

LCRO 374/2013
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CONCERNING

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

AND

CONCERNING

Determinations of the [City] Standards Committee [x]

BETWEEN

BD

Applicant/Respondent

AND

EG

Respondent/Applicant

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

DECISION

Introduction

[1] Mr BD and Mr EG have each applied to review a decision by the [City] Standards Committee [X] in which the Committee found that Mr EG's conduct had been unsatisfactory pursuant to s 12(c) of The Lawyers and Conveyancers Act 2006 (the Act) by his contravention of rule 5.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the rules). The Committee otherwise dismissed Mr BD's complaints about Mr EG's conduct.

[2] Mr EG acted for Mr BD's former wife after she and Mr BD had settled some of the disputes between them, including relationship property and the care of their five children. His complaint and review application centre on the use of \$50,000, which he says he wanted held in trust for his children's benefit, but which he believes was applied to pay Mr EG's fees.

Background

[3] Settlement of the BDs' relationship property was contentious, and complicated by the fact that the BDs did not personally own the family home. Settlement terms were documented in a deed of agreement and a letter.

The Agreement

[4] The deed of agreement dated 1 February 2008 (the agreement) is between Mr and Mrs BD personally, and the trustees of the BD Family Trust (the family trust), Mr BD and Mr KN (the trustees). The agreement covers a range of matters in dispute between Mr and Mrs BD, including separation, parenting, protection orders, occupation and ancillary orders, custody and access. It also binds the trustees because they owned the family home as trustees of the family trust. The family home was to be sold under the agreement, and the proceeds of sale distributed.

[5] For the purposes of this review, the agreement relevantly says:

Property Division

- 21 This deed is intended to be an agreement relating to all relationship property as defined by the Relationship Property Act and both parties by virtue thereof contract out of all their rights and obligations pursuant to the Act and by this deed settle all their financial affairs.
- 22 The [family home] owned by the BD Family Trust is considered a family home and the parties shall sell the home and divide the proceeds of sale as follows. The home shall be sold and after the deduction of the following expenses the proceeds of sale shall be paid as follows:
- ...
- 24 The proceeds of sale after deduction of the items set out in the immediately preceding paragraph shall be paid as to the first half, for and on behalf of the children and as to the other half, for and on behalf of Mr BD.
- 25 On the sale of the property the proceeds of sale shall be paid into the trust account of Mr BD's solicitor who undertakes only to release such money after having the written consent of both parties to its release.
- 26 The release of the children's share shall be to a nominated account and trust created by Mrs BD for the benefit of the children and Mr BD shall not question or have any input into the terms of the trust deed or as to the trustees.
- 27 Each party will pay their own legal costs in relation to all of these proceedings out of their respective shares.

[6] Although the agreement is not certified pursuant to s 21F of the Property (Relationship) Act 1976 (PRA), it records that Mrs BD received advice from her lawyer on the effect and implications of the agreement before she signed it.

[7] It also contains a certificate from Mr GK to the effect that he gave Mr BD independent legal advice as to the agreement and explained to him the effects and implications of it. Mr BD accepts he received independent advice before he signed the agreement.¹

The Letter

[8] The letter records an offer by Mr BD and Mr KN to Mrs BD, put on their behalf by Mr JL on 20 November 2009. Mr JL was acting for Mr BD personally, and on instructions from the trustees recorded in a resolution, to complete settlement of the sale of the family home.

[9] The letter says:

I refer to meeting yesterday attended by CC on behalf of Mr KN, Mr FI on behalf of Mrs BD and the writer on behalf of Mr BD and the writer as Solicitor instructed by the trust to complete the sale conveyance of the above property with instruction from Mr BD as trustee.

I confirm from that meeting the trustees authorised settlement offer be made to Mrs BD in consideration for her withdrawing notice of claim and caveat and authorising [City Law] to discharge the documents pursuant to the A & I authority held for this purpose. That the trustees authorised by joint resolution that a payment be made to Mrs BD. That this settlement offer of \$50,000.00 was made on the basis that Mrs BD withdrew the above claims to allow settlement of the sale to proceed and in full and final settlement of all claims by her, both for herself and her children against the family trust, the trust property and financially against Mr BD and Mr KN, including withdrawal of the proposed claim filed against them as trustees, but not yet formally served.

This letter records agreement of the parties in particular that Mrs BD has accepted that offer and this acceptance has been communicated via Mr FI after Mr FI has fully advised Mrs BD regarding the financial details of the sale including the various claims and payments necessary for the trust to be made and settled.

As requested I hereby undertake as the Solicitor for the family trust regarding the sale, that on completion of settlement from the sale proceeds the sum of \$50,000.00 should be held for the benefit of the trust to be formed on behalf of Mrs BD as trustee, such trust to be for the benefit of her children as primary beneficiaries and herself as a discretionary beneficiary.

I hereby undertake to hold such money on completion of settlement for the benefit of this trust until the trust has opened an appropriate bank account and to pay direct to that bank account as directed by Mrs BD, less payment of any legal fees she may direct to be paid from the amount held. As discussed with Mr FI on providing this written undertaking to his office, [City Law] is authorised to proceed to complete the sale settlement including withdrawal of claim and caveat on behalf of Mrs BD.

[10] Mrs BD had registered notice of her claim to an interest in the family home pursuant to s 42 of the PRA. The trustees could not settle the sale until they had reached

¹ BD evidence, review hearing.

agreement with her, and she had consented to the notice of claim being removed from the title to the family home. Mr BD says the notice of claim was removed, and the sale settled, on 20 November 2009.

[11] The proceeds of sale were paid into Mr JL's trust account, and he held those pursuant to the undertaking he had provided to Mrs BD so that settlement could proceed.

Mr EG's involvement

[12] Mrs BD instructed Mr EG in April 2010.

[13] At Mr EG's urging, Mr JL discharged the undertaking he had given to Mrs BD by paying the money into a bank account at her direction.

Mr BD's discovery

[14] Mr BD says he discovered some time later that Mr JL had paid the money out of his trust account, and into an account as directed by Mr EG on behalf of Mrs BD. Mr BD says he also discovered, to his horror, that Mrs BD had used all of that money to pay her legal fees.

[15] Mr BD says he believes Mr EG has stolen his children's money, and he wants Mr EG to pay it back. He says that his intention was to set aside all of the \$50,000 for the benefit of the BD children.

[16] Mr BD laid a complaint to the New Zealand Law Society (NZLS) alleging that Mr EG had misappropriated money that rightly belonged to the children under the trust, and seeking compensation of \$50,000 from Mr EG.

Complaint and Standards Committee Process

[17] Mr BD recited his concerns over the \$50,000 and accused Mr EG of siphoning off funds for his own benefit to cover the cost of representing Mrs BD.

[18] Mr BD says Mrs BD had been in receipt of legal aid when she was represented by Mr FI, who acted for her at the time the agreement was entered into, and the content of the letter negotiated. Mr BD believes she would therefore have been eligible for legal aid in relation to the work Mr EG did for her.

[19] Mr BD says that without his knowledge or consent, Mr EG named Mrs BD as a discretionary beneficiary to the trust referred to in the agreement. He says Mr EG formed the trust with the intention of paying himself from money to which Mr BD's children are

entitled under the agreement. He accuses Mr EG of dishonesty and incompetence in acting for Mrs BD.

[20] Mr BD says he has expressed his concerns about Mr EG's conduct, and requested information from Mr EG, but says Mr EG has not had the "professional courtesy to answer".

Mr EG's response

[21] In essence, Mr EG says that Mrs BD has not waived privilege, and he has done nothing wrong. Repeated requests by Mr BD for information in the course of the Standards Committee process resulted in Mr EG providing a significant amount of information over which Mrs BD has not waived privilege, and which is confidential and private to her. Although Mr BD has not seen the information Mr EG provided, the Committee made reference to some of it in the decision under review.

Committee Consideration

[22] After reviewing all of the information provided to it, the Committee concluded that Mr EG had breached rule 5.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the rules), which precludes a lawyer from acting if there is a conflict or risk of conflict between the interests of the lawyer and the interests of a client for whom he is acting or proposing to act.

[23] The Committee considered there was a conflict between Mr EG's duties as a lawyer, as a trustee, as lawyer for Mrs BD, and as a business person. It did not consider that disclosures and resolutions made to the trustees of the trust were sufficient to enable him to avoid a conflict of interest. The Committee considered using trust money to pay Mr EG's legal fees was not appropriate. The Committee made a finding of unsatisfactory conduct with respect to that aspect of Mr EG's conduct, pursuant to s 12(c) of the Act, for a contravention of rule 5.4.

[24] The Committee also considered whether Mr EG had complied with rule 9.5, which required him to inform Mrs BD with respect to her eligibility for legal aid, and concluded he had sufficiently complied with the rule. The Committee determined that aspect of his complaint on the basis that it would take no further action pursuant to s 152(2)(c) of the Act.

[25] Mr BD also complained that Mr EG had not responded to him requesting information about the trust. Mr EG believes he responded to Mr BD's new lawyer. The Committee decided to take no further action on that issue pursuant to s 138(2) of the Act.

[26] On the basis of its determination that Mr EG's conduct had contravened rule 5.4, and s 12(c), the Committee ordered Mr EG to refund the legal fees he had received from the trust and to pay costs of \$1,000 to NZLS, pursuant to ss 156(1)(f) and (n) of the Act.

[27] Both parties applied to review the decision.

Review Applications

[28] Mr BD's application for review expresses concern that the Committee directed Mr EG to refund money to a trust he describes as "a sham". Mr BD makes a series of allegations directed at Mr EG's honesty and professionalism, provides further information, poses a number of rhetorical questions, and suggests that Mr EG should pay \$50,000 either to Mr JL's trust account, or half each to Mr and Mrs BD directly.

[29] In his application for review Mr EG says that the Committee materially erred when defining the issue before it as calling for the application of rule 5.4. He says he acted for Mrs BD, and considers the Committee failed to distinguish between "the original intention of the parties" and his client's instructions to him, which he was obliged to obey. He says those instructions related to the formation of a trust, and that he was obliged to follow his client's instructions, not those of Mr BD.

Role of LCRO

[30] The role of the Legal Complaints Review Officer (LCRO) on review is to reach her own view of the evidence before her. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting her own judgement for that of the Standards Committee, without good reason.²

Scope of Review

[31] The LCRO has broad powers to conduct 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 where she considers appropriate. The statutory power of review is much broader than an appeal, and gives the LCRO discretion

² *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [41].

as to the approach to be taken on any particular review and the extent of the investigations necessary to conduct that review.

Review Hearing

[32] The parties, and counsel for Mr EG, attended a review hearing in Auckland on 17 November 2015.

Privilege and confidentiality

[33] On review, I have not overlooked the difficulties Mr EG has faced in progressing and defending review applications arising from a complaint laid by Mr BD, in which Mr EG was constrained in answering the allegations by his duties to Mrs BD.

[34] The Committee required Mr EG to produce information over which Mrs BD has not waived privilege, and which was confidential and private to her. Mr EG, quite properly, produced information to the Committee to assist it in its process of inquiry. That is consistent with his obligation to co-operate with the complaints and disciplinary processes under the Act.

[35] However, the information he provided to the Committee could not be passed on to Mr BD without compromising Mrs BD's rights and privileges. Unfortunately, the decision contains more information than Mrs BD might like Mr BD to have.

[36] Given the dispute between Mr and Mrs BD, and the privilege and confidentiality issues raised by his complaint, the Committee process might have been easier to manage if the Committee had commenced an inquiry of its own motion pursuant to s 130(c) of the Act to investigate the Committee's concerns about conflict of interest.

[37] I am also mindful that the question of where the best interests of the BD children lay in terms of their personal and property interests is not a question that a Standards Committee or this Office is well equipped to consider.

[38] However, Mr BD is a party to, and therefore quite properly has copies of, the agreement and the letter, both of which are relevant to the outcome of this review.³ I have focussed on the agreement and the letter, because they contain indications of Mrs BD's intentions that are crucial in forming a view of whether the decision relating to her lawyer's conduct (Mr EG) should be confirmed, amended or reversed on review.

Review Issues

³ Deed of Agreement 1 February 2008, at [27]; letter JL to FI (20 November 2009).

Rule 12 – integrity, respect and courtesy

[39] Broadly speaking, Mr EG owed obligations to Mrs BD, and only very limited professional obligations to Mr BD. In particular, rule 12 obliged Mr EG, when acting in a professional capacity, to conduct his professional dealings with Mr BD, and others, with integrity, respect and courtesy.

[40] I have seen no evidence that could support a finding that Mr EG's conduct towards Mr BD, or anyone else, was anything other than respectful and courteous. Although Mr BD's view is that Mr EG depriving the children of benefits under the trust could not possibly be said to meet a proper professional standard of integrity. There is no persuasive evidence that supports a finding that Mr EG's conduct fell below the standards of integrity, respect and courtesy expected of a lawyer. I do not accept Mr BD's concerns are valid for the reasons discussed in greater detail in the body of this decision.

Rule 9.5 - Legal Aid

[41] Mr BD says that Mrs BD was in receipt of legal aid when she was represented by Mr FI, who had conduct of her matters before Mr EG, therefore legal aid should have paid Mr EG.

[42] The terms of Mrs BD's retainer with Mr EG are confidential between them, pursuant to rule 8. It is not appropriate in a review of a decision on a complaint made by Mrs BD's former husband to delve into her financial situation, or to explore questions around whether or not she may have been entitled to legal aid, or could, should or did apply.

[43] The Committee was satisfied that Mr EG met his obligations to Mrs BD. I have no concerns in that regard.

[44] That aspect of Mr BD's complaint about the terms of the retainer between Mrs BD and Mr EG will receive no further consideration on review because in all the circumstances, further action is not necessary or appropriate.

Rule 3 - Competence

[45] In the course of the review hearing Mr BD impugned Mr EG's competence in acting for Mrs BD in Family Court proceedings relating to the children. Rule 3 requires lawyers providing regulated services to act competently.

[46] It is relevant to note that Mr EG is subject to a professional obligation imposed by rule 4 to be available to take instructions from the public. That rule prohibits a lawyer from refusing to accept instructions from any client without good cause. A lack of familiarity with the particular field of practice to which the retainer relates would be good cause.

[47] Although Mr BD says Mr EG does not advertise himself as a specialist family lawyer, no inference as to his competence in that field of practice can be drawn from how Mr EG chooses to market himself.

[48] Mr BD's view that Mr EG did not know what he was doing when it came to representing Mrs BD on applications relating to the children is not the proper measure. The overarching consideration in all of the matters relating to the children should have been to further their best interests. The disputes between Mr and Mrs BD indicate that they did not share one another's views on the children's best interests, or which of them was the best parent. In the circumstances, it is difficult to see how Mr EG could have furthered his client's interests in a way that met with Mr BD's approval.

[49] In any event, Mr EG did not have to satisfy Mr BD as to his competence. Mr EG's obligations were first to the court, and second to his client. Mr BD says he is not aware of any concern having been expressed by the Family Court. It is not appropriate in a review of a decision on a complaint made by Mr BD to enquire of Mrs BD whether she thinks she has grounds for complaint about her lawyer.

[50] There is nothing further to be made of the more general conduct concerns set out in Mr BD's complaint. Further action with respect to those aspects of Mr BD's complaints is unnecessary and inappropriate.

Obligation to Respond

[51] Mr BD objects to Mr EG having apparently ignored his correspondence requesting information about the business of a trust he thought Mrs BD should have established in accordance with his intentions under the agreement. He refers to a comment in the decision relating to the disclosure of information to beneficiaries, and their guardians. Mr BD should not take the decision by the Committee, or from this Office, as a substitute for legal advice on trust law.

[52] Mr EG says he believes he responded to Mr BD's new lawyer. The Committee was satisfied with that. So am I.

[53] I note also that the agreement contains a provision to the effect that how a trust might be established and who may be appointed to run it are not Mr BD's concern. In the circumstances, that aspect of Mr BD's complaint does not raise a professional standards issue and will receive no further attention on review.

Review Issue

[54] The issue on review is whether Mr BD's complaint raises any professional standards issues. The short answer to that question is no.

[55] For the reasons discussed below, the finding that Mr EG's conduct was unsatisfactory is reversed, and as a consequence, the orders made under s 156 requiring him to pay money fall away.

Discussion

Rule 5.4 - Conflict of Interest

[56] Mr EG acted for Mrs BD well after the agreement had been signed and the letter sent. He had no part in those arrangements. They were already in place in April 2010 when Mrs BD asked him to act for her.

[57] In the agreement, the parties had agreed that each would pay his or her own legal costs in relation to all of the proceedings out of their respective shares. Mrs BD, however, had agreed that her share would be paid "for and on behalf of the children". If there were any legal costs to her, she would be in no position to pay them from her respective share, because she did not have one.

[58] That position was addressed in the letter, which provided for Mrs BD to direct Mr JL to pay "any legal fees ... from the amount held" in his trust account. By joint resolution as trustees Mr BD and Mr KN had approved the payment of \$50,000 to Mrs BD, and neither had imposed any constraint on her ability to pay legal fees from the amount held at her direction. She could, for example, have left all of the money in Mr JL's trust account and directed him to pay any legal fees with it, including Mr EG's, until the funds were exhausted, in reliance on Mr BD's express agreement recorded in the letter. I do not consider it relevant to this analysis that the money was removed from the JL's trust account.

[59] Mr BD says the letter does not accurately capture his intentions. He says he intended all of the money to be preserved for the children's benefit. He says he did not intend it to be spent on legal fees. While that may be the case, Mr BD's intentions are of

far less significance to this review of Mr EG's conduct than what Mrs BD was able to do, having secured the concession recorded in the letter.

[60] I have considered Mrs BD's evidence of her intentions at the time, against what can be seen of the circumstances from the evidence that is available on review, because Mrs BD's intentions and capabilities are far more relevant to her instructions to Mr EG and the retainer between them. The letter is of particular significance, because it captures the stalemate created by the notice of claim Mrs BD registered under s 42 of the RPA.

[61] Settlement of the sale of the family home could not be completed without that notice being removed from the title. That being the case, Mr BD was in a position of having to capitulate to Mrs BD, or losing the sale of the family home. In exchange for her agreeing to withdraw the notice, Mr BD agreed to Mrs BD paying the fees of any lawyer, including Mr EG, from the \$50,000, at her sole discretion.

[62] Having authorised Mrs BD to spend the money on payment of legal fees at her sole discretion, Mr BD cannot repent that bargain by challenging Mr EG's conduct, and seeking to recover money from him, through the complaints and review process.

[63] Although Mr BD says his intention at the time was not to allow Mrs BD to squander money on legal fees, he was in receipt of legal advice at all relevant times regarding the agreement and the letter. Although I have no difficulty in accepting that his intention, and his preference, was to conserve the money for his children's education, I must assume that he was made aware of the extent of the concession Mrs BD's lawyer had negotiated.

[64] Viewed in that light, Mr EG is correct to say that there is no conflict of interest between his interests and those of the children as beneficiaries of the trust. To the extent of her legal fees, Mrs BD had free rein over the money with Mr BD's agreement. That is a fundamentally different approach to that taken by the Committee. The Committee's view was that after he had agreed to part with \$50,000 on his own behalf and on behalf of the family trust, what Mr BD wanted still mattered. It did not. In my view, that is the fundamental flaw in the Committee's reasoning that led it astray in approaching the complaint on the basis of a conflict of interest.

[65] In the circumstances surrounding Mr BD's complaint, there are no grounds for a finding that Mr EG's conduct contravened rule 5.4, or was in any way unsatisfactory. That aspect of the Committee's decision is therefore reversed, and it is unnecessary and inappropriate in all the circumstances to take any further action.

[66] In the absence of the finding that his conduct was unsatisfactory the orders made under s 156 requiring Mr EG to refund legal fees to the trust, and pay costs to NZLS, fall away.

Summary

[67] This review is determined on the basis that the findings of unsatisfactory conduct against Mr EG are reversed. In all the circumstances, further action on Mr BD's complaints about Mr EG's conduct is not necessary or appropriate.

Orders

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the Committee's determination that Mr EG's conduct was unsatisfactory is reversed, and the decision is otherwise confirmed.

DATED this 30th day of November 2015

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 EG as the Applicant

Mr PT as counsel for Mr EG

Mr BD as the Respondent

[City] Standards Committee [X]

The New Zealand Law Society