

**LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE**

[2020] NZLCRO 126

Ref: LCRO 073/2019

CONCERNING

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

AND

CONCERNING

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

BETWEEN

LM

Applicant

AND

NO

Respondent

DECISION

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

Introduction

[1] Ms LM has applied for a review of a decision by the [City] Standards Committee [X] to take no further action in respect of her complaint concerning the conduct of the respondent, Mr NO.

[2] Mr NO had been instructed to act as counsel for Ms LM's then husband in relationship property proceedings between the couple.

Background

[3] Ms LM and her now ex-husband, PQ, separated in October 2016 after a relationship of approximately 20 years.

[4] During their marriage the couple had farmed in conjunction with PQ's parents, S and T.

[5] In 2011 S and T started to make plans to retire. As part of that the two couples instructed a law firm, WP, to assist with restructuring their various entities and assets (the Q family restructuring).

[6] S and T were represented by Mr W, a partner in WP. Ms LM and PQ were represented by Ms S, then also a partner in WP. The two couples' accountant was also involved.

[7] Significant restructuring work was finalised in November 2011, although wash-up transactional work occurred for several months afterwards.

[8] Following their separation in October 2016, Ms LM and PQ were unable to informally agree about the division of relationship property. The main sticking point was a sum of money S had contributed towards the purchase of the family farm by a company owned by Ms LM and PQ ([ABC]), as part of the Q family restructuring.¹

[9] In essence, S and PQ said that the contribution was a loan; Ms LM believed it was a gift. The nature of the advance had an impact on the value of Ms LM's and PQ's relationship property pool.²

[10] PQ instructed WP to act for him in connection with his and Ms LM's relationship property disagreement. Ms W, as a partner in WP, was given the carriage of the matter. PQ instructed her that S's 2011 advance to [ABC] was, as far as he was concerned, a loan and properly documented as such at the time, in a Deed of Acknowledgment of Debt (the Deed).

[11] Relationship property proceedings were issued by PQ towards the end of 2016.

[12] In February 2018 Ms W instructed Mr NO to act for PQ.

[13] PQ instructed Mr NO that S's 2011 advance was a loan. Mr NO spoke to S who confirmed this. S swore an affidavit to this effect in the relationship property proceedings.

¹ Approximately \$1.5M. Ms LM and PQ were the sole directors of and shareholders in [ABC]

² In *LM v [ABC]* [20XX] NZHC XXX the High Court (amongst other orders) ordered [ABC] to pay S the amount advanced to purchase the farm.

[14] Despite that evidence, Ms LM persisted with her position that the 2011 advance by S was a gift.

[15] Mr NO advised S that he would need to take formal steps to have the Deed recognised. To that end, and on PQ's instructions, Mr NO drafted a statement of claim seeking rectification of an arithmetical error in the Deed and a declaration of liability for the advance to [ABC] (the Deed proceedings).

[16] The parties to the draft Deed proceedings were identified as S and T as the plaintiffs, [ABC] as the first defendant and PQ and Ms LM as the second and third defendants respectively. S's solicitors in [Town] were noted on the cover sheet as the solicitors on the record, with Mr NO as counsel acting.

[17] Mr NO sent the draft Deed proceedings to Ms LM's lawyers indicating that he had instructions to file them unless Ms LM acknowledged the debt.

[18] In July 2018 S's [Town] lawyers lodged the Deed proceedings in the High Court. No counsel was noted as having been instructed to act. By September 2018, counsel (Mr UV QC) was instructed to act for S in those proceedings.

The complaint

[19] Ms LM lodged a complaint against Mr NO with the New Zealand Law Society Complaints Service (the Complaints Service) on 15 October 2018.

[20] The essence of Ms LM's complaint was that Mr NO was acting for two clients (PQ and S) in one matter (issues relevant to relationship property) when it was clear that their interests did not align.³

[21] The complaint engaged r 6.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules). Ms LM generally identified this in a letter to the Complaints Service dated 29 November 2018.

[22] Ms LM provided the Committee with a number of documents to support her complaint.

³ In her letter to the Complaints Service dated 29 November 2018, Ms LM makes it clear that a complaint about Mr NO concerns "his representation of both PQ and S".

Response

[23] Mr NO's response to the complaint was that he had never acted for S.⁴ He had spoken to S as a witness on NO's behalf in the relationship property proceedings; in particular he had spoken to S about the disputed nature of the advance in 2011 to [ABC].

[24] Mr NO said that PQ's instructions to him – from the outset and consistently since then – have been that the advance was a loan and not a gift as asserted by Ms LM.

[25] Mr NO also emphasised that he had never acted for Ms LM in any matter at any time. He said that he did not owe Ms LM any ethical or professional duties as a result.

[26] Mr NO said the following:

15 In the course of the relationship property proceedings, I identified that S's interest in the debt would not be dealt with under the Property (Relationships) Act s 37 in a way that was fair to him. If [Ms LM] did not acknowledge it as a Director of [ABC] then in the division of property [ABC] may assume debts that made it impossible for [it] to repay the debt. On instructions from [PQ] I prepared a draft statement of claim that [PQ] said S would be willing and able to make if the issue of the debt was unresolved taking account of accounting evidence also called by [PQ] in the [relationship property] proceedings. S's solicitors in [Town] were identified as the solicitors S would use. That was to make clear to [Ms LM] if an agreement could not be reached then what would happen is that S would make a claim to assert his rights as he had as a witness for [PQ]. A settlement could not be reached.

16 I informed [WP] that if S wanted to file a claim, then he should instruct his [Town] lawyers. I could not act for [PQ] and S because their interests were not necessarily identical.

Standards Committee decision

[27] The Standards Committee delivered its decision on 28 May 2019.

[28] It identified the issue for consideration as being:⁵

Whether Mr NO acted for both PQ and S and if so, whether he breached his professional obligations under rr 6 and/or 8 of [the Rules].

[29] In deciding to take no further action on the complaint, the Committee held:⁶

⁴ Letter from Mr NO to WP (10 November 2018). Ms LM's complaint against Mr NO had been combined in the one document with a complaint against Ms W. Mr NO appears to have forwarded his response to Ms LM's complaint, to WP for Ms W to combine with her response to the complaint about her conduct.

⁵ Standards Committee decision at [6].

⁶ Standards Committee decision at [14]–[20].

- (a) Mr NO “may well have had conflicting duties if he acted for S ... in his High Court claim against [ABC], while at the same time representing PQ ... But this is not what happened. When it became apparent that S ... was going to commence High Court proceedings, he instructed his own lawyers.”
- (b) There was no evidence that Mr NO “had behaved in a way that raised a professional standards issue or that warranted the further intervention of the Standards Committee.”

Application for review

[30] Ms LM filed her application for review on 10 June 2019. The outcome sought includes an order that Mr NO can no longer act for PQ.

[31] Ms LM submits:

- (a) Mr NO misled the Committee by saying that he had not acted for S, who was only ever a witness in PQ’s relationship property proceedings.
- (b) Mr NO had drafted a statement of claim in the Deed proceedings in which S was a plaintiff, and Mr NO noted as counsel acting.
- (c) Mr NO forwarded a copy of that statement of claim to Ms LM’s lawyers, saying that it would be filed if Ms LM did not acknowledge the debt owing to S.
- (d) Mr NO continued to act for S until Mr UV was instructed.

[32] Attached to Ms LM’s review application were several documents which she asserts corroborates her argument that Mr NO acted for both PQ and S.

Response

[33] Mr NO submits that:⁷

- (a) He has never acted for Ms LM.
- (b) PQ had always accepted that a debt was owed to S.
- (c) S was represented by Mr UV in the Deed proceedings.

⁷ Letter from Mr NO to this Office (21 June 2019).

- (d) Ms LM is improperly trying to interfere with his lawyer/client relationship with PQ. This is an abuse of the complaints process.
- (e) He did not accept instructions to act for S. He is not recorded on any court documents as acting; he provided no terms of engagement to S and nor did he charge any fees.
- (f) He “decided it was not prudent to act for S because of S’s interests” and ensured that other counsel was instructed.
- (g) Neither PQ nor S have complained that he improperly acted for them both.

Comments by Ms LM

[34] Ms LM provided comment on Mr NO’s response to her review application. In large measure she rehearses the thrust of her complaint, which is that Mr NO acted for both PQ and S, and that this was a breach of r 6.1.⁸

Nature and scope of review

[35] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:⁹

... 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.

[36] More recently, the High Court has described a review by this Office in the following way:¹⁰

⁸ Letters from Ms LM to this Office (3 July 2019 and 23 June 2020).

⁹ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

¹⁰ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

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.

[37] 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.

Hearing in person

[38] Ms LM's application for review was progressed before me at a hearing in [Town B], on 7 July 2020. Ms LM appeared on her own behalf. Mr NO appeared together with his Chambers' practice manager, WX.

[39] I confirm that I have read Ms LM's complaint, Mr NO's responses to it, Ms LM's comments on those responses and the Committee's decision. I have also read Ms LM's application for review (including all additional material provided after the review application had been filed by her) and Mr NO's response to that. I have heard from Ms LM and Mr NO in person.

[40] I confirm that there are no additional issues or questions in my mind that necessitate any further evidence, information or submissions from either party.

Discussion

Ms LM's case

[41] The beating heart of Ms LM's complaint against Mr NO is that he was acting for more than one client in a matter, in which the interests of those two clients did not align.

[42] The clients were PQ, and S. The "matter" concerned a disputed debt relevant to relationship property calculations.

[43] Ms LM argues that it is not possible for Mr NO to act for S in proceedings against [ABC], PQ and herself, and at the same time represent PQ in the relationship property proceedings.

[44] I interpolate at this point that there is no dispute that Mr NO was retained to act for PQ, and has continuously acted for him in all aspects of the relationship property proceedings, including the Deed proceedings.

[45] In support of her argument that Mr NO was acting for S as well, Ms LM refers to the following:

- (a) An email from Mr NO to Ms LM's counsel dated 15 May 2018, in which he refers to then-future instructions from S to seek a declaration of liability under the Deed.
- (b) A letter from Mr NO to Ms LM's solicitors dated 25 May 2018, attaching the draft Deed proceedings and indicating that unless Ms LM, in effect, agreed that S's 2011 advance was a loan, the proceedings would be quickly filed and served.
- (c) The draft Deed proceedings themselves, which record Mr NO's name as counsel acting.
- (d) A letter from Mr NO to Ms LM's solicitors dated 12 June 2018 in which Mr NO disagreed with the suggestion that he cannot act for both PQ and S in the Deed proceedings.
- (e) A letter from Mr NO to Ms LM's counsel dated 14 June 2018, in which Mr NO referred to S having "a caveatable interest" created in part by the Deed, in relation to the farm purchased with the advance, and that "he will caveat if necessary."

[46] Ms LM's concerns about Mr NO's role in seemingly acting for both PQ and S, stem from concerns that she has about WP's involvement in acting for PQ against her in the relationship property proceedings, in circumstances where lawyers at WP had previously acted for them both.¹¹

¹¹ In LCRO 143/2019 I dealt with Ms LM's application to review a determination of a Standards Committee dismissing her complaint against Ms W. That complaint was based on Ms LM's belief that Ms W was acting against her as a former client in the relationship property proceedings. It will be remembered that Ms W instructed Mr NO to act for PQ some 14 months after beginning to act for him in the relationship property proceedings.

Mr NO's case

[47] Mr NO's position, distilled from his responses to the complaint and review application as well as from his submissions at the hearing, may be summarised as follows:

- (a) From day-one – even before Ms W instructed Mr NO to act – PQ had always maintained that the 2011 advance by S to [ABC] was a properly documented loan payable on demand.
- (b) Mr NO initially spoke to S at PQ's request, in about February or March 2018, for corroboration of the 2011 advance to [ABC] as a loan. S swore an affidavit to this effect in support of PQ's evidence in the relationship property proceedings.
- (c) When Ms LM persisted with her gift argument, he prepared the draft Deed proceedings, on PQ's instructions, as a sign of strength of the loan argument; a tactical threat.
- (d) Initially he had not resolved whether he could act for S in any substantive Deed proceedings. He thought it might however be unwise to do so. Subsequently he concluded that he could not act for S.
- (e) If he was acting for S at all, it was on a limited basis to give him initial and limited advice about the status and enforceability of the 2011 advance to [ABC].
- (f) Once it became plain that S had little choice but to issue the Deed proceedings, S's lawyers in [Town] acted and subsequently instructed counsel in Wellington to act for S in those proceedings.
- (g) Consistent with his position throughout, when PQ was served with the proceedings Mr NO filed a notice of acceptance of claim on his behalf.
- (h) At the most, his involvement with S lasted from approximately February/March 2018 until approximately late June 2018.
- (i) Neither PQ nor S has expressed any concern about Mr NO's conduct.

[48] In support of his position, Mr NO provided affidavits sworn by PQ and by his Practice Manager [WX]. Both have said that Mr NO did not act for S. I refer to this evidence further below.

Analysis

Preliminary:

[49] Both Ms LM and Mr NO have raised preliminary issues, which I deal with immediately below.

Order that Mr NO cease acting for PQ

[50] In both her complaint material and review application, Ms LM has sought an order that Mr NO be directed to stop acting for PQ in both the relationship property proceedings and the Deed proceedings.

[51] At the beginning of the hearing I addressed this issue directly with Ms LM. I informed her that neither a Standards Committee nor this Office has the jurisdiction to make an order of that nature.

[52] I advised Ms LM that the question of whether a lawyer should be debarred from acting in a particular matter, was one to be determined by the judge before whom that matter was proceeding. The power to debar a lawyer is founded in a court's inherent jurisdiction to prevent abuses of its process.¹²

Motivation for complaint

[53] Mr NO has submitted that Ms LM's complaint has not been brought in good faith and is part of ongoing attempts by her to have him removed as counsel for PQ. He submits that he has been an extremely effective advocate for PQ.

[54] Mr NO notes that neither PQ nor S have complained about any conflict of interest.

[55] I do not intend to be drawn into, much less comment upon, whether Ms LM's is endeavouring to remove Mr NO from the relationship property litigation for her own purposes, and is using the complaints process as one of a number of vehicles to accomplish that.

[56] The fact is that any person may complain about a lawyer's conduct. A connection between the complainant and the lawyer complained about is not a necessary prerequisite to inquiry into a complaint about lawyer conduct.

¹² *Li v Lui* [2018] NZCA 528 at [23].

[57] That being said, a Standards Committee may elect to dismiss a complaint if it considers that the complainant does not have a sufficient interest in the complaint's subject matter.¹³

[58] However, it is clear that Ms LM does have an interest in the subject matter of the complaint that she made about Mr NO's conduct. She is a party to litigation brought against her by PQ (the relationship property proceedings) and S (the Deed proceedings), in which the status of the 2011 advance by S to [ABC] was a central issue.

[59] Quite apart from that, the issues raised by Ms LM in her complaint – whatever her motivation for complaining – are important and difficult.

[60] I now turn to deal with the nub of this review application.

Did Mr NO act for more than one client in a matter?

[61] I begin by setting out r 6.1:

Conflicting duties

A lawyer must not act for more than 1 client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients.

[62] This rule is not difficult to understand. The interests of two different clients in one matter must almost exactly align before a lawyer can act for them both.

[63] Mr NO first spoke to S about the 2011 advance to [ABC], shortly after he was instructed to act for PQ in February 2018. Initial discussions about the advance were with a view to S giving evidence on PQ's behalf in the relationship property proceedings.

[64] Discussion about S's options in relation to the 2011 advance, did not immediately take place. Mr NO was instructed by PQ to prepare the draft Deed proceedings.

[65] When it became clear that Ms LM was sticking to her position that the advance was a gift, and that S would have to take formal steps to advance his position that it was a loan, S's lawyers in [Town] filed and served the Deed proceedings in July 2018.

[66] The Deed proceedings that were filed largely mirrored the draft that had been prepared by Mr NO. The same parties were named as plaintiffs and defendants. Essentially the same causes of action were pleaded.

¹³ Section 138(1)(e) of the Act.

[67] This suggests that the factual matrix behind the Deed proceedings had not changed between Mr NO first speaking to S, and the proceedings being filed. This was however, only a period of some four months.

[68] Once the proceedings had been served on PQ, on his behalf Mr NO filed a notice accepting the claim.

[69] By September 2018, Mr UV had been instructed by S's lawyers in [Town] to act in the Deed proceedings.

[70] Mr NO said that he had always made it clear to PQ and to S that he could not act for S in the event that the draft Deed proceedings were actually issued. At the hearing, Mr NO said that his reason for this included that "it was not a good look."

[71] That position – that Mr NO had made it clear from the outset that he could not act for S in the Deed proceedings themselves – changed slightly at the hearing. It is also inconsistent with what Mr NO represented to Ms LM's lawyers in correspondence with them. I discuss that further below.

[72] Mr NO said that when first asked to give advice about the status and enforceability of the Deed, he was unclear as to whether he could act for S in the event that proceedings were issued. He said that this uncertainty changed as time went on, to a realisation that he could not act for S. He said that this was then made clear to S by both himself and his instructing solicitors.

[73] It is so fundamental as to approach the trite to observe that Mr NO could not have acted for S in the Deed proceedings. Doing so would have meant that he was suing his existing client PQ.

[74] It is, with respect to Mr NO, more than just "a bad look": it is inconceivable. Had any lawyer attempted to do so I have no doubt that a High Court judge would have quickly debarred him or her from acting for either in the Deed proceedings.

[75] From a conduct perspective, this is because of the operation of r 6.1 of the Rules. To act for a client and sue another existing client would be the very epitome of unaligned interests (let alone a procedural farce). Further analysis is not required to explain that.

[76] However, in my view the matter is not as simple as whether Mr NO could have acted in the Deed proceedings. The question is whether Mr NO acted for S in the lead up to those proceedings being filed by S's lawyers in July 2018, whilst at the same time acting for PQ in the relationship property proceedings.

[77] There was a degree of prevarication in Mr NO's explanations about whether he was acting for S, at any time.

[78] Mr NO said that he did not provide S with client care information, which is something that he invariably does when instructed to act for a client. It is a first-step for him. Further, fees were not charged.

[79] But these are not definitive indicia of whether there is a lawyer client relationship.

[80] As well, Mr NO said that his dealings with S were as a witness on PQ's behalf in the relationship property proceedings.

[81] It is not disputed that Mr NO drafted the Deed proceedings. He appears to have done so in about April or May 2018.

[82] PQ had maintained his position about the advance from S being a loan, from the outset, and before Mr NO had spoken to S about the matter. PQ had deposed to the loan position in one (or more) affidavits in the relationship property proceedings. PQ was, said Mr NO, completely committed to maintaining that.

[83] In the context of briefing S's evidence to support PQ's loan argument in the relationship property proceedings, it is abundantly clear that Mr NO also gave S advice about the status, accuracy (from an accounting perspective) and enforceability of the Deed.

[84] This is not merely briefing a witness's evidence.

[85] This was high-level advice, in my opinion. It was not a casual observation made in the course of briefing evidence.

[86] The amount at stake was in the region of \$1.5M. Steps taken by Mr NO included drafting the statement of claim on S's behalf, in proceedings destined to be heard in the High Court, and forwarding that draft to Ms LM's lawyers with an accompanying threat that he would be instructed to file it unless agreement could be reached about the status of the 2011 advance.

[87] Mr NO appears to have sent the draft Deed proceedings to Ms LM's lawyers as leverage to persuade her to resile from the gift position, and for that purpose, argues Mr NO, S's and PQ's positions were completely aligned: both maintained that the advance was a properly documented loan.

[88] Mr NO appeared to accept that for a short period of time he was “hypothetically” (as he put it during the hearing) acting for S, but only to give initial advice about the Deed and what options were open to S.

[89] I infer from the way in which this was put by Mr NO, that his retainer with S was a limited retainer: limited as to scope (initial advice about options) and duration (would end if proceedings were necessary).

[90] In my view Mr NO had little choice but to make this concession. A limited retainer is a retainer nonetheless.

[91] Mr NO represented to Ms LM’s lawyers that he anticipated being instructed to act for S to act in the Deed proceedings.

[92] This is how Mr NO put it in an email that he sent to Ms LM’s counsel on 15 May 2018:

If [Ms LM] does not confirm in writing by 12 midday 17 May a willingness to acknowledge the debt then **S will instruct me to lodge a claim in the High Court for a declaration of liability for the debt** recorded in the deed payable on demand and rectification of the existing deed for the greater amount by means of summary judgment application against [[ABC]].

[Emphasis added].

[93] In my view, there is no room for any confusion when a lawyer uses those time-honoured words: to be instructed to act for someone means that a lawyer is or will be acting for them; that person is or will become their client.

[94] This is how it was understood by Ms LM’s lawyers. In their letter to Mr NO dated 8 June 2018, they said:

A conflict of interest

It is an untenable situation for both [[ABC] and Ms LM] (quite apart from PQ) that Mr NO acts for [S] ... in [his] claim both against the company and in particular, [Ms LM].

[95] In responding to that, in his letter to Ms LM’s lawyers dated 12 June 2018, Mr NO said:

concerning the claim by S, at this stage, I am not convinced that a conflict of interest arises. However, I am considering the matter further and **if necessary a substitute counsel will be engaged**.

[Emphasis added].

[96] It is puzzling that counsel of Mr NO's considerable experience and undoubted competence, would even pause to entertain the idea that he could act for S in relation to any aspect of the Deed proceedings, including "initial advice" as he described it.

[97] But that is how Mr NO put it to both the lawyers acting for Ms LM, and at the hearing.

[98] As to the former, it may be that Mr NO's comments to Ms LM's lawyers were no more than tactical posturing, designed to show strength and an unwillingness to compromise. These are not uncommon approaches in contested matters.

[99] As to Mr NO's submissions at the hearing, he said that at the time he was instructed by PQ to prepare the draft Deed proceedings, he "hadn't resolved whether to act" in those proceedings. But he acknowledged a "hypothetical" retainer.

[100] It is, as I have said above, inconceivable that Mr NO could have acted for S against PQ, at any stage.

[101] If Mr NO could not have acted for S in the Deed proceedings themselves, how could he have given him advice about those proceedings which included advising him to name PQ – his other client – as a defendant?

[102] In my view it matters not that PQ accepted a debt was owing. A lawyer cannot advise and encourage one client to sue another, existing, client, when that lawyer is acting for the existing client on the matter in question. Compounding that is the fact that Mr NO's draft statement of claim sought costs and interest against PQ.

[103] The factual circumstances presented to Mr NO between first speaking to S in about February/March 2018 and when he prepared the draft Deed proceedings in May 2018, had not changed when those proceedings were filed and served by S's lawyers in [Town] in mid-July 2018. As well, the causes of action were largely the same and the parties were the same in both the draft Deed proceedings and those eventually filed and served.

[104] The advice that Mr NO must have given S would have included that PQ – Mr NO's other client at the time – was properly a defendant in any Deed proceedings and was a defendant from whom he could seek costs and interest. It is difficult to see how that can be anything other than contrary to PQ's interests.

[105] I accept that PQ and S were saying identical things about the status of the 2011 advance – that it was a loan – and PQ was committed to that position having filed at least one affidavit in the relationship property proceedings to this effect.

[106] But an alignment of interests cannot exist when a lawyer advises one client to issue proceedings against another existing client in these circumstances and drafts a statement of claim in furtherance of this, seeking costs and interest against the existing client.

[107] There can be no basis for saying that PQ's and S's interests were ever aligned once Mr NO assumed the role of advising S on steps he could take in relation to the Deed.

[108] Nevertheless, I accept that Mr NO moved reasonably quickly from uncertainty about whether to act for S, to a firm resolve that he could not do so.

[109] I further accept that the steps Mr NO took were tactical and designed to maximise leverage against Ms LM for what were perfectly legitimate reasons: his instructions and the supporting evidence were that the 2011 advance was indeed a loan and not a gift. That much has been confirmed by the High Court's judgment.

[110] In my view it was unwise for Mr NO to have adopted this strategy. He should never have represented that he was acting for S. It invited complaint. Mr NO should not have been surprised about that. Ms LM's complaint was entirely justified. Scrutiny of conduct which appears to fly in the face of clear conflict guidelines, was called for.

[111] I conclude that by acting for S – as I find Mr NO did, and which he has not seriously refuted – Mr NO acted for two clients on one matter, in circumstances where their interests did not align. This was contrary to r 6.1 of the Rules.

[112] It follows that I disagree with the Committee's conclusion that Mr NO's conduct would only have infringed r 6.1 of the Rules if he had acted for S in the High Court proceedings whilst at the same time continuing to act for PQ.¹⁴

[113] For the avoidance of any doubt, Mr NO gave S advice about rights and entitlements under the Deed. Mr NO accepts that he did so. Whether it was "initial" advice or a limited retainer, he did what a lawyer does for their client – he gave advice.

[114] Moreover, he translated that advice into preparation of the draft Deed proceedings in which he sought costs and interest against PQ and which he then forwarded to Ms LM's lawyers with an accompanying threat that he would be instructed to file and serve those proceedings.

¹⁴ Standards Committee decision at [19].

[115] Further, the “one matter” in respect of which he concurrently acted for PQ and S, concerned the status of S’s 2011 advance to [ABC].

[116] Whilst PQ’s and S’s evidence about the loan was aligned, it was not in PQ’s interests – which his lawyer was professionally obliged to put above those of third parties¹⁵ – for that lawyer to advise another client to issue proceedings against him, to draft a statement of claim for that purpose and to seek costs and interest.

[117] I put to one side Mr NO’s submission that PQ instructed him to prepare the draft Deed proceedings. A client cannot instruct a lawyer to act against that client’s interests; or, rather, a lawyer would be justified in refusing to accept those instructions as they involve the lawyer breaching a duty.

[118] I also put to one side the affidavit evidence of PQ and WX, in which both depose that Mr NO did not act for S.

[119] The question of whether a lawyer is acting or has acted for someone, is not one about which a Review Officer would seek answers from a layperson, particularly when that layperson is not the putative client.

[120] I mean no disrespect to either in putting it this way. Neither is an expert in determining the existence of a lawyer client relationship in others.

[121] Mr NO’s motivation was tactical – and it was a perfectly proper application of leverage against Ms LM.

[122] However, this could just as easily have been accomplished through an independent lawyer representing S from the outset, drafting Deed proceedings and circulating them. This is what should have happened.

[123] In the circumstances, and by a fine margin, I consider this to have been a technical breach that does not call for any disciplinary sanction. I agree with that aspect of the Committee’s decision.

Conclusion

[124] Albeit by a different route, I see no grounds which could persuade me to depart from the Committee’s decision to take no further action on Ms LM’s complaint.

¹⁵ Rule 6 of the Rules.

Decision

[125] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is:

- (a) modified by a finding that Mr NO breached r 6.1 of the Rules by acting for more than one client in a matter where their interests did not align;
- (b) confirmed as to the finding that Mr NO's conduct in this regard does not raise a professional standards issue that warrants further action;
- (c) confirmed as to the decision to take no further action on the complaint pursuant to s 138(2) of the Act.

Publication

[126] Pursuant to s 206(4) of the Lawyers and Conveyancers Act I direct that this decision may be published but without any details that may directly or indirectly identify Ms LM, Mr NO, or any of the persons referred to in the decision itself.

DATED this 27TH day of July 2020

R Hesketh
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 LM as the Applicant
Mr NO as the Respondent
[City] Standards Committee [X]
New Zealand Law Society