

CONCERNING

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

AND

CONCERNING

a determination of the Standards Committee

BETWEEN

AF

Applicant

AND

GJ

Respondent

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

Introduction

[1] Mr OM, on behalf of Mr AF, has applied for a review of the determination by the Standards Committee to take no further action in respect of Mr AF's complaint about Mr GJ, which related to the part Mr GJ played in a contract entered into between Mr AF's company, [Company A], with a Trust, pursuant to which the Trust contracted to provide farm services.

Background

[2] On 8 April 2011 [Company A] entered into a contract (the contract) with [Trust X] (referred to in the contract as "the contractor") to provide the services stipulated in the contract which I shall refer to as "farm services". Briefly, those services were to manage the dairy farm owned by [Company A].

[3] The trustee of [Trust X] was [Company X] of which Mr GJ was the sole director. The shareholder of [Company X] was [Company Z] which Mr GJ advises was one of three companies used by his firm to act as an independent trustee of his client's

trusts. That company was, in turn, controlled by Mr GJ. The trust deed is dated 23 April 2009.

[4] Clause 1.3 of the contract read:

The contractor agrees to the provision of **VL** as the Farm Manager for these services for the duration of the agreement. The Farm Manager, **VL**, has the authority on behalf of the Contractor to make all farming related decisions in order to meet the Contractor's obligations under this Contract. VL will not take employment off the farm within the period of the contract unless agreed in writing by both parties.

[5] Mr VL was introduced to Mr AF by a farm personnel agency and it was Mr VL who was responsible for the farm management, and for performing the obligations of [Trust X] under the contract.

[6] The Trust failed to perform the farm services to the required standards, and disputes arose between [Company A] and [Trust X], which, it would seem, involved disagreements and disputes between Mr AF and Mr VL.

[7] Although not known to Mr AF at the time, Mr VL had been adjudicated bankrupt on 23 February 2010.

[8] By the time the review hearing took place (on 14 October 2015) the Disputes Tribunal had issued a decision on the claims and counter-claims made by the parties pursuant to the contract.

[9] In his letter of complaint,¹ Mr OM describes the contract between [Company A] and [Trust X] as a "contract milking agreement" between AF of [Company A] and GJ of [Company X].

[10] He says:

GJ was not actively involved on the farm, however employed VL to manage the practical day-to-day running of the farm. My understanding was that GJ made the major decisions but was more of a hands-off director. AF is an 'off-farm owner' living some 40 minutes from the property.

He then goes on to outline the problems which arose on the farm which included alleged animal welfare issues and loss of production. Mr OM's firm, [Law Firm], was engaged by Mr AF to assist with resolving the issues.

[11] All communications concerning the problems arising on the farm were made to Mr GJ as the director of [Trust X], the contracting party. The contract between the

¹ Letter OM to Lawyers Complaints Service (27 August 2011).

parties was terminated by Mr AF by notice dated 24 August 2011. The termination was contested by Mr GJ.

[12] Mr OM advises he had meetings with Mr GJ so that Mr GJ could gain an understanding of the problems on the farm and move towards a resolution of the issues. After a period of three weeks, Mr GJ advised he had been removed from any involvement with [Trust X].²

[13] In response to a subsequent letter of complaint written by Mr OM, Mr GJ declined any responsibility for the issues that had arisen, taking the position that his “involvement in the trust was that of an independent trustee on behalf of a client”.³ He refers to himself as having been “removed” from his role as an independent trustee and rejected the suggestion by Mr OM that he had removed himself from any involvement with the independent trustee to avoid being liable for the alleged breaches of contract. He reiterated that it was “his client’s” decision to remove him from the independent trustee company.

[14] The person who replaced Mr GJ in his positions in the shareholding company and as director of [Company X] was Mr VL’s father-in-law.

Mr AF’s complaints

[15] Mr OM lodged a complaint on behalf of Mr AF by letter dated 27 August 2011.⁴

[16] The complaints to be resolved were summarised by Mr OM in the following way:

1. To investigate the actions of GJ in his handling as director and shareholder of [Trust X]. [Mr OM includes then a reference to a Companies Office record relating to [Company X].]
2. To find that GJ is liable for the loss of [Farm A] to the amount of nearly \$60,000.

[17] Mr OM’s letter of complaint focuses mainly on Mr GJ’s part in dealing with the allegations of breaches of the farm services contract, animal welfare issues and Mr

² Email GJ to OM (20 September 2011).

³ Letter GJ to OM (18 October 2011).

⁴ A number of events referred to in the accompanying letter took place after the date of complaint, and a detailed letter accompanying the complaint is dated 27 October 2011.

GJ's position in the shareholding of the trustee company and his obligations as a director of that company. The claim for \$60,000 is the amount of the alleged losses.

[18] The complaint seems to be pitched as an alternative to civil proceedings against [Trust X] for breach of contract. However, in the last paragraph of the letter of complaint Mr OM says:⁵

I also believe that GJ has breached the ethical standards of the Law Society in his misrepresentation and failure to act appropriately and to deal in any [way] with the issues that have been made plainly clear to him.

The misrepresentation Mr OM alludes to is a misrepresentation as to by whom [Trust X] was effectively directed.

The Standards Committee determination

[19] The essence of the Standards Committee determination is encapsulated in the following paragraphs:

...

9. It appears the practitioner:
 - a. Was acting in accordance with instructions from his client; and
 - b. Has no further involvement as trustee, director or shareholder.
10. If the complainant or the company of which he is a director has suffered losses of \$60,000 arising from mis-management of the farm as the complainant claims, the complainant's remedies lie beyond the jurisdiction of this Committee.
11. There is no evidence to support the Committee making an adverse finding against the practitioner.

[20] The Committee determined pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 to take no further action in respect of Mr AF's complaint.

The application for review

[21] Mr OM applied for a review of the determination on behalf of Mr AF. He states that Mr AF had no knowledge he was entering into a contract with Mr GJ until 8 April 2011 (the date of the contract) and that until that time, he believed Mr GJ was Mr VL's lawyer. He believed from the outset that he was engaging Mr VL as the contract

⁵ Statement of Complaint (27 October 2011) at [5].

milker. Mr OM advises that it was Mr VL who Mr AF interviewed and that Mr VL's CV highlighted that Mr VL was the Lower Order Sharemilker (LOSM).⁶

[22] Mr OM asserts that Mr GJ had an obligation to advise Mr AF that Mr VL was an undischarged bankrupt at the time the contract was entered into particularly as the contract included the following clause:

1.5 In the event of the Company seeking financial and legal recourse against the Contractor for any reason, should the Contractor default in its obligations to the contract, the Company has the right to seek recourse from VL.

[23] Mr OM advises that Mr AF placed considerable store on this provision. He says:

VL continued to manage [Farm X] as per 1.3 of the contract with GJ as the front man for the company. Whilst this seemed a very unusual relationship it was never made clear to AF the reason behind it.

[24] He goes on to say:

AF's initial complaint to the Law Society related to those actions. It was in GJ's response dated 9 November 2011 that it became apparent that VL was in fact the controller of [Farm X] and that GJ had only been the front man in order to allow a bankrupted person to continue to manage and control a company.

Review

[25] The review proceeded by way of a hearing in [City] on 14 October 2015. Mr AF attended, accompanied by Mr OM. Mr GJ attended with his counsel, Mr BT.

[26] Prior to the hearing, I wrote to the parties, advising that at the hearing I would be wanting to discuss in some detail:

- The trust/company documentation.
- The role played by Mr VL and reference to him by Mr GJ as his client, and instructions received from Mr VL.
- Any duty to Mr AF.
- Rules 10, 11, 12 (Conduct and Client Care Rules)⁷ which had already been the subject of correspondence.

⁶ I do not see a reference to the LOSM in the contract, but the contract provided that Mr VL was to be the full-time farm manager.

⁷ Lawyers and Conveyancers Act 2006 (Lawyers: Conduct and Client Care) Rules 2008.

[27] I did not make it clear in that letter, but must do so from the outset of this decision, that it is not the role of the Complaints Service (or this Office) to rule on the contractual issues arising between the parties, and these have been properly dealt with by the Disputes Tribunal. The issues with which I am concerned, which were raised by Mr OM in the complaint to the Complaints Service, but which the Committee did not address, relate to Mr GJ's conduct in relation to the matters referred to by me in the letter.

[28] Mr BT responded to that letter⁸ and referred to the fact that Mr GJ had, following a request from me, sent to this Office a copy of the [Trust X] Deed and a variation of the Deed dated the same day as the trust Deed itself. Mr BT advised that Mr GJ had provided those documents on a confidential basis (as recorded by Mr GJ in his letter under cover of which the documents were sent) and asserted that the documents, and matters which I had indicated I wanted to address, were subject to legal privilege and confidentiality. He advised that he would be objecting to "any interrogation about the privileged or confidential matters or requests for information or documents that are covered by legal professional privilege or confidentiality".

[29] This claim is somewhat incompatible with Mr BT's subsequent submission that Mr GJ was involved in a personal commercial activity.⁹

[30] At the commencement of the hearing, I referred Mr BT to a letter from Mr GJ to Mr OM dated 18 October 2011, the first sentence of which reads: "I refer to your letter of 14 October 2011 regarding [Trust X] ("the Trust") and my involvement in the Trust a copy of which is attached". I presume that included a copy of the Deed of Variation of the Trust dated the same day as the trust Deed.

[31] Mr AF confirmed he had received the document(s) and had it (them) with him at the hearing. I do not therefore consider myself to be constrained from referring to the documents in this decision.

[32] The other important piece of information relevant to this review was Mr GJ's state of knowledge about Mr VL's bankruptcy. The fact that Mr VL was declared bankrupt on 23 February 2010 is a matter of public knowledge. Whether or not Mr GJ was aware of that, is not a matter of legal privilege nor involves confidential information.

⁸ Letter BT to LCRO (7 October 2015).

⁹ Above n 8.

[33] Mr GJ advised at the review hearing that he had acted for Mr VL for a long time. He also confirmed he had become aware of Mr VL's bankruptcy around the time the bankruptcy occurred in February 2010. That is unsurprising, and to be expected when a lawyer has acted for a client for a long time.

[34] The important fact relevant to this review is that Mr GJ was aware Mr VL was a bankrupt person when negotiations were being held with Mr AF and the contract entered into.

[35] Throughout the investigation of this complaint and review, Mr GJ has frequently referred to Mr VL as "his client" on whose instructions he proceeded. Two issues arise from this for consideration. The first is whether Mr GJ was facilitating evasion by Mr VL of the consequences of his bankruptcy.

[36] I referred the parties to the decision of Ms Bouchier as Legal Complaints Review Officer (LCRO) *Warrington v Maidenhead*¹⁰ which involved a situation where a lawyer received funds from a third party at the request of a person whom the lawyer knew was bankrupt. Those funds were then applied by the lawyer to the purchase of a tourist lodge by a party who was acting at the direction of the bankrupt. It was clear throughout negotiations in which the lawyer had been involved that it was the bankrupt who was directing negotiations. Ms Bouchier referred that matter back to the Standards Committee pursuant to s 209 of the Lawyers and Conveyancers Act for reconsideration. I am not aware of the determination of the Standards Committee following the reconsideration of that complaint.

[37] Mr BT urged me to determine this issue (and others arising out of the review) myself, rather than referring the matter back to the Standards Committee, given the lengthy period of time that has elapsed since the complaint was made in October 2011, and the application for review lodged in January 2012. I acknowledge those concerns, and have therefore decided to address the issues arising out of this review rather than referring the matter back to the Standards Committee.

[38] I do not consider that the issue as to whether or not Mr GJ facilitated evasion by Mr VL of the consequences of his bankruptcy is a matter for me to determine. The responsibility for ensuring bankrupt persons do not directly or indirectly take part in the management or control of any business rests with the Ministry of Economic Development (as it was then). Mr OM had advised the Ministry of the possibility that

¹⁰ *Warrington v Maidenhead* LCRO 192/09.

Mr VL was acting in contravention of the Insolvency Act 2006 in November 2011. He advised at the review hearing that he did not think the Ministry had taken any action on the issue. If that is the case, then there can be no adverse consequences for Mr GJ, as it must first be established that Mr VL had acted in contravention of the Act.

[39] The second matter for consideration arising out of the facts is whether Mr GJ had misled Mr AF or had a duty to alert him to the fact that Mr VL was bankrupt. This is particularly relevant because of the provisions of clause 1.5 of the contract set out in [22] above. By that clause Mr VL effectively guaranteed the performance by [Trust X] of its obligations under the contract.

[40] Mr GJ asserts that Mr VL was able to enter into contractual obligations and the clause was binding on him. I do not agree (and that is not an issue for me to determine) but the main consequence of the fact that Mr VL was bankrupt was that any assurance Mr AF took from the fact that Mr VL was standing behind performance by [Trust X] of its obligations under the contract, was illusory, as all of his assets were vested in the Official Assignee in bankruptcy as a result of his adjudication.

[41] Mr AF also expected that Mr VL would be a co-trustee of [Trust X], but the only indication of the fact that he was not at the time the contract was entered into, was the fact that it was only Mr GJ who signed the contract as director of [Company X]. That is not enough to shift the burden on to Mr AF to be alert to the fact that Mr VL was not part of the Trust structure, as companies can execute documents by a single director, and in any event, Mr AF could not be expected to be sufficiently aware of the intricacies of trust documentation to recognise that Mr VL was not involved in the manner he expected.

[42] Prior to the hearing and at the hearing, I referred the parties (and Mr BT) to the provisions of Rules 10, 11 and 12 of the Conduct and Client Care Rules. In *Warrington v Maidenhead Ms Bouchier* also referred to Rule 2.2. I requested comments/submissions on the applicability of these rules (and any comment on *Warrington v Maidenhead*) that the parties and/or counsel wished to make.

[43] The rules state:

2.2 A lawyer must not attempt to obstruct, prevent, pervert, or defeat the course of justice.

Professional dealings

- 10** A lawyer must promote and maintain proper standards of professionalism in the lawyer's dealings.

Proper Professional practice

- 11** A lawyer's practice must be administered in a manner that ensures that the duties to the court and existing prospective, and former clients are adhered to, and that the reputation of the legal profession is preserved.

Third parties

- 12** A lawyer must, when acting in a professional capacity, conduct dealings with others, including self-represented persons, with integrity, respect, and courtesy.

- 12.1** When a lawyer knows that a person is self-represented, the lawyer should normally inform that person of the right to take legal advice.

[44] At the hearing, Mr BT enquired whether the sub-rules of each rule also needed to be addressed and I responded in the negative. On reflection, rule 11.1 is also relevant:

- 11.1** A lawyer must not engage in conduct that is misleading or deceptive or likely to mislead or deceive anyone on any aspect of the lawyer's practice.

However, because I have not put the application of that rule into question I will not address that.

[45] Mr BT subsequently requested an extension of time to file submissions as he considered the issue to be addressed was whether s 12(c) of the Act extended to conduct that is neither the provision of regulated services, or legal services. If s 12(c) does not apply in those circumstances, then there could be no finding of unsatisfactory conduct for breach of the Conduct and Client Care Rules.

[46] Mr BT considered that the Standards Committee should be invited to provide submissions on the point, particularly owing to the wider public interest at stake in the consideration of this point.

[47] In response, I referred Mr BT to an earlier decision issued by me *EA v BO*¹¹ in which the matter had been fully argued by counsel and followed since by this Office and (as far as I am aware) by Standards Committees. In that decision I reached the following conclusions:

...

- [31] ...a lawyer may be exposed to a finding of unsatisfactory conduct if his or her conduct is in breach of the Act, or any of the Rules or Regulations,

¹¹ *EA v BO* LCRO 237/2010

even if he or she is not providing regulated services. Each of the Rules are clear as to the circumstances in which it applies.

[32] There can only be a finding of unsatisfactory conduct if a specific Rule has been breached...

...

[34] In summary, section 12(c) is not restricted to circumstances in which a lawyer is providing regulated services. The words of the section do not provide that and each of the Rules in question will determine the circumstances in which it is to apply.

[48] Mr BT now submits:¹²

It seems to Counsel that there is an important wider point here; namely, whether the applicable Rules are *intended* to capture conduct of a director or trustee who also happens to be a lawyer, but who, when acting as a director trustee, is neither providing legal services, nor acting in the course of their professional practice.

[49] I accept this general proposition by Mr BT and each rule must be carefully examined. The rules are set out in [43] above. It is also important to carefully consider the circumstances in which the conduct took place. Mr AF believed that Mr GJ was Mr VL's lawyer. He believed he was engaging Mr VL as the contract milker. Those perceptions would have been apparent to Mr GJ.

[50] Mr GJ also referred to Mr VL as "his client" on numerous occasions, and it somewhat defies reality to suggest that Mr AF should have considered that he was entering into a purely commercial arrangement with Mr GJ, pursuant to which Mr GJ was to provide farm services, when he was clearly a lawyer. Mr GJ did nothing to disabuse Mr AF of the fact that he was acting in any capacity other than as a lawyer.

[51] Mr BT submits that "the subject conduct here is commercial activity, not professional activity." He also, somewhat surprisingly, says that "Mr GJ was not acting for a client." That truth of that statement is belied by Mr GJ himself. In his letter dated 18 October 2011 to Mr OM, he says: "By way of background I think it is worthwhile to record that my involvement in the Trust was that of an independent trustee on behalf of a client".

[52] In his response to the complaint to the Lawyers Complaints Service, he says: "My initial involvement in [Trust X] began when I was approached by a client, VL, to

¹² Letter BT to LCRO(1 November 2015)

establish a trading entity.” There are numerous other occasions where Mr GJ has referred to Mr VL as “his client” and Mr BT’s submission that Mr GJ “was not acting for a client” cannot be sustained in the light of this correspondence.

[53] Mr BT’s submissions are all founded on the view reflected in this submission: “The purposes of the Lawyers and Conveyancers Act do not include to regulate or police the commercial and personal activities of lawyers.”

[54] Mr GJ has acknowledged he was acting on behalf of a client, Mr VL, and it is stretching reality to suggest that Mr AF should have realised he was dealing with a lawyer (Mr GJ) who was also entering into contracts on his own behalf (i.e. in a personal capacity) to provide farm services, which involved engaging and supervising farm staff and for which experience in the farming industry would be essential. It is not unremarkable that Mr AF thought he was dealing with Mr VL in all capacities, and Mr GJ said and did nothing to put Mr AF on notice that he was not acting in the capacity of Mr VL’s lawyer. His frequent reference to “his client” in fact gave the opposite impression.

[55] Mr BT submits Mr AF should have made his own investigations about Mr VL. He says:

This was a commercial contract negotiated at arms length. The complainant had his own advisers. He took no trouble to see if Mr VL had financial capacity to meet any guarantee, sought no statement of financial means, and sought no security. His reliance on the guarantee was at best nominal. Any claim against Mr GJ under the general law, such as s 9 of the Fair Trading Act, would be doomed to fail, and has not been brought.

[56] To argue that Mr AF (or his advisor) should have made his own inquiries does not relieve Mr GJ of his professional obligations to deal with others with integrity, professionalism, and in a manner which preserves the reputation of the legal profession.

[57] Rules 10, 11 and 12 clearly are intended to apply to a lawyer’s conduct when acting as a lawyer. Rule 10 refers to “professionalism in the lawyer’s dealings.” Rule 11 refers to the “administration of a lawyer’s practice”, and rule 12 refers to a lawyer’s conduct “when acting in a professional capacity.”

[58] I do not consider that allowing a person to enter into a contract which contained a remedy that was worthless, and also to proceed under a misapprehension (that must have been apparent to Mr GJ) that Mr AF was in reality contracting with an undischarged bankrupt (or at least relying on the guarantee provided by Mr VL) meets

any of the standards required by rules 10 (proper standard of professionalism), 11 (preservation of the reputation of the legal profession), and 12 (dealing with a third party with integrity).

[59] The standards required by these rules are reflected in the words of the Court in *Bolton v Law Society*¹³ where the Court observed that lawyers are expected to act with “integrity, probity, and complete trustworthiness” and the purpose of the disciplinary system was “to maintain the reputation of the solicitor’s profession as one in which every member, or whatever standing, may be trusted to the ends of the earth.”

[60] The words of the Court in *Bolton* have been frequently referred to in decisions of the Lawyers and Conveyancers Disciplinary Tribunal, and before that, the New Zealand Law Practitioners Disciplinary Tribunal, when considering charges before the Tribunal. I do not suggest for one moment that the complaint against Mr GJ should be elevated to that level, but the wording of the Rules reflects these principles, and it was entirely reasonable for Mr AF to proceed on the basis that he was dealing with a trusted member, of a trusted profession, who would not allow him to proceed under a mistaken apprehension that would be to his detriment.

[61] Mr GJ cannot assert that [Company A] was not in effect dealing with Mr VL. Otherwise a trustee company (of which he was the sole director) was responsible for carrying out the farm services and no doubt Mr GJ did not expect for one moment he would be required to carry out those duties.

[62] For the reasons set out above, I have come to the view that Mr GJ’s conduct constituted unsatisfactory conduct by reason of breaches of rules 10, 11 and 12 of the Conduct and Client Care Rules and 12(c) of the Lawyers and Conveyancers Act.

Orders

[63] Having reached the conclusion that Mr GJ’s conduct constituted unsatisfactory conduct, it remains to determine what orders should be made.

[64] I reiterate that no part of this decision deals with the commercial damages which [Company A] alleges occurred as a result of breaches of the contract. That has been dealt with by the Disputes Tribunal.

[65] Nor does this decision deal with any alleged breaches of the Insolvency Act, for the reasons referred to in [38].

¹³ *Bolton v Law Society* [1994] 2 All ER 486.

[66] The only issue with which this decision is concerned is Mr GJ's conduct in allowing Mr AF to proceed on the understanding he was dealing with Mr VL insofar as the documentation was concerned and that his reliance on the guarantee by Mr VL was misplaced.

[67] In *Workington v Sheffield*¹⁴ the LCRO referred to *Wislang v Medical Council of New Zealand*¹⁵ in which the function of a penalty in a professional context was recognised as being to punish the practitioner, to act as a deterrent to other practitioners, and to reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct. The LCRO went on to note that: "It is important to mark out the conduct as unacceptable and deter other practitioners from failing to pay due regard to their professional obligations in this manner."¹⁶

[68] I do not consider this matter attracts the degree of condemnation referred to in that decision. In the circumstances, a modest fine to reinforce the finding of unsatisfactory conduct is the appropriate response. In imposing a modest fine, I take note of the fact that this aspect of the complaint was not the primary matter complained of, in that the complaint and the application for review focused on the alleged breaches of the contract and sought compensation. These are not matters to be dealt with through the complaints and disciplinary provisions of the Lawyers and Conveyancers Act.

Decision

[69] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Standards Committee is modified by finding that Mr GJ's conduct constituted a breach of rules 10, 11 and 12 of the Conduct and Client Care Rules for the reasons specified in this decision. In all other respects the determination of the Standards Committee is confirmed.

Order

¹⁴ *Workington v Sheffield* LCRO 55/2009.

¹⁵ *Wislang v Medical Council of New Zealand* [2002] NZAR 573 (CA).

¹⁶ Above n 15 at [65].

[70] Pursuant to s 156(1)(i) of the lawyers and Conveyancers Act, Mr GJ is to pay the sum of \$500 to the New Zealand Law Society by way of fine by no later than 4 December 2015.

Costs

[71] Pursuant to s 210 of the Lawyers and Conveyancers Act 2006, and the Costs Orders Guidelines issued by this Office, I direct that Mr GJ is to pay the sum of \$800 by way of the costs of this review to the New Zealand Law Society, such payment to be made by no later than 4 December 2015.

[72] The costs ordered amount to one half of the amounts specified in the Costs Orders Guidelines for the reason that the determination of the Standards Committee has been modified and not reversed in full.

DATED this 6th day of November 2015

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 AF as the Applicant
Mr OM as representative for the Applicant
Mr GJ as the Respondent
Mr BT as representative for the respondent
Standards Committee
New Zealand Law Society