

CONCERNING

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

AND

CONCERNING

determinations of ZZZ Standards Committee

BETWEEN

MR AB

Applicant

AND

MS XY

Respondent

T

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

Introduction

[1] Mr AB has applied for reviews of two determinations of [ZZZ Standards Committee]. In the first determination the Committee determined that Mr AB's conduct constituted unsatisfactory conduct, censured him, imposed a fine of \$1,500 and ordered him to pay costs in the sum of \$1,500. It then called for submissions as to compensation and publication.

[2] In its second determination the Committee ordered Mr AB to pay Ms XY the sum of \$2,500 by way of compensation and, subject to approval by the New Zealand Law Society pursuant to Regulation 30 of the Standard Committee's Regulations,¹ directed that Mr AB's name be published.

[3] The Board declined to approve publication of Mr AB's name and accordingly the Committee directed publication of a summary of the determination, but not any details that might lead to identification of any of the parties.

Background

¹ Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.

[4] XYZ Ltd. was the owner of a building in [city] from which Ms XY operated a restaurant. In mid-2009, Mr AB received instructions from the company's accountant (Mr XU) to assist with recovery of amounts payable by Ms XY pursuant to the lease.

[5] Ms XY acknowledged that she was having difficulty in meeting payments and Mr AB's client was concerned that she would "do a runner".²

[6] The director and shareholder of XYZ (Mr XV) and his wife were themselves in financial difficulties and the default by Ms XY exacerbated their problems.

[7] Ms XY did not fulfil various agreements negotiated with Mr XV and despite at one stage offering to exchange the fixtures and fittings in the restaurant to meet her debt, they were removed from the premises.

[8] On 11 November 2010 XYZ obtained an order from the Disputes Tribunal by agreement whereby Ms XY was ordered to pay the sum of \$6,976.25 to XYZ by monthly instalments.

[9] Mr AB received instructions to obtain a Charging Order against Ms XY's interest in a property in [city]. The registered proprietors of that property were Ms XY and LMZ Ltd.

[10] In support of the application for the Charging Order Mr XV swore an affidavit in the form required by the District Court Rules in which he deposed that Ms XY was "beneficially entitled to the ..." property.

[11] On 18 January 2011 the District Court issued a Charging Order against the interest of Ms XY in the property which was then registered. The Charging Order is reproduced below:³

CHARGING ORDER

ON APPLICATION of the Judgment Creditor IT IS ORDERED that until sufficient cause is shown to the contrary the interest of XY trading as land identifier [123456] in the land registration district of [city], legal description Lot 2, Deposited Plan [111111], do stand charged with payment of the amount of \$6,976.25 being the amount for which the Judgment Creditor has obtained a judgment in this proceeding.

² Email XU to ABC (20 May 2010). Mr AB received instructions primarily through Mr XU. Mr ABC was the staff solicitor in Mr AB's firm dealing with the matter. Mr ABC left Mr AB's employ around September/October 2010 and it is accepted that Mr ABC acted in accordance with directions from Mr AB at all times.

³ The Charging Order is reproduced exactly as it reads.

DATED at [city] this 18th day of January 2011.

Seal of the District Court [city]

Signed by RV
Deputy Registrar
District Court
[city]

NOTICE

Application is made to the Registrar of the Court for the making of this Order at [city] in the 12 noon of the day of 18th January 2011 at 10 minutes past the hour of am/by post - agent for the Judgment Creditor.

Signed by RV
Deputy Registrar
District Court
[city]

[12] At all times during the discussions concerning the debt due by Ms XY she had been represented by BSD Ltd. On 20 February 2012, Mr RS (under the hand of Mr SU) from another firm, TUV wrote to AB & Associates Limited advising that he acted for MET. Mr RS advised that the trustees of the Trust were Ms XY and LMN and that the Trust was the owner of the property against which the Charging Order had been registered. He pointed out that the debt was owed by Ms XY personally and that she had no legal interest in the property. He advised that the Trust was about to refinance and requested that the Charging Order be removed. In a separate letter he advised that the Trust was prepared to settle all obligations owed by Ms XY for \$4,500 which would be paid on completion of the refinancing.

[13] Mr AB sought instructions from Mr XV's accountant (who was then Mr EF). Mr EF responded:⁴

In my opinion there is no ability for you or I to get instructions from [XV] in terms of negotiating a settlement of the \$4,500. If this Charging Order is legal should not XY/her Trust secure the full amount due at the time of refinancing, as in terms of the risk exposure to the Bank it is only an additional \$3,181.

[14] Mr AB responded to Mr SU:⁵

We have not been able to obtain instructions from XYZ Ltd at this point. However, what I suggest is that you pay the \$7,681.23 (owing under the Charging Order) which we will then hold in our trust account, pending instructions.

⁴ Email EF to AB (27 February 2012).

⁵ Fax AB to SU (28 February 2012).

[15] On 8 March 2012, Mr AB wrote directly to Mr XV seeking his instructions. Mr XV did not respond and in a reply to a further letter from Mr RS, Mr AB advised that he had received no instructions.

[16] There then followed an exchange of emails between Mr AB and Mr RS:

9 March - RS to AB

[AB]

Our client has this afternoon asked whether it would be appropriate for them to make a complaint to the Law Society following our comments to them that:

1. it would have been patently obvious to the solicitor acting that the property was, or could have been owned by a trust, and
2. we have now brought it to your attention that the property is owned by a trust in which ms XY has only a discretionary interest.

Ms XY (in her capacity as Trustee) has advised that unless the Charging Order is removed as demanded, she intends to make a complaint against your firm.

[RS]

15 March - AB to RS

I refer to your email 9 March 2012. Firstly, I am still waiting for instructions from XYZ Ltd. I cannot of course act without instructions.

Secondly, I reject completely any suggestion that this firm acted improperly in the obtaining and registration of the Charging Order. It was not, as you claim, "patently obvious" that the property was or could have been owned by a Trust. Just because the name LMN appears on the Title does not mean that the property was owned by a Trust.

I accept your advice now that the property is owned by a Trust, and I accept your advice without qualification. However, as the Charge Holder would need to complete the necessary A&I Form for the release of the Charging Order, I have written to it but as yet have no instructions. If that means that you apply to the Court for a Discharge of the Order, then so be it, but without instructions, I am not able to take matters further.

At the risk of repetition, I repeat that I cannot see where there has been any breach of professional duties and obligations.

Yours faithfully
[AB]

15 March – RS to AB

[AB]

We accept the limitations you have without instructions.

Thankyou for trying.

[RS]

[17] From a review of Mr AB's files, it would appear that he received no further communication from Mr XV. It would also appear that his fees remained unpaid.

[18] From a letter dated 18 September 2012 from Mr RS to the trustees of the MET it is apparent that a settlement was reached with Mr XV which enabled the Charging Order to be withdrawn. Somewhat oddly, it would appear that Mr XV instructed the firm of TUV to act on his/the company's behalf in settling the matter with Ms XY/her trust, with one lawyer in the firm acting for Mr XV and another acting for Ms XY.

The complaint

[19] Ms XY lodged her complaint on 1 April 2012. Her complaint was succinct and is reproduced in full here.

I am trustee of the **MET** which owns a property [address]. I am making the complaint on behalf of the trust.

The complaint is against [AB] of AB & Associates Ltd [address].

Complaint: The Trust has incurred \$3000 plus GST of legal fees trying to remove a Charging Order that was placed on the property owned by the Trust. A Charging order should never have been applied to this property. When [AB] researched the title of the property he ought to have known that the property was owned by a trust. The presence of 'LMN['] should have put him on alert and he should have made further inquiries regarding this. However, he didn't and a charging order was placed. The Trust was unaware of the charging order until recently when it was brought to our attention. AB was asked by the Trust lawyers to remove the notice of charge, but elected not to act on the matter. As a result of his negligence, the Trust has wasted time & money fighting for something should have not occurred in the beginning. We would like to cost of our legal fees reimbursed as TUV have been paid by the Trust for their services.

I declare the information is true & correct

[XY]
Trustee
1.04.2012

The Standards Committee determination

[20] The Standards Committee identified the issues as being:⁶

Was there a failure to make adequate inquiries to establish that ownership of the property was with a trust before registering a charging order against the title of the property?

Was it appropriate to register a charging order against the title of the property held in trust?

⁶ Standards Committee determination dated 12 February 2012 at [16].

Was there a failure to take adequate and/or prompt steps to remove the charging order once notified that the property was held in trust; resulting in the complainant incurring considerable expense in removing the charging order?

[21] The Committee dealt with these together. The Committee acknowledged that:⁷

While Mr AB did take steps to seek instructions from his client regarding the removal of the charging order, the real issue is whether he took adequate steps at the outset when registering the charging order.

[22] In the course of its investigation the Committee ascertained that LMN was owned by the directors and associates of an accounting firm in [city]. It also noted that Ms XY and the company were registered as joint tenants, rather than as tenants in common. The Committee considered that:⁸

...a prudent practitioner would have been on alert that the property was in all likelihood held in trust and would have made further inquiries into the company before proceeding to register a charging order.

[23] In its determination the Committee made the following observations:⁹

Furthermore, the name "Trustee Services" should have triggered and alerted Mr AB to the possibility that the property was owned by a Trust and he should have made further inquiries to dismiss this, before registering the charging order. Mr AB did not make such inquiries.

A search of the Companies Office would have shown that the Trustee Company was unrelated to Ms XY and this in itself should have alerted Mr AB to the possibility that the property was owned by a trust.

[24] The Committee recorded its determination in the following way:¹⁰

In the Committee's view, Mr AB should not have proceeded to register the charging order given the factual circumstances. The title to the property makes it clear that the property is owned by [XY] and LMN as joint tenants and not as tenant in common. A competent solicitor would have been alert to the fact that the property was in all likelihood held in trust. Furthermore, a prudent solicitor in the same situation would have taken further steps to ascertain the identity of the proprietors and the status of the property before registering a charging order.

In any event, the Committee does not accept that Mr AB was unaware of the fact that the property was held in trust. The affidavit by Mr [XV] in support of the application for the charging order, prepared by Mr AB, states "*That I verily believe that the Judgment Debtor is beneficially entitled to the following property*". This indicates that Mr AB was aware of the fact that the property was held in trust at the time of making the application. Notwithstanding this knowledge, he proceeded with the application and the registration of the charging order. Mr AB had no justification to claim that Ms XY was a beneficiary in the Trust.

⁷ Above n 6 at [18].

⁸ Above n 6 at [22].

⁹ Above n 6 at [23-24].

¹⁰ Above n 6 at [30-34].

The Committee considers that Mr AB's conduct breaches Rule 2.3 of the Rules of Conduct and Client Care, which provides:

Proper purpose

2.3 A lawyer must use legal processes only for proper purposes. A lawyer must not use or knowingly assist in using, the law or legal processes for the purpose of causing unnecessary embarrassment, distress, or inconvenience to another person's reputation, interests, or occupation.

In the Committees (sic) view, the steps taken by Mr AB clearly caused unnecessary distress and inconvenience to the trustee's interests and amounted to unsatisfactory conduct on the part of Mr AB pursuant to s12(c) of the Lawyers and Conveyancers Act 2008 (sic) (Act). In addition, the Committee considers his actions to be conduct that would be regarded by lawyers of good standing as being unacceptable, amounting to unsatisfactory conduct pursuant to s12(b) of the Act.

Accordingly, the Committee determines that there has been unsatisfactory conduct on the part of Mr AB pursuant to s152(2)(b) of the Act.

[25] It then made the orders referred to in [1] and [2] above.

Review

[26] An applicant-only hearing was initially scheduled for this review. However, the submissions filed by Mr AB's counsel were comprehensive and I advised the parties that appearances were not necessary. Mr AB and his counsel agreed and the hearing was therefore vacated.

Has there been a breach of Rule 2.3?

[27] The primary issue for consideration is whether or not Mr AB should have made further inquiries as to the nature of Ms XY's interest in the property before making application to the court for the Charging Order.

[28] Ms XY was registered as a joint owner with LMN. She clearly had an interest in the property. Ms XY and her lawyers say that the name of the company (LMN) was an indication that the property was owned by a trust and that Ms XY's beneficial interest was as a discretionary beneficiary only.

[29] The Committee considered that "[a] competent solicitor would have been alert to the fact that the property was in all likelihood held in trust" and that "a prudent solicitor ... would have taken further steps to ascertain the identity of the proprietors and the status of the property before registering a charging order".¹¹

¹¹ Above n 6 at [30].

[30] The Committee established that LMN is a company owned by the directors and associates of JK Ltd in [city], and considered that this fact, together with the fact that Ms XY and LMN were registered as joint tenants, was a clear indicator that the property was held in trust. Mr AB rejected the allegation by Mr RS that it was “patently obvious that the property was or could have been owned by a Trust”.¹² He says that “[j]ust because the name LMN appear[ed] on the Title does not mean that the property was owned by a Trust”.¹³

[31] Whilst I accept that the nature of the ownership and the name of the Trustee company did not necessarily mean that the property was owned by a Trust, a competent lawyer could not fail to recognise that ownership by a company with the word “Trustee” in its name would be an indicator that a Trust was involved. The issue is whether or not a lawyer then has a duty to make further inquiries.

[32] It needs to be recognised that even if the property was owned by a Trust, this did not mean that Ms XY did not have an interest in the property. Contrary to Mr RS’s assertions, she clearly had a legal interest in the property by virtue of the fact that she was registered as a proprietor. Further inquiry would have been necessary to establish what other interest, if any, she held, and whether that interest was absolute or discretionary. The only persons from whom that information could have been obtained were Ms XY or LMN. Mr AB faced a dilemma if he decided further information was necessary – should he alert Ms XY to the fact that he was proposing to apply for a Charging Order? In this regard it is relevant to note that the application for a Charging Order is made without notice. In addition, the Charging Order itself acknowledges it stands unless “sufficient cause to the contrary is shown”.¹⁴ Remedies exist through the Court to challenge the imposition of a Charging Order.

[33] If Ms XY had been alerted to the fact that Mr AB was intending to apply for a Charging Order, she could have taken immediate steps to divest herself of any interest in the property, and the opportunity to secure the debt would have been lost. Mr AB would not have been serving his client’s interests in these circumstances.

[34] I take note of, and accept, the statement by Mr SZ in his affidavit accompanying the submissions for Mr AB for the review hearing that “[t]he whole system of registration of charging orders is to proceed with haste to preserve the status quo until

¹² Email AB to RS (15 March 2012).

¹³ Above n 12.

¹⁴ Charging Order dated 18 January 2011.

a Court has an opportunity of discovering the underlying rights”.¹⁵ This is contrasted with my statement in *BAB v PW* where I noted that:¹⁶

Lack of time to make inquiries does not in itself justify breaching the Rule. If there is insufficient evidence for a lawyer to form a view that there is a caveatable interest, then the caveat should not be lodged, notwithstanding the fact that a sale was imminent. A lawyer must be sure that he or she is not offending the Rule when lodging a caveat and positive grounds must exist for the decision to do so.

[35] In the case of an application for a Charging Order, the applicant must present sufficient evidence to the Court to enable the Court to be satisfied that the judgment debtor has an interest in the property. Mr AB was able to do that, and the Order was issued.

[36] There were in fact indicators that Ms XY did have a personal interest in the property. In response to a settlement proposal put to Ms XY, which included a proposal to secure payments by way of a caveat over the property, BSD had responded that “[o]ur client will not consent to a caveat being registered over her properties at ...”.¹⁷

[37] In *EE v ZX*,¹⁸ which involved the same issues as are involved in this case, Mr ZX guaranteed a company’s debts, and agreed to grant the supplier mortgages over properties owned by him. Searches of the Land Titles Register revealed that he owned properties, in each case as joint owner with other private individuals who shared the same surname as ZX. This was an indicator that the properties were owned in trust.

[38] In that case, the lawyer proceeded to register caveats against the interest of Mr ZX and the same challenges were made as are made by Ms XY. In that decision I stated:¹⁹

The title to the three properties against which the caveats were registered, recorded Mr ZX as one of three joint proprietors. There is no question that Mr ZX had an interest in these properties. The nature of that interest could only be determined by an examination of the underlying documentation which would need to not only include the Trust Deed under which the property was allegedly held, but in addition, evidence that the particular property had been acquired by the Trust and not by the registered proprietors in their own right. This would need to include at least a Trust Minute evidencing that the property had been acquired by the Trust, and perhaps other documentation such as the purchase agreement or finance documents referring to the Trust.

¹⁵ SZ affidavit dated 22 May 2014 at [18].

¹⁶ *BAB v PW* LCRO 4/2011 at [45].

¹⁷ Letter BSD to AB (18 January 2010).

¹⁸ *EE v ZX* LCRO 95/2012.

¹⁹ Above n 18 at [39-42].

Whatever was the case, there can be no question that Mr ZX had an interest in the properties – the titles speak for themselves.

It is then necessary to look at the actual memorial recorded against the title to the properties. This states:

Caveat against the interest of [Mr ZX] by [Company B].

It is clear therefore that the caveat did not purport to be registered against the whole of the property – it was registered against Mr ZX's interest only. Mr ZX had signed the guarantee in which he agreed to provide a mortgage over any of his interests in property and it was in reliance on that agreement that Ms EE lodged the caveat. I do not accept that in doing so Ms EE was in breach of Rule 2.3.

(footnote omitted)

[39] In this case also, the interest charged is the interest of Ms XY in the property, whatever that might be. To establish what that interest was would have required a degree of inquiry that could only have been ascertained by inquiry of Ms XY or LMN, which, even if she had been co-operative, would have enabled her to take steps to divest herself of that interest and thereby defeat the opportunities for Mr AB's client to secure the debt.

[40] In its penalty decision, the Standards Committee referred to *BAB v PW* where I stated that a lawyer has an obligation to make reasonable inquiries into whether there is a caveatable interest or not and that there was a threshold below which a lawyer should not assist with interfering with the rights of others. That case however involved different circumstances from the present case, and *EE v ZX*. In that case there was no evidence of any research, notes or opinions identifying what the lawyer considered constituted the caveatable interest of his client. Instead, he had acted on the basis of instructions from his client that the client had an interest in the property by virtue of the terms of his late mother's will, when a cursory examination of the will showed that the client's interest was in the residue of the estate only. There was nothing to support the interest claimed in the caveat as a "capital beneficiary of trusts created by ..." the will.

[41] That case also differed from the present case, in that the lawyer was able to make inquiries of his own client as to the nature of the claimed interest. In the present instance and in *EE v ZX*, any inquiries would need to have been made of the debtors.

Mr XV's affidavit

[42] Ms XY and her lawyers have pointed to the fact that the affidavit sworn by Mr XV includes the statement that he believed Ms XY was "beneficially entitled" to the property. They argue that this is an acknowledgement that the property was held in trust and that there were no grounds to make this claim.

[43] I note, as pointed out by Mr AB and his counsel, that this is the form of the supporting affidavit required by the District Court Rules. The form then provides for the type of property to be identified, and in the case of land, this is to include the alleged estate. Mr XV's affidavit followed this form, noting that Ms XY was a registered proprietor, and attached a copy of the title.

[44] The prescribed form follows the wording of s 96(1)A of the District Courts Act 1947 and makes provision for any claim to an interest in land to be specified either by reference to "the alleged estate, right, title, or interest of the judgment debtor; and the nature, location, and description of the property"²⁰ or, "...by virtue of any trust for the judgment debtor..."²¹ to be specified.

[45] It is clear from this that the reference to a "beneficial interest" does not necessarily mean that the interest is claimed by virtue of a trust. That has to be specifically referred to.

[46] The interest claimed in the affidavit merely referred to the fact that Ms XY was registered as a current owner and a copy of the title was attached. I do not accept therefore by following the form Mr AB acknowledged that the property was held in trust by reason of the use of this form, or that the court was thereby misled.

Other aspects

[47] The other aspect of the complaint is that Mr AB failed to take adequate steps to remove the Charging Order once notified that the property was held in trust. This is largely answered by the fact that Mr AB was unable to obtain instructions from his client, and he was therefore unable to remove the order without the co-operation of his client. From Mr AB's file, it would seem that he was unable to speak directly to Mr XV for reasons that will be known to the parties.

[48] Mr RS acknowledged the limitations that Mr AB was under in his email of 15 March 2012.

[49] In addition, it seems that the firm of which Mr RS was a partner acted for both Mr XV and Ms XY between March and May 2012, during which time there was a settlement, and the Charging Order withdrawn. In these circumstances it would seem that his acceptance of Mr AB's position was in may have been made with the benefit of information to which Mr AB was not privy, but which made it clear why Mr AB was unable to progress the request for him to obtain the discharge of the Charging Order.

Summary

[50] In summary, therefore, whilst I accept that the nature of the ownership by Ms XY and LMN, and the name of the company, were indicators that the property was held in Trust, that may not necessarily have been the case, and it would be unreasonable to impose an obligation on a lawyer who may have cause to suspect that this may be the case, to embark on further inquiries of a debtor who may very well not be co-operative or who could take further steps to defeat the opportunity for a creditor to secure the debt.

[51] It follows from the comments above that I do not consider Mr AB's conduct to be unsatisfactory conduct and the two determinations of the Standards Committee will be reversed.

Bias

[52] A troubling aspect of this review is the fact that the convenor of the Standards Committee had previously been a law partner of Mr AB, and the partnership had dissolved in somewhat acrimonious circumstances. In his affidavit filed in support of the review, Mr AB deposes that "[e]ven now Mr PG either ignores me when I see him, or barely acknowledges my presence".²²

[53] The accepted test for bias was enunciated in the *Saxmere* decision²³ as being:

Subject to waiver and necessity, a judge was disqualified if a fair-minded lay observer might reasonably apprehend that there was a real and not remote possibility that the judge might not bring an impartial mind to the resolution of the question the judge was required to decide. There was to be no attempt to predict or inquire into the actual thought processes of the judge. Rather, it was necessary first to identify what it was said might lead a judge to decide a case other than on its legal and factual merits and, secondly, to articulate the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.

[54] In the circumstances as described by Mr AB, it seems to me that Mr PG should have recused himself. I acknowledge, however, that I have not sought Mr PG's views of Mr AB's statements, and in any event any bias is cured by this review process.

[55] Nevertheless I understand Mr AB's concerns that the Committee may have been influenced by input from Mr PG, particularly given the extent of the orders made by the Committee and the fact that publication of Mr AB's name was proposed.

²⁰ District Court Rules 2009 form 55 clause 3(a).

²¹ Above n 20 clause 3(d).

²² AB affidavit dated 21 May 2014 at [9].

²³ *Saxmere Company Ltd v Wool Board Disestablishment Co. Ltd* [2009] NZSC 72.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 both determinations of the Standards Committee are reversed.

Pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 further action is unnecessary or inappropriate.

DATED this 9th day of June 2014

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:

Mr AB as the Applicant
Ms NG/Mr LC as the representatives for the Applicant
Ms XY as the Respondent
The [ZZZ] Standards Committee
The New Zealand Law Society