r 6.1 does not apply.

[30] The only professional standards issue that arises, and that was admitted by Mr JI, is that he did not run a conflict check before he acted for Mrs XU and Mr WV in April/May 2015. That alone is not sufficient to support a determination of unsatisfactory conduct on the present facts.

[31] In the circumstances the determination that there has been unsatisfactory conduct on the part of Mr JI is reversed. In the absence of a determination that there has been unsatisfactory conduct on Mr JI's part, there is no statutory basis on which to make or confirm orders pursuant to s 156 of the Act. While Ms ZY may well be disappointed, the orders, including compensation, necessarily fall away.

Decision

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

DATED this 22ND day of September 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 JI as the Applicant
Ms ZY as the Respondent
[Area] Standards Committee [X]
New Zealand Law Society