

CONCERNING

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

AND

CONCERNING

a determination of the Otago Standards Committee

BETWEEN

TL
Applicant

AND

NM
Respondent

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

DECISION

Background

[1] This review concerns the short but important question of whether the release of a document by a solicitor to another person who had mislaid their copy of that document is a breach of the duty of confidence.

[2] TL acted for NM who was the purchaser in a conveyancing transaction. NM complained about the conduct of TL in a number of respects. The Standards Committee upheld the complaint on one ground only (and no review is sought by NM in respect of those other matters). That ground was that TL had provided a copy of an agreement for sale and purchase agreement (the Agreement) to the agent (CCD) who acted for the vendor and who had prepared it.

[3] The Standards Committee found that this conduct was unsatisfactory as “a technical breach of Rule 8 (and associated footnote 9)” of the Rules of Conduct and Client Care for Lawyers (Rules). Rule 8 provides:

A lawyer has a duty to protect and to hold in strict confidence all information concerning a client, the retainer, and the client's business and affairs acquired in the course of the professional relationship.

[4] The footnote to which the Committee also referred provides:

Information acquired in the course of the professional relationship that may be widely known or a matter of public record (such as the address of the client, criminal convictions, or discharged bankruptcy) will nevertheless be confidential information.

[5] There was no dispute about the facts. TL accepted at an early stage that, at the request of the agent, (and without reference to NM) he released a copy of the Agreement to CCD.

[6] NM complained that TL had released "some documents" to CCD (and it appears to be accepted that this was only the Agreement). NM stated that CCD had sought copies from him, but he refused, and that he was in dispute with the agent.

[7] In response to the complaint TL stated (in letters of 16 June and 19 September 2011) that the agent had prepared the Agreement and therefore as between the agent and NM the Agreement was not confidential, that the agent would have been able to obtain a copy from other sources, and that if the Agreement was part of a dispute or complaint in respect of the agent then it would have been available on discovery by the agent. I note that there is no evidence that CCD would have been able to locate a copy of the Agreement had it searched further (other than the assertion of TL) and therefore I do not consider that assertion to be of relevance to this review.

[8] The simple question therefore is whether in releasing the Agreement to the agent TL breached the duty of confidence that he owed to NM.

What Information is Confidential?

[9] The obligation under Rule 8 is not constrained to information which is not otherwise available. The footnote to that rule makes it clear that the duty of a lawyer will extend to maintaining confidence in respect of information which would be available elsewhere including on the public record.

[10] TL (through his counsel) states that the footnote to Rule 8 should not be taken into account because it is a footnote and forms no part of the rule itself. This is clearly not the case. The footnote is part of the Rules (which have the force of legislation being the schedule to the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008). For reasons of convenience and clarity of expression it

appears that the drafters chose to put the explanatory statement in respect of the scope of the rules in the footnote. However the footnote forms part of the rules and clearly affects the scope and meaning of the rule to which it relates.

[11] In any event TL accepts that the Agreement was confidential at least in a general sense. The main thrust of his submissions on review (and in respect of the original complaint) is that the Agreement was not confidential *as between NM and CCD*.

[12] It was argued for TL that the Agreement and its contents were not confidential as between NM and CCD for two reasons.

- a. First the document was a contract between vendor and purchaser and as between vendor and purchaser the document which defines their respective obligations cannot be confidential (which must be correct). It was further argued that because CCD was the agent of the vendor a provision of the copy of the Agreement to CCD constituted a provision of a copy of the Agreement to the vendor.
- b. Secondly, the Agreement had been drawn up by CCD and therefore it was not confidential. Rather the information was confidential to all three parties.

[13] It was further noted for TL that this was not a case such as those contemplated by the footnote to Rule 8 where the information was in the public domain but not actually held by the person to whom it was disclosed (such as the fact of a previous bankruptcy). Rather here all of the parties (NM, the vendor and CCD) were fully cognisant of the Agreement and its contents. It simply appeared that CCD had mislaid its copy.

[14] Finally for TL it was argued that as a matter of “plain common sense” it must be within the implied authority of a lawyer to provide a copy of the Agreement to the agent who prepared it.

[15] In response to the application for review, NM maintained his complaint that “all information” was to be kept confidential and this included the Agreement. He reiterated that he did not consent to the disclosure of the Agreement. He rejected that it was simply a professional courtesy to provide the Agreement to the agent and stated that the proper course for TL was to seek his consent.

[16] He reiterated that in his view his ability to pursue his complaint against CCD had been prejudiced by the disclosure.

[17] NM also sought to correct information from that Standards Committee and stated that he did settle the purchase of the apartment at the Sofitel and that he was not under any financial pressure.

Analysis

[18] The Standards Committee's conclusion that there had been unsatisfactory conduct rested on its finding that there had been a breach of Rule 8 (and the associated footnote). As noted, Rule 8 is concerned with the obligation of lawyers to keep their client's information confidential.

[19] The duty of confidence imposed on a lawyer extends beyond keeping "secrets"; however not all information held is confidential. Some information will be so widely known that it cannot be said to be confidential (for example where there have been media reports of the matter). Other information may be confidential in a general sense, but not confidential to the various parties involved in the transaction or matter because it is known to them. It cannot be a breach of confidence to provide information to a party who is already in possession of it.

[20] In the present case it is not clear why CCD sought a copy of the Agreement, although the Practitioner had understood that it had been mislaid. There is no evidence that they sought it on behalf of the vendor, or otherwise as agent of the vendor (as asserted by TL). It is equally tenable that they sought a copy for their own purposes (for example to calculate commission). It is clear that the provision of information to an agent of a client (whether a real estate agent or other kind of agent) will only be appropriate and not a breach of confidence where the information was requested as part of the agency and with the actual or ostensible authority of the client / principal. Here it is not clear that this was the case.

[21] However as noted above, it cannot be a breach of confidence to supply information to a person who already knows it. While in this case it was clear that the agent did not have to hand a copy of the Agreement, it had prepared the Agreement. Therefore the disclosure of the Agreement to the agent cannot have been a breach of confidence as the agent was aware of all of the details in the Agreement – having authored them.

[22] In this case the CCD agent would have been in possession of the information. In my view disclosing information to a person already in possession of it cannot amount to a breach of confidence. Thus I do not agree with the Committee's conclusion that there was a breach of Rule 8.

Was there any other professional failure?

[23] It is also appropriate to address the matter in terms of the Practitioner having given a copy of the Agreement document from the client file to CCD. While erring in going down the Rule 8 route, the release of a copy of the document was a matter that appeared to trouble the Standards Committee, which would have been aware from its enquiries that the Practitioner was, at the time, advising the complainant on whether there was a basis for challenging the Agreement.

[24] It is not clear to what extent (if any) the Practitioner was at that time aware of, or had considered whether there was, a case against the estate agency separate from any claim against the vendor (he had advised NM and NL that there was no viable case against the vendor for misrepresentation).

[25] NM had informed the Standards Committee that he was "*building up a legal case*" against CCD for a complaint to the Real Estate Agents Authority, and that "*the missing paperwork could have helped me.*" The Practitioner's response was that the agent prepared the Agreement, would have been able to obtain a copy from other sources including their own records, and the Agreement would have been discoverable on the receipt of any complaint by NM.

[26] Even where there is no breach of a specific rule a finding of 'unsatisfactory conduct' can be made under Section 12(a) in respect of conduct that is assessed as falling short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer. I have therefore considered whether there is any wrongdoing in TL providing an agent with a copy of the Agreement document.

[27] It should also be noted that the fact that a document or other information might be able to be obtained through another process (such as discovery) does not permit or excuse the release of that information. Indeed the footnote to Rule 8 makes it very clear that information may be confidential to a client notwithstanding that it may be otherwise available.

[28] There is some force in the argument that a client impliedly authorises actions that are routine in the day to day handling of a transaction (in accordance with r 8.4(a)), although caution must be exercised. It is appreciated that to TL at the time the provision of the Agreement to the agent that had drafted it would be entirely unexceptionable. It would be seen as a normal incident of managing the file, and also an obvious professional courtesy. To have obtained the client's consent to providing to CCD a copy of an Agreement that had been drafted by CCD and provided to NM's lawyer in the first place would seem somewhat perverse.

[29] What the conduct amounted to is the Practitioner gave to CCD a copy of a document that CCD had provided in the first place. I cannot agree that this action should lead to a disciplinary outcome for the Practitioner.

[30] Having found that the Standards Committee erred in concluding that there was a breach of confidence and having found no other professional failure, I conclude that in this case the conduct of TL was not unsatisfactory.

Decision

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

DATED this 18th day of January 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:

TL as the Applicant
TM as the Representative for the Applicant
NM as the Respondent
The Otago Standards Committee
The New Zealand Law Society