

CONCERNING

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

AND

CONCERNING

a determination of the [Area] Standards Committee

BETWEEN

DL

Applicant

AND

SJ, GS and PQ

Respondents

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

DECISION

Introduction

[1] Mr DL has applied to review a decision by the [Area] Standards Committee (the Committee), in which the Committee made findings of unsatisfactory conduct against him.

[2] Those findings resulted in Mr DL being ordered by the Committee to pay a fine of \$5,000 together with costs of \$1,000.

Background

[3] Mr DL is a senior lawyer in a law firm. His area of work tends towards litigation rather than commercial.

[4] Mr and Mrs Y were married in 1980. They had each been married previously. Mrs Y had four children from her first marriage; Mr Y had three.

[5] The couple were in their late 50s when they married.

[6] In 2005 Mrs Y made a will in Australia in which she left all of her estate to her four children (all adults). At that time, Mr and Mrs Y were living in Australia.

[7] In August 2007, the couple returned to New Zealand, and purchased a licence to occupy a unit in a retirement village (the occupation licence). Each contributed to the purchase; Mrs Y contributed slightly less than Mr Y.

[8] Mr PQ assisted his mother with the purchase, as she was by this time elderly and frail. With his mother's authority, Mr PQ organised the withdrawal from her bank account of her cash contribution towards the purchase of the occupation licence.

[9] Through Mr PQ, the other of Mrs Y's children were aware that their mother had made the cash contribution. They had understood, following a discussion between Mr PQ and Mr and Mrs Y at the time of the purchase of the occupation licence, that they would eventually receive their mother's share as part of their inheritance.

[10] A lawyer unconnected with Mr DL and his law firm acted for Mr and Mrs Y when they purchased the occupation licence. Under the occupation licence, Mr and Mrs Y were joint tenants.

[11] Mrs Y passed away on 3 September 2007. Mrs GS was her mother's trustee and executor. A legal executive in Mr DL's law firm, Mrs B, managed the administration of her estate. Mr DL was not involved in that.

[12] Shortly after Mrs Y passed away, Mr Y updated his will. A lawyer in Mr DL's law firm took those instructions. Again, Mr DL did not have any involvement in that. Mr Y's only beneficiary in his updated will was one of his children. Mr Y appointed Mrs GS as his trustee and executor.

[13] In December 2007 Mr Y, exercised Option B under s 61 of the Property (Relationship) Act 1976 (PRA), to the effect that he elected not to bring a relationship property claim against Mrs Y's estate.

[14] Because Mr and Mrs Y owned the occupation licence as joint tenants, on her death Mrs Y's share passed automatically to Mr Y by survivorship.

[15] During 2008, Mrs B completed the administration of Mrs Y's estate and her four children received cash legacies.

[16] In January 2012, Mr Y further updated his will through Mr DL's law firm. The amendments added his other children as beneficiaries, and replaced Mrs GS with one of his sons as the trustee and executor. Mr DL was not involved in that legal work.

[17] Mr Y passed away in May 2013. Probate to administer his estate was granted on 25 June 2013.

[18] As she had done with Mrs Y's estate some years earlier, Mrs B began the process of administering Mr Y's estate.

[19] In August 2013, Mrs GS made enquiries of Mrs B about the administration of Mr Y's estate. She was told that any enquiry would need to come through an independent lawyer acting for Mrs Y's children.

[20] Mrs SJ and her husband, both of whom had previously known Mr DL socially, approached him in November 2013 to ask him about Mr Y's estate, and the administration of it.

[21] The three had a discussion at Mr DL's offices. The topics included the cash contribution that Mrs Y had made to the purchase of the rest home unit, and Mr PQ's discussion with Mr Y in or about 2007 concerning that. Mr and Mrs SJ also expressed their frustration about Mrs B's unwillingness to provide information about Mr Y's estate.

[22] Mr DL said that he would make some enquiries about Mr Y's estate, and provide them with any information to which they might be entitled.

[23] After the meeting and during November and early December 2013, Mr SJ sent Mr DL a number of emails and left telephone messages asking for a progress update. He also provided him with copies of emails passing between various of Mrs Y's children.

[24] On 13 December 2013, Mr DL sent Mr and Mrs SJ an email summarising what he had ascertained following their November meeting. He provided them with some information about their mother's estate. He also raised the issue of whether Mrs Y's children might have a claim against Mr Y's estate in relation to their mother's cash contribution towards the purchase of the occupation licence (the constructive trust claim). He suggested that such a claim might not be strong. However, he indicated that strategically a constructive claim might assist in securing a settlement with Mr Y's beneficiaries.

[25] Mrs Y's children instructed a lawyer to act for them to pursue any claim they may have against Mr Y's estate. The lawyer wrote to Mr DL's firm about that on 20 January 2014, and invited the executor and trustee of Mr Y's estate to consider making a settlement in favour of Mrs Y's children.

[26] No settlement was achieved and Mr Y's estate was finally wound up in accordance with his will, in February 2014.

Complaint and response

[27] In a letter dated 17 February 2014, three of Mrs Y's four children lodged a complaint with the New Zealand Law Society Complaints Service (the Complaints Service) against Mr DL.

[28] The substance of their complaint was that:

- (a) Mr DL's law firm acted in the administration of Mr Y's estate;
- (b) Mr DL had previously acted for Mrs Y, and Mr and Mrs SJ;
- (c) Mrs Y's children were aware of an understanding that on Mr Y's death, Mrs Y's cash contribution towards the purchase of the occupation licence would be returned to them;
- (d) Mr SJ approached Mr DL about this and he indicated that the children might have a constructive trust claim, although that might be met with resistance by Mr Y's estate on the basis that Mr Y had elected Option B when Mrs Y had passed away;
- (e) the advice, in his email of 13 December 2013 to Mr and Mrs SJ, was inadequate and incomplete. Mr DL ought to have advised Mrs Y's children that the trustees of her estate could bring a claim against Mr Y's estate under the PRA, within six months of probate being granted in Mr Y's estate — on or before 25 December 2013;
- (f) Mr DL made no mention of time limits;
- (g) Mr DL did not advise Mrs Y's children to obtain independent legal advice, as his firm was acting in the administration of Mr Y's estate;

- (h) Mr DL has acted substantially to the detriment of Mrs Y's children. He purported to give them advice in circumstances where his conflicting duties put them at a significant disadvantage; and
- (i) their loss is \$65,000, that being Mrs Y's cash contribution to the occupation licence, less rest home deductions.

Response by Mr DL

[29] Mr DL's response, sent in a letter to the Complaints Service dated 20 March 2014, may be summarised as follows:

- (a) he had no knowledge of either of the estate files of Mrs and Mr Y;
- (b) he had not had any contact with Mr and Mrs SJ for several years before Mr SJ telephoned him in late 2013;
- (c) Mr SJ indicated that he and his wife were having difficulty in getting information from Mr DL's law firm about two estates;
- (d) Mr DL met Mr SJ on 15 November 2013 at the law firm's offices. Mr DL took a brief handwritten note of their meeting;
- (e) Mr SJ outlined the family background of Mr and Mrs Y. He referred to the occupation licence and Mrs Y's cash contribution towards that. Mr Y had indicated that the proceeds of the occupation licence would be shared equally between Mrs Y's children and his own children;
- (f) Mr Y's will had however left everything to his children;
- (g) Mrs Y's children were gathering information to see what, if anything, could be done about the disinheritance;
- (h) Mrs B was being unhelpful;
- (i) Mr SJ asked whether Mr DL could review his firm's files and provide information about Mr Y's estate including information about the disinheritance. Information and not advice, was sought;
- (j) because his law firm had acted in the administration of Mrs Y's estate and was then acting in the administration of Mr Y's estate, Mr DL

appreciated that he could not act for any party wishing to bring a claim against either estate;

- (k) at the 15 November 2013 meeting, Mr DL said that his firm could not advise the beneficiaries in the two estates. His impression was that Mr and Mrs SJ had or were about to instruct their own lawyer;
- (l) he considered that all he was being asked for was information to which Mr and Mrs SJ might otherwise be entitled;
- (m) on reviewing the files, Mr DL considered that “there might be a constructive trust claim”, and that the lawyer who had acted when Mr and Mrs Y purchased the occupation licence, might have some responsibility in connection with advice given about survivorship issues; and
- (n) Mr DL sent Mr and Mrs SJ an email on 13 December 2013 setting out his thoughts. He was providing information and not advice.

Further comment by Mr and Mrs SJ

[30] Mrs SJ commented on Mr DL’s response, in an undated email to the Complaints Service. She said that:

- (a) she and her husband has approached Mr DL after a friend had mentioned the Family Protection Act 1955 to them;
- (b) Mr DL “quite quickly” referred to that legislation and explained its operation, saying he would write to them about it;
- (c) their expectation was advice on how to redress the unfairness;
- (d) Mr DL’s 13 December 2013 email “told them nothing”. Mr DL should have told them that time was of the essence as they had only six months from the date of probate within which to bring a claim;
- (e) a discussion with one of Mr Y’s sons in early 2014 prompted them to instruct a lawyer about a claim against Mr Y’s estate; and

- (f) neither Mr nor Mrs SJ has any recollection of Mr DL telling them to seek alternative advice.

Notice of Hearing

[31] The Committee resolved to set the complaint down for a hearing on the papers, and on 9 May 2014 provided the parties with a Notice of Hearing.

[32] The Notice of Hearing identified the following issues for consideration:¹

- (a) Whether Mr DL provided legal advice to [Mr and Mrs SJ] in relation to possible claims that could be made against [Mr Y's estate]; and in doing so whether he was bound to act in accordance with the fundamental obligations of lawyers as set out in section 4 of the Lawyers and Conveyancers Act 2006, which includes duties to be independent and to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients.
- (b) If Mr DL was providing legal advice, whether:
 - i. He failed to provide adequate and competent advice in breach of rule 3.1 of the [Lawyers and Conveyancers Act: (Conduct and Client Care) Rules 2008]; and in particular whether he provided negligent and/or incompetent advice in relation to their rights and time limits under the [PRA], resulting in the ability to make a valid claim against the estate being compromised.
 - ii. He breached any or all of Rules 5, 5.1, 5.2, SJ 5.3, 6 and 6.1 in that the firm also acted in the estate of [Mr Y] and there was an inherent conflict of duties.
 - iii. He should not have provided any advice at all given the apparent conflict and should have referred [Mr and Mrs SJ] for independent legal advice.
 - iv. Whether he breached any or all of Rules 8 and 8.7 by disclosing confidential information about both estates in which the firm acted to [Mr and Mrs SJ].
- (c) If asserted that Mr DL was not providing legal advice:
 - i. Whether he failed in his obligation to make it clear to [Mr and Mrs SJ] that he was not providing them with legal advice.
 - ii. Why his email of 13 December 2013 contained apparent legal advice, not just information as asserted.
 - iii. Whether he breached any or all of Rules 8 and 8.7 by disclosing confidential information about both estates in which the firm acted to [Mr and Mrs SJ].

¹ Standards Committee notice of hearing, 9 May 2014 at [3].

Comments from Mr DL's counsel

[33] In written submissions dated 21 May 2014, counsel then acting for Mr DL, Mr VS, addressed the issues set out in the Notice of Hearing as follows:

- (a) Mr DL regarded Mr and Mrs SJ's approach to the firm as being a complaint about the failure by Mrs B to provide information when asked.
- (b) Mr DL is adamant that he was not asked to provide advice in respect of legal remedies.
- (c) As a senior and experienced lawyer, Mr DL is well versed in the client care rules. A letter of engagement was not provided because Mr DL did not accept instructions from or give advice to Mr and Mrs SJ.
- (d) Mr DL was reviewing and providing information. He informed Mr and Mrs SJ that his law firm was acting in relation to the estates of both Mr and Mrs Y and that advice could not therefore be given to a beneficiary.
- (e) Nothing Mr DL said was either negligent or incompetent.
- (f) A claim under the PRA could be made at any time up to 25 June 2014. Mr and Mrs SJ were not time barred from making such claim as a result of anything said by Mr DL.
- (g) Mr DL's comment in his email to Mr and Mrs SJ on 13 December 2013 about a potential constructive trust claim was a "gratuitous comment" and "never was and cannot be construed as advice as he and [Mr and Mrs SJ] would have understood that he was not giving advice given the fact that [his law firm was] acting on the estate".
- (h) Mr DL understood from what Mr and Mrs SJ had told him that they had or were consulting separate solicitors about the estates.
- (i) No confidential information was given to Mr and Mrs SJ: nothing was mentioned about Mr Y's estate, and such information, as was given in relation to Mrs Y's estate, was information already held by her beneficiaries who included Mrs SJ.

- (j) Mr DL's email of 13 December 2013 "was not as clear as it might have been regarding the fact that Mr DL was not acting and was not giving legal advice".

Standards Committee hearing and decision

[34] In its decision dated 10 July 2014, the Committee concluded:

*Legal advice*²

- (a) It appeared to the Committee that Mr DL's 13 December 2013 email contained legal advice; in particular, that there may be a constructive trust argument which should be strategically advanced to use as leverage in negotiations with the beneficiaries in Mr Y's estate.
- (b) If he was not intending to provide legal advice, Mr DL should not have offered solutions.
- (c) As he was giving legal advice Mr DL had a duty to act independently.

*Competent advice?*³

- (d) "The critical issue is that Mr DL did not advise [Mr and Mrs SJ] of the ability to make a claim under the [PRA] pursuant to section 91(b) [sic] or of any of the time limits that might apply. In that regard his advice was deficient. Having purported to provide advice, there was an obligation on Mr DL to ensure that the advice he gave was competent".⁴
- (e) The Committee found that Mr DL's advice fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer, and that this amounted to unsatisfactory conduct pursuant to s 12(a) of the Act.⁵

² Standards Committee determination, 10 July 2014 at [14] – [20].

³ At [21] – [25].

⁴ At [24].

⁵ At [25].

*Rules breaches?*⁶

- (f) The Committee found that Mr DL had breached the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules (the Rules) rr 5, 5.1, 5.2 and 5.3. Those rules provide:

5. A lawyer must be independent and free from compromising influences or loyalties when providing services to his or her clients.

5.1 The relationship between lawyer and client is one of confidence and trust that must never be abused.

5.2 The professional judgment of a lawyer must at all times be exercised within the bounds of the law and the professional obligations of the lawyer solely for the benefit of the client.

5.3 A lawyer must at all times exercise independent professional judgment on a client's behalf. A lawyer must give objective advice to the client based on the lawyer's understanding of the law.

- (g) The Committee found that because Mr DL's law firm was acting in the administration of Mr Y's estate, "it was completely inappropriate [for him] to provide any form of advice about bringing claims against that estate".⁷

- (h) The Committee found that this amounted to unsatisfactory conduct.⁸

- (i) The Committee also found that Mr DL had breached r 6.1.⁹ That rule provides:

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 one or more of the clients.

- (j) The Committee held that "Mr DL should not have provided any advice to Mr and Mrs SJ as he was, in essence, acting for the estate and at the same time providing advice on possible claims against that estate."¹⁰

- (k) A finding of unsatisfactory conduct followed.

- (l) The Committee also concluded that Mr DL had breached rr 8 and 8.7, which provide:

⁶ At [26] – [37].

⁷ At [27].

⁸ At [28].

⁹ At [32].

¹⁰ At [31].

8. A lawyer has a duty to protect and hold in strict confidence all information concerning a client, the retainer, and the client's business and affairs acquired in the course of the professional relationship.

...

8.7 A lawyer must not use information that is confidential to a client (including a former client) for the benefit of any other person or of the lawyer.

- (m) The Committee held that Mr DL "had no right to discuss any matters with Mr SJ as he had no entitlement to any of the information sought. Although [Mrs SJ], as [Mrs Y's daughter], may have had the right to some information, there was clearly no right to disclose information to Mr SJ".¹¹
- (n) This too was met with a finding of unsatisfactory conduct.¹²

Conclusions

- (o) The Committee imposed a fine of \$5,000 together with costs of \$1,000.¹³ It directed publication of the facts.¹⁴

Review Application

[35] Mr DL filed his application for review, through his counsel Mr CN, on 14 August 2014. Together with Mr CN's supplementary written submissions, dated 12 September 2017, the grounds may be summarised as follows:

- (a) There was no lawyer client relationship between Mr DL on the one hand and Mr and Mrs SJ on the other.
- (b) Because of this, Mr DL did not give legal advice and the provisions of rr 3–7, do not apply.
- (c) If he did in fact provide legal advice, it was 100% correct. The PRA does not and could not apply to the beneficiaries of Mrs Y's estate.

¹¹ At [36].

¹² At [32].

¹³ At [40].

¹⁴ At [43].

- (d) The advice he gave was not in breach of r 6.1 because it was qualified by further advice that any claim against Mr Y's estate would almost certainly fail.
- (e) As to a breach of r 8, no confidential information about Mr Y's estate was disclosed to Mr and Mrs SJ. In relation to Mrs Y's estate, Mrs SJ was a beneficiary of that estate. Her sister, Mrs GS, was the executor. As she was a beneficiary, it was likely that Mrs SJ already had the information about Mrs Y's estate from her sister Mrs GS. Because of this, there was an implied authorisation to disclose details about Mrs Y's estate to her beneficiary daughter Mrs SJ.

[36] Mrs SJ responded to the application for review in a letter to this Office dated 3 October 2014. She said that:

- (a) Mr DL was approached for advice and he gave limited advice, promising to write further;
- (b) Mr and Mrs SJ's perceptions were that Mr DL was acting as their solicitor;
- (c) he did not indicate that there was a conflict of interest;
- (d) he led them to believe he was continuing to act by promising to write to them; and
- (e) the complainants have suffered loss by reason of Mr DL's failure to properly advise them and notify them of a conflict of interest.

[37] In support of his application for review, Mr DL has also filed and served an affidavit, sworn by him on 18 September 2017. Mrs B also filed and served an affidavit, setting out her dealings in the administration of both estates.

Nature and Scope of Review

[38] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:¹⁵

... 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.

[39] More recently, the High Court has described a review by this Office in the following way:¹⁶

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.

[40] Given those directions, the approach on this review will be to:

- (a) consider all of the available material afresh, including the Committee’s decision; and
- (b) provide an independent opinion based on those materials.

¹⁵ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

¹⁶ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475, at [2].

Statutory delegation and hearing in person

[41] As the Officer with responsibility for deciding this application for review, I appointed Mr Robert Hesketh as my statutory delegate to assist me in that task.¹⁷ As part of that delegation, on 7 November 2017, Mr Hesketh conducted a hearing at which Mr DL appeared in person together with his counsel Mr CN. Mr PQ and Ms BT appeared on behalf of Mrs Y's children.

[42] Mr Hesketh has reported to me about the hearing and we have conferred about the application for review, and my decision. There are no additional issues or questions in my mind that necessitate any further submissions from either party.

Analysis

[43] I propose to deal with the following issues:

- (a) Were Mr and Mrs SJ clients of Mr DL's at and following their meeting on 15 November 2013?
- (b) Was Mr DL's email to Mr and Mrs SJ, dated 13 December 2013, legal advice?
- (c) If so, was the advice given competent?
- (d) If Mr DL was acting for Mr and Mrs SJ and gave them advice, was he conflicted under r 6.1 because his firm was acting in the administration of Mr Y's estate?
- (e) Did Mr DL improperly disclose any confidential information pertaining to Mr Y's estate and Mrs Y's estate?
- (f) Did Mr DL breach any of his duties to act independently?

Were Mr and Mrs SJ clients of Mr DL

[44] Mr and Mrs SJ say that they approached Mr DL for legal advice and regarded him as their solicitor. They were fortified in this view because Mr DL told them that he would write to them after their meeting on 15 November 2013.

¹⁷ Lawyers and Conveyancers Act 2006, sch 3, cl 6.

[45] On the other hand, Mr DL argues that Mr and Mrs SJ were not his, or his law firm's, clients in connection with either or both of the estates of Mr and Mrs Y. He saw his role as giving them such information as they were entitled to, and no more. He did not open a file in their names, nor did he charge them a fee (or contemplate doing so).

[46] Mr DL points to the fact that Mrs B had told Mrs GS, when approached for information about the administration of Mr Y's estate, that the beneficiaries of Mrs Y's estate would need to be independently advised.

[47] Mr DL informed Mr and Mrs SJ that because his law firm was acting in the administration of Mr Y's estate, he "could not give them any advice concerning the estates, such as their rights, but [he] could certainly give them information to which they were entitled".

[48] Mr CN submits that a useful test for determining whether a lawyer client relationship exists, is the *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd (No 2)* test for judicial bias involving an objective bystander.¹⁸ Mr CN proposed the following modifications of that test as follows:

- (a) The objective bystander is presumed to be intelligent.
- (b) The person is presumed to be able to view matters objectively.
- (c) He or she must not be unduly sensitive.
- (d) He or she must not be unduly suspicious.
- (e) He or she must be a non-lawyer, yet
- (f) He or she must be reasonably informed about the workings of the lawyer client relationship.

[49] Applying that test to the facts, Mr CN submitted that "it is simply not reasonable to suppose that at the conclusion of their meeting with Mr DL on 15 November 2013, [Mr and Mrs SJ] could possibly have believed that they were clients of [his law firm]".

¹⁸ *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76.

[50] Particular emphasis is placed by Mr CN on the fact that Mrs B made it clear to Mrs GS that the beneficiaries of Mrs Y's estate would need to obtain independent legal advice.

Discussion

[51] Neither the Act nor the Rules defines "client".

[52] In *Lawyers' Professional Responsibility*, the learned author said:¹⁹

Retainer is the term used to describe a contract between a lawyer and client for the provision of legal services. It must accordingly be proved like any other contract, the terms of which determine the nature and scope of the contractual rights and obligations attendant to the relationship [citation omitted].

[53] Under the Rules, before a lawyer commences to act for a client on a matter, he or she must provide information on particular aspects of client care and service.²⁰ Having done so, the existence of the retainer is confirmed.

[54] However, it does not follow that the lack of written terms means that there is no retainer. If, for whatever reason, a lawyer has not provided terms in writing it may sometimes be necessary for a Standards Committee or this Office to make a finding as to whether a retainer exists at all.

[55] This is one such case, as the parties disagree about whether Mr and Mrs SJ were clients of Mr DL, with Mr DL arguing they were not, and that there was, thus, no retainer.

[56] Further in *Lawyers' Professional Responsibility*, the learned author said:²¹

[W]here evidence [as to whether a retainer exists] consists of the lawyer's word against that of the client, *all else being equal*, the court ordinarily sides with the client. An oft-cited judicial pronouncement to this effect is that of Denning LJ in *Griffiths v Evans*, who reasoned that "the word of the client is to be preferred to the word of the solicitor" because "the client is ignorant and the solicitor is, or should be, learned" ... [citation omitted].

[57] At hearing, Mr PQ and Ms BT were unable to indicate much more about Mr and Mrs SJ's position, beyond what they had said in the complaint and responses, and the response to Mr DL's application for review. That may be simply summarised: they

¹⁹ GE Dal Pont *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2017) at [3.05].

²⁰ Lawyers and Conveyancers Act (LawyersL Conduct and Client Care) Rules 2008 rr 3.4, 3.5.

²¹ Dal Pont, above n 19, at [3.55].

regarded themselves as Mr DL's clients, seeking advice about Mr and Mrs Y's respective estates.

[58] I do not place particular reliance on the fact that Mr DL did not provide Mr and Mrs SJ with written terms of engagement, as being evidence that there was no retainer. This approach has been urged by Mr DL, who submits that his law firm has a comprehensive procedure for opening a file when accepting instructions to act for a client, which includes the provision of terms of engagement. Mr DL submits that he did not invoke those procedures, because he did not consider Mr and Mrs SJ to be clients.

[59] As Mr DL has acknowledged, he was particularly busy during this time, late 2013, and frequently away from his home base in other parts of New Zealand. Although I do not doubt that he would otherwise be efficient about following his firm's protocols, the fact that he did not on this occasion does not resolve the issue of whether there was a retainer between him and Mr and Mrs SJ.

[60] What is, perhaps, of more significance is the fact that Mr DL met Mr and Mrs SJ in a meeting room in his law firm's offices, took notes, and promised to revert to them once he had reviewed his firm's two estate files. This suggests a reasonably formal structure.

[61] Were it informal, or simply assisting with information gathering as Mr DL suggests, it might be expected that Mr DL would be careful to draw a line between his professional role as a lawyer, and his role in responding to queries from a couple he had known socially some years earlier.

[62] In looking at the question of whether a retainer existed, it is also instructive to consider what Mr DL said to Mr and Mrs SJ in his 13 December 2013 email. This email was sent from Mr DL's law firm's email account.

[63] Mr DL said:

Now that [Mr Y] has died, the question I understand that you are interested in is whether any claim can be made in [Mr Y's] estate with respect to the survivorship interest that he apparently took when [Mrs Y] died ... It might be possible ... to assert that [Mr Y] took [Mrs Y's] survivorship interest on a constructive trust for [Mrs Y's four children] ... Against such a constructive trust argument however is the election [Mr Y] made not to pursue a [PRA] claim when [Mrs Y] died.

[64] Mr DL also raised concerns about the lawyer who had acted for Mr and Mrs Y when they purchased the occupation licence, and what advice he gave about the “survivorship consequences” of purchasing the licence as joint tenants.

[65] In my view those comments go further than providing information to which Mr and Mrs SJ may have been entitled, as Mr DL contends the visit and his email were limited to.

[66] I consider that Mr and Mrs SJ were Mr DL’s clients. The following, collectively, are the important factors supporting this conclusion:

- (a) Mr and Mrs SJ have consistently maintained that they considered themselves to be Mr DL’s clients, and that they were seeking advice from him.
- (b) They do not recall Mr DL saying that he could not act. Had he done so, they would have gone elsewhere rather than wait to hear from him following the 15 November 2013 meeting.
- (c) Mr DL saw and spoke to Mr and Mrs SJ at his law firm’s offices, after an appointment was made.
- (d) Mr DL kept a note of the meeting on 15 November 2013. That file note, and Mr DL’s email to Mr and Mrs SJ dated 13 December 2013, do not refer to his inability to act for them or his perception of his limited role of providing them with information to which they were otherwise entitled.
- (e) Mr SJ sent emails to Mr DL following the meeting, including forwarding emails from other family members about Mrs Y’s contribution towards the purchase of the occupation licence, and comments that Mr Y had made to them about that.
- (f) Mr DL’s email of 13 December 2013 was sent through his firm’s email account.
- (g) Mr DL’s email does more than provide information, it specifically refers to a cause of action and to concerns about advice given when Mr and Mrs Y purchased their occupation licence.

[67] I do not overlook the evidence that when Mrs GS approached Mrs B for information about Mr Y's estate, she was told that the beneficiaries of Mrs Y's estate would need to be independently advised. Mr CN submits that Mr and Mrs SJ were aware of this, and so must have known when they spoke to Mr DL in November 2013 that his firm could not act for them.

[68] However, I am satisfied that Mr DL's actions at and after that meeting, including the contents of his 13 December 2013 email, sufficiently override the comments that had been made earlier by Mrs B to Mrs GS. The intervention of Mr DL was a new factor which changed things in the minds of those beneficiaries. As lay-people, this is not an unreasonable conclusion for them to have drawn.

[69] As indicated, I am satisfied that there was a contract of retainer for legal services to be provided by Mr DL to Mr and Mrs SJ.

[70] That retainer had not been committed to writing, in the sense that information on client care and service had been provided "in advance" as is contemplated by r 3.4. This was not seen as a conduct issue by the Committee, nor has it been raised as one by Mr and Mrs SJ.

[71] There is some uncertainty as to whether the requirement to provide terms of engagement "in advance" is "simply a recommendation rather than a mandatory requirement".²²

[72] Because the issue of the lack of any written terms of engagement has not been raised or argued, it is not necessary for me to consider that matter any further. Suffice it to say, that the lack of written terms of engagement is not a definitive answer to the question of whether there was a contract of retainer.

[73] As to the terms of the retainer, in my view Mr and Mrs SJ, on behalf of Mrs SJ and Mrs Y's three other children, were looking for advice as to how they might recover their mother's cash contribution to the purchase of Mr and Mrs Y's occupation licence, particularly as Mr Y had apparently indicated to some of those children that it would eventually revert to them.

[74] I discuss the consequences of finding that Mr and Mrs SJ were Mr DL's clients further below.

²² *McGuire v Manawatu Standards Committee* [2016] NZHC 1052 at [65].

Was Mr DL's email to Mr and Mrs SJ dated 13 December 2013, legal advice?

[75] It will be apparent from my conclusions above, that Mr DL's email of 13 December 2013 contained advice to Mr and Mrs SJ.

[76] It is bears repeating, as it underpins the conclusion that Mr DL provided legal advice, that Mr DL said "...the question you are interested in is whether any claim can be made...". He then proceeded to answer that question.

[77] The email is written in the language of a lawyer setting out the legal issue about which advice has been sought. It referred to a query about a "claim". In his email, Mr DL:

- (a) queried whether Mrs Y's estate could have made a PRA claim against Mr Y's estate;
- (b) raised the possibility that Mrs Y's beneficiaries could bring a constructive trust claim against Mr Y's estate in relation to Mrs Y's cash contribution towards the purchase of the occupation licence;
- (c) commented that there was a counterfactual to any constructive trust argument — which is that Mr Y elected to forgo any claim that he may well have had against Mrs Y's estate under the PRA, by his electing Option B;
- (d) offered strategic advice that Mrs Y's children's constructive trust claim could "put [them] in a position to negotiate a Deed of Family Arrangement with the beneficiaries of [Mr Y's] estate pursuant to which they receive some of the proceeds of [sale of the occupation licence] (perhaps all of Mrs Y's survivorship interest)"; and
- (e) raised a concern about the advice given by the lawyer who acted for Mr and Mrs Y when they purchased their occupation licence.

Was Mr DL's advice competent?

[78] Mr and Mrs SJ, and the lawyer subsequently instructed by them to act in relation to Mr Y's estate, have laid considerable emphasis on the PRA as the means by which Mrs Y's children can obtain some form of redress.

[79] The position adopted by Mrs Y's children, following advice from a lawyer, is that they could have used that legislation to bring a claim against Mr Y's estate to secure the return of their mother's contribution towards the purchase of the occupation licence, but that they had six months from the date of the grant of probate in his estate within which to bring the claim.

[80] That date was, according to them, 25 December 2013. They say that Mr DL should have advised them of this. Because he did not, they lost their opportunity to bring a claim when Mr Y's estate was finally distributed.

[81] In considering the application of the PRA, the Standards Committee concluded that Mr DL's advice about this was wrong, and that he had overlooked a critical time limit.

[82] On the other hand, Mr CN submitted that the PRA did not apply and could not be pleaded in any cause of action, by any of Mrs Y's children.

[83] It is important to look closely at the application of the PRA as there has been much heat and little light generated about it.

[84] The starting point is that under the PRA, proceedings may only be brought by, relevantly, "either spouse or partner, or both of them jointly".²³

[85] In the case of a deceased spouse, s 88(2) of the PRA provides that "the personal representative of the deceased spouse or partner, may, with the leave of the court, apply for [orders under s 25(1)(a) of the PRA]". The section further provides that the court "may grant leave only if it is satisfied that refusing leave would cause serious injustice".

[86] Section 89 of the PRA allows proceedings to be commenced after the death of one of the spouses if the couple were living together at the death of that spouse.

[87] Section 90(1)(b) of the PRA prescribes the time limit for bring proceedings against the estate of a deceased spouse: "no later than 12 months after administration of the estate of the deceased spouse ... is granted in New Zealand".

[88] It is clear from the above that the PRA contemplates proceedings by or between the estates of deceased partners. A trustee of one deceased partner's estate

²³ Property (Relationships) Act 1976, s 23(1)(a).

can bring proceedings against the trustee of the other deceased partner's estate. Such would not be common, but it is allowed for by the scheme of the PRA.

[89] The PRA also contemplates proceedings by a living partner against the estate of their deceased partner, and a claim by the estate of a deceased partner against a living partner.

[90] Claim must be brought within 12 months of the grant of probate of the first deceased partner.

[91] I accept Mr CN's submission that Mrs Y's children could not, in their own names, bring a claim against either Mr Y whilst he was still alive, or Mr Y's estate after he passed away, under the PRA. If such a claim can be brought at all, it could only be in the name of Mrs GS as the trustee and executor of Mrs Y's estate.

[92] The difficulty for Mrs GS is that she is also a beneficiary and cannot as a trustee bring proceedings in a matter in which she stands to benefit personally. That difficulty is not insurmountable, and would require steps to have her formally replaced as the trustee and executor of Mrs Y's estate, with the replacement trustee continuing the proceedings on behalf of that estate.

[93] A further difficulty in any claim by Mrs Y's estate, is that probate was granted in Mrs Y's estate on 13 December 2007. Proceedings against Mr Y personally, while he was alive, should have been commenced on or before 13 December 2008.

[94] Mr Y passed away in May 2013, and probate was granted in June of that year. By then, well over five years had passed since probate had been granted in Mrs Y's estate. Any claim by her estate would have to have been brought against Mr Y's estate.

[95] However, by February 2014 Mr Y's estate had been finally distributed. There is, in effect, nothing to sue for. This factor would be significant in any judicial consideration of whether to grant leave to Mrs Y's estate to bring proceedings against Mr Y's estate.

[96] In his email to Mr and Mrs SJ dated 13 December 2013, Mr DL makes an oblique reference to a challenge under the PRA. I do not read that as advice that there was, at that time, an ability on the part of someone to bring such a claim. Rather, in the context in which that reference appears, it is clear to me that Mr DL is referring to the

possibility that Mrs Y's estate could have brought a claim against Mr Y personally under the PRA for the amount she contributed to the purchase of the occupation licence, and which had passed by survivorship to Mr Y. This, presumably, would be on the basis that although the occupation licence was jointly owned, it was recognised by the couple that their contributions to its purchase remained their separate property.

[97] Mr DL correctly observed that the time for bringing such a claim had long since passed.

[98] When analysed in that way, it seems clear that any complaint that Mr DL gave Mr and Mrs SJ incompetent advice about the time limit provisions of the PRA, has no substance. There was a theoretical possibility of proceedings by Mrs Y's estate against Mr Y's estate, but any such proceedings would be riddled with difficulties, not the least of which concern time limits, to the point of being almost insurmountable.

[99] The balance of Mr DL's advice was not challenged by the complainants. There is nothing before me to suggest that what Mr DL said, about the possibility of there being a constructive trust claim, was wrong.

[100] It follows that the Committee's finding of unsatisfactory conduct on the basis that Mr DL's advice fell short of the standard of competence and diligence, that a member of the public is entitled to expect of a reasonably competent lawyer, is reversed.

Rules breaches

[101] The Committee concluded that Mr DL was guilty of three groups of rules breaches:

- (a) Breaches of rr 5, 5.1, 5.2 and 5.3 (independent judgment and advice).
- (b) Breach of r 6.1 (acting for more than one client where their interests do not align).
- (c) Breach of rr 8 and 8.7 (breach of the duty of confidence to the executor of Mrs Y's estate).

[102] The Committee's overarching concern was that Mr DL's law firm had acted in the administration of Mrs Y's estate, and was at the relevant time, late 2013, still acting in the administration of Mr Y's estate.

[103] As such, Mr DL had a duty not to disclose confidential information about the administration of either estate, to any third party. He also had a duty not to act against the interests of either client.

Rule 6.1

[104] The obvious starting point is to consider r 6.1. It provides:

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 one or more of the clients.

[105] It requires little analysis to conclude that Mr DL's law firm could not, on the one hand, act for the executor of Mr Y's estate and at the same time act for a party whose interest is in challenging that estate. The interests of both clients can never align.

[106] Indeed, Mr DL acknowledges that. He believes that he informed Mr and Mrs SJ that he could not have acted for the beneficiaries of Mrs Y's estate against Mr Y's estate.

[107] I have found that despite appearing to appreciate that conflict, Mr DL nevertheless had, albeit briefly, a lawyer-client relationship with Mr and Mrs SJ, during the course of which he gave advice about a claim against Mr Y's estate.

[108] To that criticism, Mr CN submitted to Mr Hesketh that the advice was in the nature of a "straw man" which Mr DL then demolished. In other words, Mr DL referred to the possibility of a constructive trust claim, but then put the counterfactual, which was that Mr Y was entitled to the contribution that Mrs Y had made by virtue of the PRA. In this way, Mr DL had not given advice against the interests of Mr Y's estate.

[109] The difficulty that I have with this argument is that Mr DL goes much further. In his email, he offers the strategic advice that the beneficiaries ought nevertheless to bring the constructive trust claim in order to secure leverage to negotiate a settlement with the beneficiaries of Mr Y's estate.

[110] There is no basis to argue that this was anything other than advice that was completely against the interests of his client, Mr Y's estate.

[111] Mr DL ought not to have given any advice about the potential rights and claims of the beneficiaries of Mrs Y's estate, against Mr Y's estate. It placed him fairly and

squarely in breach of r 6.1. The rule prevented Mr DL from acting for Mr and Mrs SJ and the other beneficiaries.

[112] For completeness, I note that Mr DL did not personally act for or have any involvement in the administration of Mr Y's estate. That task fell to Mrs B. However, r 6.2 provides that r 6.1 applies "whenever lawyers who are members of the same practice act for more than 1 party". Although Mrs B is a registered legal executive, she will have been managed within Mr DL's law firm by another lawyer, who will ultimately be responsible for Mr Y's estate file.

[113] I agree with the Committee's conclusions in relation to r 6.1.

Rules 8 and 8.7

[114] The particular breach found by the Committee to have been committed by Mr DL under this heading, is that he gave Mr SJ confidential information about Mrs Y's estate in circumstances where Mr SJ was neither executor nor a beneficiary.

[115] I do not agree with the Committee's finding in that regard.

[116] Both Mr and Mrs SJ saw and spoke to Mr DL at his offices on 15 November 2013. Mrs SJ was a beneficiary in Mrs Y's estate. The executor of that estate was Mrs GS, Mrs SJ's sister and another beneficiary in the estate. The administration of that estate had been concluded several years before the meeting in November 2013.

[117] The relevant client for the purposes of the administration of Mrs Y's estate was Mrs GS, the executor. Mr DL's duty of confidentiality was to her.

[118] Mrs GS had tried to obtain information about Mr Y's estate from Mrs B, but had been told that the beneficiaries had to be independently represented. In an email exchange between Mrs GS and Mr and Mrs SJ, forwarded to Mr DL in late November 2013, Mrs GS outlined that discussion with Mrs B.

[119] In late November 2013, another of Mrs Y's children also had email correspondence with Mr SJ in connection with Mrs Y's cash contribution towards the purchase of the occupation licence. That email exchange was also forwarded to Mr DL by Mr SJ.

[120] Mr and Mrs SJ also spoke to Mr DL about the collective wish of the beneficiaries of Mrs Y's estate — her children — to try to recover their mother's

contribution towards the purchase of the occupation licence. The complaint against Mr DL is brought on behalf of “the family of [Mrs Y]”.

[121] Rule 8.4(a) creates an exception to the presumption of confidentiality “where the client [Mrs GS] ... impliedly authorises the disclosure”.

[122] In my view, it was more than reasonable for Mr DL to conclude that he had the implied authority of Mrs GS, as the executor of Mrs Y’s estate, to provide Mrs SJ with information about the administration of that estate. It would have been readily apparent to Mr DL that whatever he said to Mr and Mrs SJ would be circulated by them to the other beneficiaries of Mrs Y’s estate.

[123] The Committee’s particular concern was that Mr DL ought not to have also told Mr SJ.

[124] It is, in my view, an artifice to suggest that Mr DL ought not to have engaged with Mr SJ. Mr and Mrs SJ are clearly husband and wife, and known by Mr DL for some time to have been so. They visited his offices and spoke to him together. Mr DL’s email of 13 December 2013 was addressed to them both.

[125] For those reasons the Committee’s determination that Mr DL had breached rr 8 and 8.7, is reversed.

Rules 5, 5.1, 5.2 and 5.3

[126] The Committee held that as Mr DL’s law firm was acting in the administration of Mr Y’s estate, “it was completely inappropriate to provide any form of advice about bringing claims against that estate. In doing so, Mr DL was compromised and not acting solely for the benefit of [the executors of Mr Y’s estate]”.²⁴

[127] It is difficult to precisely identify the various r 5 breaches by Mr DL that the Committee had in mind. Its decision refers simply to giving advice against the interests of Mr Y’s estate.

[128] It may be that the Committee considered that Mr DL was not “independent” when he, whilst his firm acted in the administration of Mr Y’s estate, gave advice against that client’s interests to Mr and Mrs SJ.

²⁴ Standards Committee determination, above n 2, at [27].

[129] A more appropriate rule to cover this situation would, perhaps, have been r 6, which provides:

In acting for a client, a lawyer must, within the bounds of the law and these rules, protect and promote the interests of the client to the exclusion of the interests of third parties.

[130] However, although the Committee referred to that rule as a potential issue in its Notice of Hearing, it did not ultimately consider and make any determination about it. Consequently, it has not been addressed by Mr DL in his application for review. It is not appropriate for me to now consider and make a finding about r 6.

[131] I am not persuaded that the facts of this matter neatly engage the various parts of r 5 that the Committee identified. It seems to me that r 5 and its sub-parts are more concerned with external influences that might affect a lawyer's duty of loyalty to their client. In the present matter, Mr DL made the mistake of acting for two clients with competing interests, and from that basic standpoint the disciplinary issues have flowed.

[132] The Committee's determination of unsatisfactory conduct in relation to the various r 5 breaches, is therefore reversed.

Penalty

[133] The Committee found that there were four conduct breaches by Mr DL, as follows:

- (a) Advice that fell below the required standard of competence and diligence.
- (b) Breaches of r 5 and some of its sub-parts.
- (c) Breach of r 6.1.
- (d) Breaches of rr 8 and 8.7.

[134] For those breaches, which the Committee held amounted to unsatisfactory conduct, it fined Mr DL \$5,000.

[135] I have overturned all but the finding that Mr DL breached r 6.1.

[136] In considering the appropriate penalty to impose for that breach, I take into account the following:

- (a) Although there was a lawyer client relationship between Mr DL and Mr and Mrs SJ, I accept that Mr DL was primarily motivated to assist them in circumstances where they had had an association with his firm in the past, and he had known them socially.
- (b) In addition, Mr DL initially considered that their approach was by way of a complaint about Mrs B, and Mr DL was concerned about that.
- (c) The advice Mr DL gave Mr and Mrs B was competent and, it would appear, correct. I do not accept that Mr DL has caused the beneficiaries of Mrs Y's estate to suffer any loss.
- (d) Mr Y's estate did not suffer any loss of any description as a result of the advice given against its interests.
- (e) Mr DL is a senior and well-respected lawyer both locally where he practices, and nationally. He has an unblemished disciplinary record.

[137] In all of the circumstances, I consider that Mr DL's conduct in breaching rule 6.1 can be met by the imposition of a fine of \$1,000.

Decision

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

- (a) reversed as to the finding of unsatisfactory conduct for a breach of s 12(a) of the Lawyers and Conveyancers Act 2006;
- (b) reversed as to the finding of unsatisfactory conduct for breaches of rules 5, 5.1, 5.2 and 5.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008;
- (c) reversed as to the finding of unsatisfactory conduct for breaches of rules 8 and 8.7 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008;
- (d) confirmed as to the finding of unsatisfactory conduct for the breach of rule 6.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008;

- (e) modified by the reduction of the fine imposed from \$5,000 to \$1,000 for the breach of rule 6.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008; and
- (f) confirmed as to the payment of costs of \$1,000 to the New Zealand Law Society.

Costs

[139] In the circumstances, given that Mr DL has been substantially successful with his application for review, no order for costs of this review is made.

DATED this 29TH day of November 2017

Rex Maidment
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 DL as the Applicant
Mr CN as the Representative for the Applicant
Mrs SJ, Mrs GS and Mr PQ as the Respondents
Mr TH as a related person
[Area] Standards Committee
New Zealand Law Society