

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of the Auckland Standards Committee 3

**BETWEEN**

**MS GK**

of Auckland

Applicant

**AND**

**MR TV**

of Auckland

Respondent

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

**DECISION**

**Background**

[1] This is a review of a determination by Auckland Standards Committee 3 which arises out of a factual situation which has now been traversed in a number of Standards Committee determinations and reviews by this Office.

[2] In brief, in 2002, Ms GK and her then partner, Mr GL, gave instructions for a contracting out agreement pursuant to section 21 of the Property (Relationships) Act 1976 to be prepared and completed. Mr TV acted for Mr GL and Mr TU acted for Ms GK.

[3] In early 2003, Ms GK instructed Mr TV to act on her behalf to establish a trust to be known as the ACO Trust, and to transfer a property or properties into that Trust which had been acknowledged by Mr GL as being Ms GK's sole property in the relationship property agreement.

[4] In September 2004, Mr TV became aware that the relationship property agreement could not be located, and made enquiry of Mr TU as to where Mr GL's copy of the agreement was.

[5] Mr TU replied by advising that both copies of the agreement were in Ms GK's possession, and that Mr GL's copy would be handed directly to him by her.

[6] Ms GK advises that, prior to this, she had telephoned Mr TV, and requested that she be provided with a copy of the agreement which Mr TV should have been holding on Mr GL's behalf. She has provided a copy of her telephone account which shows a call to Mr TV's office on 9 September 2004.

[7] Ms GK and Mr GL proceeded to construct a home on one of the properties owned by the Trust, with Mr GL providing funds from the sale of a property which had been acknowledged as his separate property in the relationship property agreement.

[8] The parties consulted Mr TV as to how each of them was to be protected with regard to this arrangement, and it was proposed that a property sharing agreement should be entered into. Mr TV also suggested that they should enter into a relationship property agreement. Whether this was to be a revision of the agreement which was already supposedly in existence, or it had slipped his mind that the parties had taken steps to enter into an agreement in 2002, is not entirely clear.

[9] The property sharing agreement and any revised or new relationship property agreement, were not completed however, and Mr GL provided funds towards the construction of the dwelling without any documentation.

[10] Ms GK and Mr GL separated in September 2008 at which time the provisions of the relationship property agreement became important. The agreement was subsequently located in June 2009, but prior to this, Mr GL had lodged what Ms GK refers to as a caveat against the title to the property on which the house was being or had been constructed. This prevented her from raising funds against the security of that property which she alleges had serious consequences for her property trading business.

[11] In June 2009, Ms GK lodged a complaint against Mr TV. The details of that complaint were recorded by the Complaints Service in the following way:

- that Mr TV had failed to retain a copy of an original contracting out agreement for his client.

- that Mr TV withheld vital information from Ms GK in 2004, which she alleged should have been disclosed to her as she was a client of Mr TV and he was a trustee of her trust.
- that Mr TV met with Mr GL, without Ms GK being present, to discuss matters pertaining to a new contracting out agreement being drawn up.
- that on 23 April 2009 Mr TV had a conversation with Mr GL as a result of which a conflict of interest arose and the conversation should never have taken place.

[12] The Standards Committee issued its determination in August 2009 in which it determined pursuant to section 138(2) of the Lawyers and Conveyancers Act 2006, that it would take no further action with regard to the complaint.

[13] Ms GK applied to this Office for a review of that determination, and in November 2009, the determination of the Standards Committee was confirmed by the LCRO.

#### **The complaint and the Standards Committee determination**

[14] In September 2010, Ms GK lodged a further complaint about Mr TV in the following terms:

- 1) that Mr TV had failed to inform the other trustees of the ACO Trust in 2004 of a letter sent to him on 21 September 2004 which alleged that one of the trustees (Ms GK) was in possession of the two original contracting out agreements that protected the Trust.
- 2) that Mr TV failed to include or mention in the Trust Deed the existence of an existing contracting out agreement that was fully signed in late 2002 which protected the ACO Trust.
- 3) that Mr TV failed to protect the ACO Trust by allowing funds to be forwarded from a third party (Mr GL) without any documentation being in place to provide legal clarity why the funds were forwarded.

[15] In subsequent correspondence, she put her complaint in terms that Mr TV had a conflict of interest, in that having acted for herself and the ACO Trust (and also being a trustee of that trust), as well as acting for Mr GL, Mr TV was conflicted when he did not report to her in 2004 the information provided to him by Mr TU which was that she was alleged to be in possession of both copies of the relationship property agreement.

[16] She considered that Mr TV had failed in his duty to her as her solicitor and as solicitor for the ACO Trust.

[17] The Standards Committee issued its determination on 23 February 2011, in which it determined pursuant to section 138(2) of the Lawyers and Conveyancers Act 2006 to take no further action in respect of the complaints.

[18] In its determination, the Standards Committee described her complaints in the following way:

- failure to disclose relevant information to a client (LCCC Rule 7): Rules of Professional Conduct (RPC 1.09);
- failure to act in a competent and timely manner (LCCC Rule 3: No RPC equivalent);
- conflict of interest (LCCC Rules 6 and 6.1: RPC 1.07).

[19] The Committee noted that the conduct complained of occurred both before and after 1 August 2008 which was the commencement date of the Lawyers and Conveyancers Act 2006. This required the Committee to consider the transitional provisions of the Act with regard to the conduct prior to 1 August 2008.

[20] Having considered all of the material the Committee came to the following conclusions:

- that it was misconceived for Ms GK to try to link the agreement to the ACO Trust. The two were separate and distinct matters and Mr TV had not acted for Ms GK in relation to the agreement.
- that it did not consider it appropriate to require the Trust Deed or other trust establishment documents to incorporate any reference to, or reproduce the terms of, a contracting out agreement between two individuals.
- that it did not consider that Mr TV had deliberately withheld information from Ms GK.
- it accepted Mr TV's advice that he was not instructed to document the advance from Mr GL, and although he had advised Mr GL to do so, Mr GL had declined to instruct him in this regard.

[21] Ms GK has applied for a review of that determination.

## **The Review**

[22] An Applicant only hearing took place in Auckland on 16 November 2011.

[23] As noted at the commencement of the hearing, a review can only consider matters which have been included in the complaint to the Standards Committee in respect of which the determination has been made. In addition, neither the Standards Committee nor the LCRO can consider matters which have already been the subject of a complaint previously to the Complaints Service.

## **The conflict of interest**

[24] Ms GK elaborated on the information provided by her to the Standards Committee and this Office with regard to her view of Mr TV's actions when he became aware that the relationship property agreement could not be located. She considers that by not informing her, Mr TV had acted in a way which preferred Mr GL and/or his trust to herself and/or the ACO Trust. She considers that Mr TV had a conflict of interest and did not meet his obligations to her and / or the ACO Trust.

[25] Mr TV had originally acted for Mr GL in relation to the contracting out agreement.

[26] He subsequently acted for Ms GK to establish the ACO Trust and to transfer the property(ies) to the Trust. He also acted for the Trust and was a trustee.

[27] The property(ies) which were transferred to the Trust had been identified as being Ms GK's separate property in the relationship property agreement. If the status of separate property were to be upset, then Ms GK contends that the Trust's ownership in turn was at risk. It is understandable that Ms GK therefore considers that Mr TV ought to have ensured that the Trust's ownership of those properties could not be affected.

[28] I have not sighted the proceedings between Mr GL and Ms GK and whether orders have been sought against the Trust. However, the Trust is not a party to the relationship property agreement. Mr TV did not act for Ms GK in connection with the relationship property agreement. He has no duty to her with regard to this. That was Mr TU's duty. Mr TV's duty to Mr GL with regard to the property relationship agreement, does not transfer to a duty to Ms GK or the Trust because he subsequently acted for them. It follows therefore that the complaint against Mr TV in this regard cannot succeed.

[29] With the benefit of hindsight, it would have been better had Mr TV not agreed to act for Ms GK in establishing her Trust and transferring property(ies) identified as her separate property in the relationship property agreement to the Trust. However, it must be made clear, that by doing so he did not have a conflict of interest. No conflict of interest arises in circumstances where a lawyer acts for one party to an agreement, and subsequently acts for the other party in respect of a different matter. By acting for Ms GK in connection with the establishment of her Trust and the transfer of the property(ies) to the Trust, Mr TV did not thereby assume a responsibility to her in connection with the relationship property agreement.

[30] He certainly had obligations to ensure that Ms GK had legal ownership of the property(ies) being transferred to the Trust. Those obligations were fulfilled and the Trust became the legal owner of the properties. It must be made clear that while Ms GK may allege that Mr TV has breached a duty to Ms GK in negligence, that is not the focus of the disciplinary process, which is to focus on professional standards.

#### **Other matters**

[31] Other factors need to be taken into account in this review. These include the fact that the conduct took place prior to the commencement of the Lawyers and Conveyancers Act, and the transitional provisions of the Act set a relatively high threshold in respect of conduct prior to 1 August 2008 before disciplinary proceedings may be instituted.

[32] It is also relevant that this matter has already been addressed in the complaint lodged in June 2009. At that time, Ms GK complained that Mr TV had withheld vital information from her, namely, the information that Mr TU had notified Mr TV that Ms GK was holding both copies of the Agreement. It is difficult to see how this differs from the complaint in September 2010, that Mr TV had failed to disclose information to her as a client. The difference between the two complaints lies in the explanation provided by Ms GK that she considered that Mr TV had a conflict of interest. The complaint from this perspective, has been dealt with in this review.

[33] Ms GK considers that the Standards Committee and the LCRO approached the earlier complaint on the basis that she was complaining on behalf of Mr GL. I am not sure that is entirely correct, but if that is the case, then the matter has been dealt with by the Standards Committee and the LCRO from that perspective as well.

[34] In this review application, Ms GK alleges that all material relating to the contracting out agreement has been removed from the files of Mr TV and Mr TU. That is not something that was before the Standards Committee and I am unclear as to the relevance of the observation, unless it is to suggest some form of conspiracy between the various parties. If that is the case, this was not a matter which was before the Standards Committee and I am unable to consider that matter any further.

[35] Ms GK also referred to subsequent events which have occurred with regard to requests by her current lawyers for the files held by Mr TV. These relate to events which have occurred since the complaint was lodged and from what I could ascertain, have largely occurred since the date of the Standards Committee decision. These matters clearly cannot form part of this review.

### **The property sharing agreement**

[36] Mr GL proposed to make funds available to the ACO Trust to assist with funding the construction of the dwelling. It was proposed that the Trust and Mr GL should enter into a property sharing agreement to document the manner in which these funds would be protected. Ms GK advised that this was to be effected by Mr GL becoming a part owner of the property and thereby sharing in any profit realised when the property was sold. As it turns out, no profits have eventuated, and instead, losses have been incurred.

[37] Ms GK advises that Mr GL now contends that the funds were provided by him to the Trust by way of a loan and he seeks full repayment of the funds provided by him. If an agreement as advised by Ms GK had been effected, then Mr GL would have shared proportionately in the losses.

[38] Ms GK complains that Mr TV did not take steps to complete that agreement. Mr TV contends that the documentation was not completed because he did not receive instructions from the parties. In particular, he did not receive instructions from Mr GL.

[39] Ms GK submits that Mr TV should have at least put in place the "profit sharing" arrangement leaving to one side all other aspects that Mr TV intended to incorporate into the document.

[40] The fact that Mr TV was awaiting instructions was noted in his letter of 12 March 2008 addressed to both Ms GK and Mr GL. Mr TV concludes that letter by stating "should you wish to continue with arranging the property sharing agreement and

contracting out agreement, we are more than happy to take your instructions on this matter”.

[41] Ms GK and Mr GL need to take some responsibility for the situation which has arisen. A lawyer cannot complete documents without instructions. If Mr GL chose to make the funds available, and the ACO Trust chose to avail itself of those funds, without the documentation being concluded, then this is not something for which Mr TV as solicitor can be held accountable.

[42] If the parties had approached him and advised that it was intended that the funds be used, and that some preliminary documentation was required, then it would have been necessary for him to turn his mind to that situation. There is no evidence that this was the case and consequently there can be no basis for any adverse finding against Mr TV in this regard.

[43] Finally, I note that Mr TV states that he advised both Ms GK and Mr GL that they would each have to obtain independent legal advice with regard to any such agreement. This is standard practice and there is no reason to discount that statement. On a strict legal basis therefore, Mr TV could not, and did not, assume responsibility to either Ms GK or Mr GL to conclude the documentation.

### **The Trust Deed**

[44] In her complaint, Ms GK alleged that Mr TV should have included reference to the contracting out agreement, or the terms of same, in the Trust Deed. The Standards Committee did not consider this was the case and Ms GK did not pursue the matter at the review hearing.

### **Summary**

[45] Having addressed all of the matters raised by Ms GK in her complaint, and considered by the Standards Committee, I concur with the findings of the Standards Committee.

### **Decision**

[46] Pursuant to Section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee is confirmed.

**DATED** this 25<sup>th</sup> day of November 2011



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Owen 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:

Ms GK as the Applicant  
Mr TV the Respondent  
The Auckland Standards Committee 3  
The New Zealand Law Society