

CONCERNING

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

AND

CONCERNING

a determination of [North Island] Standards Committee

BETWEEN

LS

Applicant

AND

TD

Respondent

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

DECISION AS TO PENALTY

Introduction

[1] On 10 December 2014 I issued a decision (the findings decision) in which I found Mr TD's conduct constituted unsatisfactory conduct pursuant to s 12(c) of the Lawyers and Conveyancers Act 2006 by reason of breaches of rules 7, 10, 11 and 11.1 of the Conduct and Client Care Rules.¹

[2] Both parties have now provided submissions as to penalty as requested.

Background

[3] Mr TD had prepared a will for Mrs LS's mother in which she purported to appoint Mrs LS and her sister as trustees of the [Trust name]. The power to appoint new trustees in fact lay with the surviving trustee, Mr RH, and he declined to appoint them.

[4] Instead of advising the sisters of this, Mr TD (and Mr RH) continued to treat them as if they were trustees including referring to them as trustees in documents.

¹ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[5] The Trust Deed required there to be no fewer than two trustees at all times which meant that potentially all decisions made by Mr RH as a sole trustee were invalid.² In addition, by not being informed they had not been appointed, Mrs LS and her sister were deprived of the ability to take steps to require Mr RH to comply with the terms of the Trust Deed or to challenge any trustee resolution.

Mrs LS's submissions

[6] Mrs LS has provided submissions from herself, the lawyer (Mr XE) whom she instructed in her capacity as a "trustee" and who corresponded with Mr TD in respect of trust matters,³ and her husband.

[7] Mrs LS submitted:⁴

- Mr TD has abused the most elementary principle of the legal profession, namely truthfulness and trust.
- Mr TD should apologise to her and her advisors.
- Mr TD should compensate her for costs incurred in her role as a "trustee" and for advice sought about her role as a trustee.
- Mr TD should cancel fees rendered to the Trust.
- Mr TD should pay for the costs of investigating the "unlawful and fraudulent sale of [address]".

[8] Mr XE's comments are in the form of a letter addressed to Mrs LS. He considers that Mr TD had treated Mrs LS "somewhat with contempt" and advises her that:

- (a) she should receive an apology;
- (b) she should be reimbursed for all her travel costs in attending meetings (I assume this refers to meetings of trustees);
- (c) she should receive payment for emotional stress;
- (d) fees charged by Mr TD to the [Trust name] should be reimbursed;
- (e) fees charged by himself and Mr QO should be reimbursed.

[9] Mrs LS's husband refers to the personal toll that this matter has taken on Mrs LS, himself and their relationship. In essence this is the same as Mr XE's submission that there should be some payment for emotional stress. He too refers to the need for

² I note in [48] of the findings decision that it is obviously beyond my jurisdiction to do anything further than to raise this issue.

³ I note the letter from Mr XE is neither signed nor on letterhead. There is no reason however to consider the letter has not been provided by him.

⁴ Submissions LS to LCRO (9 February 2015).

an apology and by reference to the industry in which he is engaged (the building industry) submits that Mr TD's licence to practise should be withdrawn.⁵

Mr JW's submissions

[10] Mr JW submits that Mr TD's unsatisfactory conduct is at the lower end of the scale. He says that the process has been "gruelling and extremely stressful for the practitioner".⁶ He refers to the multiple complaints made against Mr TD by Mrs LS over a period of four years as being "an unwelcome distraction".⁷ He notes the first complaint was not upheld by the Standards Committee and confirmed on review, and submits that "this entire process has been punishment enough".⁸

[11] Mr JW also submits that, viewed objectively, Mrs LS has not suffered any loss, either financially or emotionally. He notes that although she was not a trustee, she was "fully engaged in all matters regarding the [Trust name]"⁹ and contends that "realisation of the Trust was arguably greater due to being dealt with in an efficient manner".¹⁰ In this regard, Mr JW also notes that Mrs LS's sister was in the same position but she does not allege any loss.

[12] Overall, Mr JW minimises the consequences of Mr TD's conduct, referring to it as "simply being one of Mrs LS being described in a capacity that she was not, causing her no quantifiable loss".¹¹ He also submits there was no intention to mislead on Mr TD's part and that this is a case of "good intentions being misinterpreted".¹²

[13] Mr JW advises that "Mr TD would like to make it clear that he accepts he should have been clearer and for that reason he has apologised to Mrs LS".¹³ He submits that should be the end of the matter.

The findings decision

[14] The conduct which I have found to be unacceptable was that Mr TD "conducted communications with [Mrs LS] over a period of two years as if she were a trustee and ... prepared documents which referred to her as such".¹⁴ I found this conduct breached rules 7, 10, 11 and 11.1 of the Conduct and Client Care Rules. I declined to

⁵ Strike off or suspension are penalties that can be imposed only by the Lawyers and Conveyancers Disciplinary Tribunal. In the findings decision I determined that charges should not be laid before the Tribunal.

⁶ Submissions JW to LCRO (9 February 2015) at [8].

⁷ At [9].

⁸ At [9].

⁹ At [12].

¹⁰ At [7].

¹¹ At [14].

¹² At [7].

¹³ At [19].

¹⁴ Findings decision (10 December 2014) at [63].

lay charges before the Lawyers and Conveyancers Disciplinary Tribunal because Mr TD:¹⁵

...had nothing to gain by his conduct and I accept that his failure to advise Mrs LS that she had not been appointed a trustee was driven by different factors, although what these were have not been made clear

[15] I have noted Mr TD's motivation as being to ensure "the effective administration of the trust"¹⁶ and have speculated that:¹⁷

"[i]t may be that Mr TD did not wish to reveal to Mrs LS that he had not drafted the will correctly so that her mother's wishes were unable to be fulfilled".

[16] Although I have noted that deceit for the purpose of personal gain was absent, it is inescapable that Mr TD deceived Mrs LS into thinking that she had been appointed a trustee.

Discussion

[17] Mr JW's submissions give the impression that Mr TD has not accepted or realised the essence of the finding against him. He describes Mrs LS's behaviour towards Mr TD as "vindictive"¹⁸ and notes that her "current concern did not appear to become an issue until her initial complaint was dismissed by the LCRO". He "believe[s] that this proves her motive to stop at nothing until Mr TD was punished. This behaviour has put the practitioner under extreme personal pressure".¹⁹

[18] Mr JW continues with the view that Mr TD was upholding his duty to promote the interests of Mr RH. The logic of this submission is that it is acceptable to breach a lawyer's obligations and specifically the Conduct and Client Care Rules, provided it can be argued it was done to protect and promote the interests of a lawyer's client. This submission exhibits a disturbing view of a lawyer's obligations. It also continues to reflect the submission which I have described as "condescending" that the failure to advise Mrs LS of the situation was "for her own good".²⁰

[19] Mr JW submits:

With the benefit of hindsight, Mr TD accepts that he should have been clearer as to Mrs LS and Ms AG's true legal position. However, Mr TD simply addressed the sisters as trustees. The practitioner never purported to action any document to mislead Mrs LS into believing that she was a trustee. Mr TD had no intention to mislead. Counsel for the Respondent contends that this is a situation of good intentions being misinterpreted.

¹⁵ At [28].

¹⁶ At [70].

¹⁷ At [51].

¹⁸ Above n 6 at [15].

¹⁹ At [15].

²⁰ Above n 14, at [70].

[20] I find this statement to be somewhat puzzling. It does not indicate clear acceptance by Mr TD that he was not truthful to Mrs LS and by referring to his well-intentioned conduct as being misinterpreted, Mr JW again seems to endeavour to transfer responsibility to Mrs LS (for misinterpreting Mr TD's intentions).

[21] I also find it difficult to understand the submission that "he never purported to action any document". One needs to look no further than the Deed of Arrangement referred to in [39](c) of the findings decision to realise that this submission cannot stand. That document referred to Mrs LS and her sister as trustees and settled how the administration and distribution of the Trust was to proceed. To submit that Mr TD did not "purport" to action the document is incomprehensible.

[22] The submission made by Mr JW in paragraph [18] of his submissions that "no agreements were executed in that capacity [as trustee] and no vested party questioned the agreement" is also difficult to comprehend. The various documents referred to in [39] of the findings decision described Mrs LS and her sister as trustees and were executed by all concerned. No vested party questioned the Agreement because they were labouring under the impression that the document had been validly executed by the parties described as trustees in that capacity. There was no reason to question the Agreement.

[23] Overall, I am somewhat disquieted by the tenor of Mr JW's submissions. They do not seem to exhibit an acceptance or understanding of the content of the findings decision.

[24] A judgment that is often referred to in the disciplinary arena is *Bolton v Law Society*²¹ where it was observed that lawyers are expected to act with "integrity, probity and complete trustworthiness". The Court also observed that "[a] profession's most valuable asset is its collective reputation and the confidence which that inspires".²²

[25] It is these principles to which I direct the penalties imposed in this decision.

Censure/reprimand

[26] The Court of Appeal in *New Zealand Law Society v B*²³ saw little difference between a censure and a reprimand. At [39] the Court stated:

²¹ *Bolton v Law Society* [1994] 2 All ER 486.

²² At 492.

²³ *New Zealand Law Society v B* [2013] NZCA 156.

...Both words envisage a disciplinary tribunal, here a Standards Committee, making a formal or official statement rebuking a practitioner for his or her unsatisfactory conduct. A censure or reprimand, however expressed, is likely to be of particular significance in this context because it will be taken into account in the event of a further complaint against the practitioner in respect of his or her ongoing conduct. We therefore do not see any distinction between a harsh or soft rebuke: a rebuke of a professional person will inevitably be taken seriously.

[27] Bearing these comments in mind, I consider it appropriate that Mr TD be censured pursuant to s 156(1)(b) of the Lawyers and Conveyancers Act 2006.

Apology

[28] Mrs LS, Mr XE and Mrs LS's husband have all submitted that Mr TD should apologise to Mrs LS. At the review hearing, Mr TD apologised verbally to Mrs LS if she misunderstood the situation. He noted he had nothing to gain and acknowledged that he would do things differently in the future.

[29] Mr TD's apology was predicated on a misunderstanding by Mrs LS. Any apology needs to focus on Mr TD's conduct, not Mrs LS's interpretation of the conduct.

[30] Pursuant to s 156(1)(c) of the Lawyers and Conveyancers Act 2006 Mr TD is ordered to apologise to Mrs LS in the following terms:

I apologise for not advising you that you had not been appointed as a trustee of the [Trust name] as provided by your mother in her will.

[31] This is a simple and direct apology directed at the conduct in question. He may of course include any other apology he wishes. Mr TD is directed to provide the apology by no later than [two weeks]. Failure to comply with this (and any other Order made in this decision) is viewed seriously by the courts²⁴ and Standards Committees.

Fine

[32] The function of a penalty in a professional context was recognised in *Wislang v Medical Council of New Zealand*²⁵ as being to punish a practitioner, to act as a deterrent to other practitioners and to reflect public and the profession's disapproval of a practitioner's conduct.

[33] I consider the most appropriate way to fulfil the functions of a penalty in this context is by the imposition of a fine. Section 156(1)(i) of the Lawyers and Conveyancers Act 2006 provides for a fine up to \$15,000 when unsatisfactory conduct is found.

²⁴ See for example *LCRO v B* [2012] NZHC 1349.

²⁵ *Wislang v Medical Council of New Zealand* [2002] NZAR 573.

[34] In *Workington v Sheffield*²⁶ the LCRO considered that:²⁷

In cases where unsatisfactory conduct is found as a result of a breach of applicable rules ...and a fine is appropriate, a fine of \$1000 would be a proper starting place in the absence of other factors.

[35] As noted subsequently, I consider the focus of these penalties should be to recognise that the major impact of Mr TD's conduct has been on Mrs LS. In the circumstances, I consider a fine of \$1,500 to be an appropriate fine to impose.

Compensation

[36] Mr JW submits:²⁸

...it is difficult to fathom her [Mrs LS's] claim of loss. We struggle to find any discernable cost to Mrs LS either financially or emotionally. Although she was not a trustee, Mrs LS was fully engaged in all matters regarding the [Trust name]. In all respects Mrs LS was treated as a trustee. We contend that realisation of the estate was arguably greater due to being dealt with in an efficient manner.

[37] In making this submission Mr JW repeats submissions made at the review hearing. I reiterate the comments in [70] of the findings decision that:

Mrs LS must carry the consequences of her actions if administration of the Trust became impossible, but that does not mean that Mr TD should take upon himself a decision to withhold information to ensure that she did not have the opportunity to disrupt what he considered to be the effective administration of the Trust. The decision was not one for Mr TD to make – that was up to the parties involved and that decision should have been made with full knowledge.

[38] Mr XE says that Mrs LS has been treated with “contempt”.²⁹ Mr XE does not mention he too could be seen to have been treated by Mr TD with contempt when he allowed Mr XE to proceed to engage with him on the understanding that Mrs LS was a trustee of the Trust.

[39] Allowing for the fact that Mr XE acted for Mrs LS, he nonetheless could be expected to reflect an objective opinion as to what penalty should be imposed. It was not in Mr XE's interests to do otherwise and to voice such an opinion about a fellow practitioner requires some careful consideration.

[40] It is clear Mrs LS herself feels betrayed. Mr TD was not truthful to her. It is not an unreasonable expectation that a lawyer should be truthful. I again note this was not an isolated oversight but took place over a period of two years.

²⁶ *Workington v Sheffield* LCRO 55/2009.

²⁷ At [68].

²⁸ Above n 6, at [12].

²⁹ Letter XE to LS (3 February 2015) at [5].

[41] I consider the lack of truthfulness is the most serious aspect of Mr TD's conduct and therefore consider this must attract a reasonably significant response.

[42] In *Wandsworth v Ddinbych and Keith*³⁰ the LCRO commented that "[t]he ability to compensate for anguish and distress in the lawyer client relationship has been recognised in a number of cases, most recently *Heslop v Cousins* [2007] 3 NZLR 679. She noted that "[t]he Court of Appeal has recognised that such distress damages are compensatory in nature: *Paper Reclaim Limited v Aotearoa International Limited* [2006] 3 NZLR 188 (CA) at para [171]".³¹

[43] At [21], the LCRO noted that there was however no punitive element to an award of damages for anxiety and stress.

[44] The maximum compensation that may be ordered pursuant to s 156(1)(d) of the Lawyers and Conveyancers Act is \$25,000.³² To be treated with contempt and to have the truth of a matter withheld for some two years necessarily must invoke anxiety and distress. In his submissions, Mr JW has referred to previous LCRO decisions where lawyers have failed to communicate equally with all executors of an estate or failed adequately to explain the terms of a document. In each case, the penalties imposed were minimal.

[45] As noted, I consider the major impact of Mr TD's untruthfulness has been on Mrs LS herself and loss of opportunity to take steps to enforce the Trust Deed or to challenge trustee resolutions. This must result in considerable stress and anxiety for her in determining how she should react. I hasten to add that this decision is not intended in any way to be a substitute for court proceedings in that regard. The purpose of this decision is purely to provide compensation for Mrs LS for the impact on her personally.

[46] In the circumstances I consider an award of \$5,000 to be an appropriate level of compensation for anxiety and stress to Mrs LS.

Fees

[47] Mrs LS argues she should be reimbursed for all costs incurred by her "as a trustee". By this I understand her to mean that she consulted Mr XE and Mr QO to advise her in relation to her position as a trustee and the decisions to be taken in that capacity.

³⁰ *Wandsworth v Ddinbych and Keith* LCRO 149 & 150/2009.

³¹ At [19].

³² Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, reg 32.

[48] I do not consider this to necessarily be the case. It must be that Mrs LS was in reality seeking advice as to whether or not to agree to a certain course of action in administering the estate which necessarily affected her position as a beneficiary of the Trust. It is in this context that Mr JW's submissions that Mrs LS's views were sought as if she was a trustee are relevant. The course of action to be taken was agreed by all parties in the Deed of Arrangement and Mr RH did not take unilateral decisions in this regard. Consequently, I see no reason to order Mrs LS should be compensated for any of the fees incurred.

Mr TD's fees

[49] The fees incurred for Mr TD's work fall into the same category as referred to above. Mr TD proceeded on the basis that Mrs LS was a trustee and consequently the fees incurred were incurred on that basis. It would be somewhat odd if he were ordered to cancel fees rendered on the basis that Mrs LS was a trustee because he had not advised her she had not been appointed. The work was done and Mrs LS's views were taken into account.

Publication

[50] Publication of an LCRO decision is made pursuant to s 206(4) of the Lawyers and Conveyancers Act and the overriding requirement is that publication must be in the public interest.

[51] In the Publication Guidelines issued by this Office, other factors to be taken into account are the impact of publication on the interests and privacy of the complainant, the practitioner and any other person; the seriousness of the breach; and whether the practitioner has previously been found to have breached professional standards.

[52] Mrs LS has specifically requested her name to be published.

[53] To order publication of a practitioner's name is not something to be done lightly. It has significant consequences for the practitioner and his work colleagues and potentially personal relationships. I accept Mr TD acted with the best of, although misguided, intentions. Name publication would have consequences out of proportion to the breaches involved and the facts out of which this complaint has arisen. I do not consider it appropriate to order publication of Mr TD's name. However, I direct that a summary of the findings decision and this decision with the identifying details of all persons removed should be published in the New Zealand Law Society publication LawTalk for educational purposes. Notwithstanding Mrs LS's request, I direct her name should not be published either.

[54] I draw the attention of the parties to the fact that s 206(1) of the Lawyers and Conveyancers Act provides that every review conducted by this Office must be conducted in private. This means that this decision should not be made available to any other person other than those to whom a copy is provided in accordance with the provisions of the Act. However, I specifically provide pursuant to s 206(4) of the Act that Mrs LS may provide a copy of this decision to Mr QO and Mr XE.

Costs

[55] Section 210(1) of the Lawyers and Conveyancers Act provides that the LCRO may make such order as to payment of costs and expenses as he thinks fit. I have found that Mr TD's conduct constituted unsatisfactory conduct and in accordance with the Costs Orders Guidelines issued by this Office direct that Mr TD pay the sum of \$1,600 by way of costs to the New Zealand Law Society by no later than 23 March 2015.

Summary of orders

- (1) Mr TD is censured as provided in [26] to [27].
- (2) Mr TD is ordered to apologise by no later than 9 March 2015 to Mrs LS as provided in [28] to [31].
- (3) Mr TD is fined the sum of \$1,500 as provided in [32] to [35] such fine to be paid to the New Zealand Law Society by no later than 23 March 2015.
- (4) Mr TD is to pay to Mrs LS the sum of \$5,000 by way of compensation as provided in [36] to [46] by no later than one month from the date on which Mrs LS communicates to Mr TD and/or Mr JW a bank account number into which such payment should be made.
- (5) Mr TD is to pay the sum of \$1,600 by way of costs as provided in [55] to the New Zealand Law Society by no later than 23 March 2015.

Correction

[56] In [27] of the findings decision I noted that Mrs LS had received or been sent approximately 680 emails from Mr TD in her role as a "trustee". This is incorrect. Mrs LS advises that 260 of these emails had been received from Mr TD.

DATED this 23rd day of February 2015

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:

Mrs LS as the Applicant
Mr QO as the Representative
Mr TD as the Respondent
Mr JW as the Representative and Related Person under s 213
[North Island] Standards Committee
The New Zealand Law Society