

LCRO 48/2014

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 [X]

BETWEEN

M LJ AND THE TRUSTEES OF THE M LJ FAMILY TRUST

Applicants

AND

PY

Respondent

DECISION

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

Introduction

[1] On behalf of the M LJ Family Trust, Mrs LJ has applied for a review of a decision by the [Area] Standards Committee [X] (the Committee) to take no further action in respect of the complaint by Mrs LJ and the trustees concerning Mr PY's conduct.

[2] Mr PY acted in two conveyancing transactions involving Mrs LJ's Family Trust, and that of her husband.

Background

[3] Mr and Mrs LJ were married. They each had a family trust. The trustees of the Trusts (in both cases Mrs LJ, her husband and an independent trustee) owned, as tenants in common in equal shares, two farms, the "[AB] Farm" and another on the corner of [address] ([XY] Road). The LJs lived in a home with their children on one of

the farms. The LJs also operated a company in which they were directors and shareholders. The Trusts displayed outward manifestations of partnership, including by arranging for Trusts Partnership accounts to be prepared, and presumably by filing tax returns based on the Trusts Partnership accounts.

[4] In May 2010, Mr and Mrs LJ separated. Mr LJ moved out. Mrs LJ and the children did not. Company and farming operations continued.

[5] Mrs LJ and her husband discussed their situation. At some point Mr LJ proposed buying Mrs LJ's Trust's share in one of the farms. That proposal did not eventuate, both farms were placed on the market and the [AB] Farm sold first.

[6] Mr LJ contacted Mr PY and asked if he would act on the transactional aspects of the farm sales.

[7] On the understanding that the Trusts Partnership would be his client, on 20 April 2011, Mr PY sent his firm's standard terms of engagement attached to a letter addressed to "The Trustees, R & M LJ Family Trusts Partnership". Mr PY sent a copy of the letter to Mrs LJ, but referred to discussions he had had with Mr LJ, apparently on behalf of all concerned. The letter began:

Dear Mr LJ

SALE OF [AB] FARM TO [CD] LANDS TRUST

We refer to our previous discussions with [Mr LJ] and confirm that our instructions are to proceed with the sale of your property...

[8] Mr PY went on to set out the terms on which he expected his retainer to proceed. It is evident from the letter that Mr PY had received the agreement for sale and purchase signed by all of the trustees of the vendor and purchaser trusts, and had reviewed that. Reference is made to the agreement being conditional on the purchasers [sic] obtaining finance and a satisfactory LIM. Mr PY also noted that the agreement made provision for a subdivision that was not expected to be complete at the date of settlement, but if complete within the proposed timeframe, would result in title to a lot being transferred back to (somewhat ambiguously) "yourselves".

[9] Paragraphs 6 and 7 say:

6. Any discussions with regard to the sale and distribution of funds will need to be with all parties either personally or through your solicitors.
7. The further conditions of sale we believe are self explanatory and we have discussed these with you. If you have any queries with regard to those conditions please contact us.

[10] Up to 20 April 2011, it appears that all of Mr PY's discussions had been with Mr LJ. However, by early May 2011, Mrs LJ and her husband were both separately represented. Mrs LJ instructed Mr LK who instructed Ms GW as counsel. Mr LJ instructed Mr TB.

[11] Correspondence was exchanged between Mr TB, Ms GW and Mr LK about the LJ's relationship property and related trust and company issues including the farm sales.

[12] The LJs personally did not reach agreement on all matters for the purposes of the Property Relationships Act, which left open questions, including what was to happen on the sale regarding the distribution of funds. In amongst the proposals exchanged was the suggestion, which the trustees of the Trusts did not adopt, that Mr LK might act on the farm sales.

[13] Settlement of the sale of the [AB] Farm was scheduled to occur on 1 June 2011. Mr PY was not instructed to delay or cancel settlement, and on 25 May 2011, Mrs LJ and her husband went to Mr PY's office to sign documents to enable that sale to proceed. Mr PY's file-note of his meeting with Mrs and Mr LJ on 25 May 2011 includes the following:

25/5

Atg R and M LJ

Keep all funds from 2nd agmt in [law firm's] trust a/c

...

Pay back R's parents ...

...

M's solr is [GW] – [City]

[14] "Keep all funds from 2nd agmt in [law firm's] trust a/c" is significant because the money released from that sale would represent the Trusts' equity in the farms. Mrs LJ claimed a personal interest in that money. At that stage, although the Trusts owned both farms as tenants in common in equal shares, no one knew what would be left over for either of the LJs personally or their respective Trusts. There were joint obligations and liabilities to be met by the trustees to other parties, debts to pay and other property issues to be resolved before the LJs could finalise their personal arrangements over relationship property.

[15] Insofar as registered mortgages securing bank loans were concerned, Mr PY would have had to provide a solicitor's certificate undertaking to the mortgagees that he would repay the trust debt that was secured by mortgages. That would enable him to register discharges of mortgages, so the transfers could be registered with the purchasing trustees taking clear title.

[16] Mention was also made of paying back Mr LJ's parents. Although it appears from what followed settlement of the [AB] Farm sale that the LJs accepted they owed his parents money, the parents had no registered interest in either farm. Whatever the value of the parents' contribution, it was a consideration that was discussed at the meeting with Mr PY before the sale of the [AB] Farm proceeded.

[17] Mr PY was told that Mrs LJ had instructed Ms GW (who is a barrister) as her solicitor.

[18] Mr PY's understanding from his meeting with the LJs on 25 May 2011 was that the trustees of the Trusts Partnership had unanimously instructed him to do the transactional work associated with selling the [AB] Farm, receive and hold money from the sale exclusively for the Trusts Partnership and pay it out as the trustees would unanimously direct.

[19] Then there was [XY] Road. It is inferred from Mr PY's letter of engagement dated 3 June 2011 that on 25 May 2011 there was a level of uncertainty over whether that sale would proceed.

[20] After the meeting on 25 May 2011, Mr PY received further instructions regarding distribution of the money from the sale of the [AB] Farm from 26 May 2011 onwards, on the part of Mrs LJ, from Ms GW.

[21] Settlement of the sale of the [AB] Farm proceeded without incident on 1 June 2011. Mr PY received money into his firm's trust account and paid it out on directions from the trustees, Mrs LJ and Mr LJ included, in Mrs LJ's case, via her lawyers. Mr PY also received some money from the LJs' company.

[22] Mr LJ's parents adopted the position that they had lent, not given, \$1.3million, and expected it back from Mr and Mrs LJ. That argument was resolved on the basis that Mr PY was directed to pay \$1.3 million to Mr LJ's parents, while Mrs LJ expressly reserved her position on whether that money had been a loan or a gift.

[23] After attending to the payments out of money held in his trust account as directed, Mr PY held the balance for the Trusts Partnership and sent a copy of his

firm's settlement statement, addressed to the Trusts Partnership, to Mrs LJ, Mr LJ and their respective lawyers. No one made any comment to Mr PY about him having received money for and on behalf of the trustees of the Trusts Partnership, made payments or held money for the Trusts Partnership.

[24] On 3 June 2011, Mr PY sent a second letter of engagement to the Trusts Partnership regarding the sale of [XY] Road. Mr PY sent that letter to Mrs LJ and her husband at their separate addresses, [addresses] respectively. Mr PY referred to a recent meeting and telephone conversations and confirmed he had been instructed to proceed with the sale of [XY] Road.

[25] Mr PY enclosed a copy of the agreement for sale and purchase of [XY] Road, noting it was unconditional, and that he would have to attend to the release of registered mortgages in advance of settlement on 17 June 2011. Mr PY referred to a payment he was to make to the LJ's company and again invited those concerned to address any queries over the conditions of sale to him.

[26] On 17 June 2011, Mr PY again received settlement money into his firm's trust account, and paid some of it out on directions from the trustees, in Mrs LJ's case, via her lawyer. Mr PY held what was left of the money for the Trusts Partnership in his firm's trust account. Again, Mr PY sent his firm's settlement statement, addressed to the Trusts Partnership, to Mrs LJ, Mr LJ and their respective lawyers.

[27] As anticipated, the second sale released substantial equity which Mr PY received into his firm's trust account on 17 June 2011 without demur from either party or their lawyers at the time. Mr PY paid some money out as directed and held the rest of the money in his firm's trust account exclusively on behalf of the Trusts Partnership.

[28] Mr PY awaited further directions from the Trusts Partnership which did not arrive.

[29] By July 2011, Mrs LJs lawyers had begun to explore Mr PY's dealings with Mrs LJ, quizzing him and challenging his responses.

[30] By August 2011, Mrs LJ had instructed her lawyers to direct Mr PY to pay money out of his trust account.

[31] Having received no similar direction from the other two trustees, Mr PY considered himself unable to act on Mrs LJ's direction. He continued to hold the money in his firm's trust account exclusively for the Trusts Partnership.

[32] Mrs LJ's lawyers propounded various arguments on her behalf in an attempt to persuade Mr PY to deviate from his understanding of his obligation to hold and pay the money as directed by all of the trustees of the Trusts Partnership.

[33] In early March 2012, Mrs LJ lodged a complaint to the New Zealand Law Society (NZLS) regarding Mr PY's conduct. At about the same time she rearranged the trustees of her trust, appointing her brother and removing Mr LJ. Mrs LJ also brought an application for interim injunction in the High Court against Mr PY, his firm and the trustees of Mr LJ's trust, aimed at breaking the deadlock over the money Mr PY held in his firm's trust account.

[34] The Court did not grant interim relief, and in due course the parties reached what is said to have been a confidential settlement in the High Court. It is understood that all of the trustees at that time directed Mr PY to pay the money held out of his firm's trust account. Nonetheless, it was agreed that Mrs LJ could pursue the complaint made on her behalf to NZLS some months earlier.

Complaint, response and Standards Committee processes

[35] On 8 March 2012, Mr LK on behalf of Mrs LJ and her Trust made a wide-ranging complaint about Mr PY's conduct and service. Mr PY responded comprehensively to the concerns raised. Written submissions were exchanged over several months during 2012.

[36] The Committee deferred consideration of the complaint at Mr PY's request and without opposition from Mrs LJ, while the injunction proceeding was concluded by agreement. With the exception of her residual concerns over rr 6.1 and 10.2, Mrs LJ accepted that Mr PY's conduct had not fallen below a proper professional standard.

[37] The Committee completed its process on the basis of issues raised in Mr LK's submissions of 21 February 2013. The two key issues were whether Mr PY's conduct contravened rr 10.2 and 6.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

Mrs LJ's complaint

[38] The alleged contravention of r 6.1 was supported by arguments first traversed in correspondence that had been sent to Mr PY before Mrs LJ commenced proceedings in the High Court and laid her complaint. Mr LK argued the point in his submissions to the Committee dated 21 February 2013 in the following way:

The complaint is that [Mr PY] should not have acted as the situation was one in which there was a conflict between the interests of [Mr and Mrs LJ].

[39] Mrs LJ's position is that she understood from her husband that the sale proceeds would be shared equally between them and available to each of them immediately. Mrs LJ says that was the basis on which she instructed Mr PY on 25 May 2011, and that is the basis on which, from her perspective, discussions proceeded that day.

[40] However, difficulties arose for Mrs LJ when her expectations of a timely payout were not met and her (Trust's) share of the sale proceeds did not become available to her Trust, or her, immediately. Unable to break the deadlock with her co-trustees, and unable to persuade Mr PY to depart from his understanding that his instructions obliged him to hold the Trusts Partnership's money until he received a direction from all the trustees of the Trusts Partnership to pay it out, Mrs LJ commenced proceedings.

[41] The nub of Mrs LJ's complaint regarding the alleged contravention of r 10.2 was that Mr PY had communicated directly with her over the farm sales, knowing she was represented in those matters by another lawyer. It is argued that none of the exceptions to r 10.2 apply.

[42] It was argued for Mrs LJ that she suffered losses through being unable to access her (Trust's) exclusive share of the money (however much that might have been). The exclusive right argument was premised on various grounds, including Mrs LJ's instructions to Mr PY not being irrevocable, her Trust being the owner of a half-share as a tenant in common with her husband's Trust, and the rights of partners against one another pursuant to s 23 of the Partnerships Act 1908.

[43] It was argued that as the farms were owned by tenants in common, Mr PY could not receive the money from the sale of the farms without immediately dividing it into a half share for each Trust, so that the share to which Mrs LJ's Trust was

exclusively entitled as a tenant in common would have been immediately available to her.

[44] Mr LK says the salient issue is not the instructions Mr PY claims were given on 25 May 2011. Mr LK argues “that Mr PY should not have accepted instructions in circumstances where Ms GW was acting for Mrs LJ” who was in dispute her husband, and their interests were inconsistent or in conflict.

[45] Mr LK says Mr PY should have referred Mrs LJ and her husband to their own lawyers, whom he knew were acting. Those lawyers would then have given instructions as to how the money was to be dealt with.

[46] Mr LK’s view is that where, as here, tenants in common do not share a common interest, the practice of opening a single trust account ledger in joint names ought not to be followed because it “leaves open to one of the parties to later refuse ... to consent to payment out”.

Mr PY’s Responses¹

[47] Mr PY says he advised Mr LJ that he and Mrs LJ could sign the settlement documents together at his office or separately at their respective lawyers’ offices. Mr PY’s view is that by the time they met at his office Mrs LJ and her husband had agreed that the two sales should proceed, which made his attendances purely procedural.

[48] Mr PY was aware the couple “had not yet resolved their property matters”, but were in negotiation, although beyond agreeing to sell the farms, he did not know what point they had reached. Mr PY says he gave no advice to either about the division of relationship and other property, making it clear that each had to consult their own lawyer on that matter. Mr PY says that by the end of his meeting with the LJs on 25 May 2011 he knew they were both legally represented in respect of relationship property and by whom. Mr PY refers to correspondence exchanged with Mrs LJ’s lawyers from 26 May 2011 onwards.

[49] Mr PY says he had one client, which was the vendor of the two farm properties, and that client was the Trusts Partnership. Mr PY says he has not

¹ Mr PY responded (either directly or through his counsel) on 30 March 2012, 27 April 2012, 21 August 2012, 11 December 2012, 28 June 2013 and 16 August 2013.

purported to act for any other party and there is no evidence of him having done so. There is also no evidence of Mr PY having been instructed by Mrs LJ, her husband or any of their lawyers in advance of either settlement not to follow what Mr LK came to describe later as the usual practice of opening a single trust account ledger, which is what Mr PY did.

[50] Mr PY confirmed that he received the two sale and purchase agreements for the farms, the second arriving some weeks after the first. The LJs, through their lawyers, instructed him to pay some debts, then hold the balance of the money in his firm's trust account pending resolution of all matters between them. Mr PY "did not anticipate any disadvantage" to either party, "but rather considered it to be in both parties' interests to have the settlement sums held pending resolution of its disbursement".

[51] Mr PY says he did not consider that there was a conflict of interest between Mr and Mrs LJ in relation to the sales of the farms because both Trusts were contractually bound to settle the sales. Mr PY says it is "industry practice for a solicitor to act for two vendors in a sale and ... this does not bring about a conflict of interest".

[52] Mr PY says he could not act on the instructions of only Mrs LJ or her husband. Mr PY's understanding was that he was acting as a stakeholder in relation to the money. He therefore could not release any of it without the consent of all the Trustees concerned. He considers that was reasonable and accorded with industry practice.

[53] Through his counsel, Mr PY submitted authority from this Office to the effect that a lawyer acting for tenants in common cannot disburse money without agreement between the tenants. Further, where tenants in common have a contractual obligation to settle a sale, "there is no conflict of interest between them".²

[54] Expert evidence on which Mr PY and his firm relied in the High Court proceeding, concludes with the following quote from the Property Law Section Practice Guidelines (the Guidelines):³

If you are acting as the independent lawyer, you must deal with the settlement proceeds as instructed by the lawyers for the parties. You must hold the proceeds undisbursed on behalf of all parties, if they cannot agree how the proceeds should be dealt with.

² *IK v SN* LCRO 42/2011 (21 February 2012) and *AJ v ZQ* LCRO 134/2010 (7 February 2011) at [65].

³ At [20], citing New Zealand Law Society "Property Transactions and E-Dealing Practice Guidelines" (April 2015) <www.lawsociety.org.nz> at 31.

Standards Committee decision

[55] In its decision dated 20 December 2013, the Committee addressed all of the issues raised in the complaint. Although those were more extensive than the two issues considered on review, the relevant points were dealt with by the Committee in the following way.

Failure to hold monies in a separate trust account and pay out when directed

[56] In deciding to take no further action on this issue of complaint, the Committee said:⁴

- (a) The funds for tenants in common in half shares could be held in one account, but still be properly attributable to the relevant parties. Mr PY's alleged failure to follow instructions in this regard did not necessarily indicate any breach of his professional obligations.
- (b) Mr PY did not release the funds held in his firm's trust account on behalf of the M LJ Family Trust, in accordance with the Trustees' instructions. This was on the understanding that he required the agreement of the Trustees of both trusts.
- (c) Although the farms were held by tenants in common in equal shares:

that does not always mean that the parties are each entitled to a half share of the eventual proceeds. In many cases, other factors come into play. ... Mr PY was correct not to simply pay out according to the share percentage.

Breaches of rr 10.2, 12 and 12.1

[57] The Committee considered that Mr PY's meeting with Mr and Mrs LJ on 25 May 2011 was "largely a procedural one to sign documents" and that this did not involve a breach of the rules in question.⁵

Application for review

[58] Mrs LJ advanced the following grounds for review in her application dated 24 February 2014:

⁴ Standards Committee determination, 20 December 2014 at [76]–[78].

⁵ At [84].

- (a) The Committee was wrong to conclude that although Mr PY was aware that Mrs LJ had her own lawyer and that the parties had not reached agreement about the division of property, he nevertheless had a duty to accept Mr and Mrs LJ's instructions to pool the farms sales proceeds and not distribute them until jointly instructed to do so.
- (b) This was wrong because the operation of r 6.1 prevented Mr PY from accepting instructions.
- (c) The Committee held that although the parties' interests were aligned in relation to the sale but may not have been aligned in relation to the funds, that both parties had their own lawyers in this regard. This overlooks that a lawyer in those circumstances is obliged to ensure that he/she gets instructions not from the client but from the client's lawyer as to what is to happen in relation to the sale proceeds.
- (d) The Committee was wrong to speculate that had Mr PY referred Mr and Mrs LJ to their respective lawyers for advice about the sale proceeds, then the outcome would likely have been the same.
- (e) The Committee was wrong to find that Mr PY was not preferring the position of Mr LJ over that of Mrs LJ.
- (f) The Committee was wrong to find that the meeting between Mr PY and Mr and Mrs LJ on 25 May 2011, was largely procedural to sign documents. Mr PY went further and took instructions as to the sales proceeds without reference to Mr and Mrs LJ's lawyers.

[59] Mrs LJ also asked for her "lawyers' costs on the complaint and this application for review" to be met, and for the first time asked that Mr PY be ordered to pay her compensation:

for losses incurred by the actions which are the subject of the complaints including costs incurred by [her] in having to pursue court action to obtain the funds which [Mr PY] improperly refused to pay ...

Response by Mr PY

[60] Through his counsel, Mr PY responded to the application for review. He submitted that the Committee's determination was correct and should be upheld. In particular:

- (a) The proceedings between Mrs LJ and Mr PY (and others) were settled and included Mr PY making a payment to Mrs LJ. “That ... should be the end of any claim for compensation by Mrs LJ against Mr PY”.
- (b) Mr PY was aware that Mr and Mrs LJ had not yet resolved property matters and that this was why his law firm was to hold the money from the farm sales, pending agreement. Mr PY was not aware whether Mr and Mrs LJ “were in dispute or simply working through matters”.
- (c) Mr PY had no idea of any potential disadvantage to either party. He did not anticipate any disadvantage and considered it to be in their interests to have the settlement sums held pending resolution.
- (d) Mr and Mrs LJ’s interests were aligned in relation to the sales of the properties.
- (e) “It is industry practice for a solicitor to act for two vendors in the sale and this does not bring about a conflict of interest”.
- (f) Mr PY was not acting in a conflict of interest because he was acting as a stakeholder.
- (g) There was no conflict in retaining the farms sales funds until any dispute had been resolved. In fact, it was consistent with preserving the interests of both parties, to do so. Moreover, those were Mr and Mrs LJ’s instructions to Mr PY.

Nature and scope of review

[61] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:⁶

... 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

⁶ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

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.

[62] More recently, the High Court has described a review by this Office in the following way:⁷

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.

Statutory delegation and hearing in person

[63] Mr Hesketh is appointed as a statutory delegate pursuant to the Act.⁸ As part of that delegation, on 29 September 2017 in Auckland, Mr Hesketh conducted a hearing at which Ms GW appeared for Mrs LJ, and Messrs HR and VZ appeared for Mr PY. Although Mrs LJ did not attend the review hearing, Mr PY did.

[64] Mr Hesketh explained the process by which a Review Officer may delegate functions and powers to a duly appointed delegate to counsel and to Mr PY. They indicated that they understood that process and took no issue with it.

[65] Mr Hesketh has reported to me about that hearing and I have listened to the audio record of hearing. We have conferred about the complaint, 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.

[66] The delay in determining Mrs LJ's application for review is regretted and an apology is extended to the parties.

Discussion

[67] The parties framed the issues on review in the following way:

- (a) Was Mr PY in breach of r 6.1 in agreeing to act for both Mr and Mrs LJ in the two conveyancing transactions?
- (b) If the answer to that is "no", then that issue of review is at an end.

⁷ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

⁸ Lawyers and Conveyancers Act 2006, sch 3, cl 6.

- (c) If the answer to that is “yes”, then should the breach result in a disciplinary finding?
- (d) If a disciplinary finding should follow, as part of any penalty should Mr PY pay Mrs LJ compensation for the lack of access to and use of her half-share of the settlement funds? If so, how much?
- (e) Was Mr PY in breach of r 10.2 in communicating directly with Mrs LJ about what he should do with her (Trust’s) share of the money at a time when she was legally represented?

Rule 6.1

[68] Rule 6.1 says:

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

[69] For rule 6.1 to be engaged it would have been necessary for Mr PY to have been acting for more than 1 client in the farm sales matter. If Mr PY had only one client, rule 6.1 was not engaged.

[70] While the parties would have this Office draw no particular distinction between Mrs LJ and the trustees of her trust for the purposes of this review, that approach tends to gloss over some important points. Those include the historical arrangements the LJs had made, the way the Trusts and related entities had been doing business before the LJs arrived at Mr PY’s door, and the rules that apply to partnerships and trustees of private trusts.

[71] As the Trusts were private trusts, and the Deeds that establish the LJs’ two Trusts do not say otherwise, it appears that the trustees of both Trusts in May 2011, Mrs LJ, her husband and the independent trustee, were:⁹

governed by the rule of *trustee unanimity*, such that trustees must agree unanimously to any course of action. The unanimity rule is a corollary to the non-delegation principle, for if trustees cannot delegate, it follows that they must all perform the duties attendant upon the execution of the trust. The practical consequence of the rule is that trust business can only be transacted at a meeting of *all* trustees – the general law of private trusts recognises no concept of a “managing trustee”. Actions of one trustee taken independently of co-trustees are beyond the trustee’s powers. To this end, the object of

⁹ GE Dal Pont and DRC Chambers *Equity and Trusts in Australia and New Zealand* (2nd ed, LBC Information Services, Sydney, 2000) at 628.

appointing two (or more) trustees is as a double control over trust property, and a safe-guard against wanton or capricious exercises of trustee discretion.

[72] For accounting and tax purposes at least, the Trusts had been operating as a farming partnership. In order to carry out that business, while the Trusts' interests in the farms were recorded as tenancies in common in equal shares, various historical facts tended to support the argument that, while the interests as tenants in common were divisible as between the Trusts, the trustees had effectively pooled the Trusts' interests by doing business as they had, in partnership.

[73] It is acknowledged that history may not have been convenient to Mrs LJ personally when she and her husband went their separate ways, but that is not a reason to rewrite the past or to draw Mr PY and his firm into a professional standards complaint.

[74] The materials available on review record that Mr PY understood from 20 April 2011 that he would act for one client, the Trusts Partnership, and that he conveyed that understanding to Mrs LJ, her husband and their lawyers in advance of the first settlement. Mr PY's understanding of the position is evidenced by his:

- (a) letter of engagement dated 20 April 2011, addressed to the Trusts Partnership, copied to each of the LJs;
- (b) letter of engagement dated 3 June 2011, addressed to the Trusts Partnership, copied to each of the LJs and their lawyers;
- (c) reporting letters, both addressed to the Trusts Partnership, copied to each of the LJs and their lawyers;
- (d) settlement statements, both addressed to the Trusts Partnership, copied to each of the LJs and their lawyers; and
- (e) correspondence from 26 May 2011 onwards.

[75] Unlike a company or a natural person, a partnership, like a trust, is not a legal entity in its own right. A trust acts through its trustees, whoever they may be at any given time. Trustees have fiduciary obligations, duties, responsibilities and so forth. A partnership is "the relation which subsists between persons carrying on a business in common with a view to profit".¹⁰ Whether or not a partnership exists is a question of

¹⁰ Section 4, Partnership Act 1908, s 4.

fact and law. If there is no written partnership agreement, there are rules laid out in statute that assist in determining whether or not a partnership exists.¹¹

[76] It is beyond the jurisdiction of this Office to determine whether or not the LJs' Trusts were, in fact and law, a partnership.

[77] If Mr PY was wrong, and his client was not in fact and law the Trusts Partnership, no one sought to disabuse him of that understanding between 20 April 2011 and 18 June 2011. By 18 June 2011, Mr PY had completed both of the settlements, received money into his firm's trust account, paid some money out of his firm's trust account and was holding what was left for the Trusts Partnership.

[78] By August 2011, Mrs LJ's lawyers had changed tack. Until then, the identity of Mr PY's client had not been questioned. By August 2011, Mrs LJ appears to have somehow resolved her internal conflicts (as an individual, a trustee of two trusts potentially operating in a partnership, a director and shareholder of the company) sufficiently to have adopted the position that there was nothing left for Mr PY to do but distribute her (Trust's) share of the money held in his firm's trust account at Mrs LJ's sole direction.

[79] Whether or not there was, in fact and law, a partnership between the two Trusts, Mr PY's treatment of the two Trusts as a Trusts Partnership passed entirely unremarked until August 2011, by which time he had committed to a course of action which had at its foundation the operating presumption that there was a Trusts Partnership. As there is no reliable evidential basis on which to conclude that there was no Trusts Partnership, this review is determined on the basis that Mr PY was not acting for two clients but one. That resolves the questions that might otherwise arise if r 6.1 had been engaged on the facts.

[80] As r 6.1 was not engaged, that aspect of the decision is confirmed.

Rule 10.2

[81] Rule 10.2 says:

- 10.2 A lawyer acting in a matter must not communicate directly with a person whom the lawyer knows is represented by another lawyer in that matter except as authorised in this rule.

¹¹ Section 5.

[82] Rule 10.2 is engaged when a lawyer acts for a person the lawyer knows is represented by another lawyer in the same matter.

[83] On the basis discussed above, Mr PY represented the Trusts Partnership in the matter of the farm sales. There is no evidence that any other lawyer represented the Trusts Partnership in the matter of the farm sales. Consequently r 10.2 is not engaged on the facts.

[84] That aspect of the decision is also confirmed.

Summary

[85] I have carefully considered all of the materials available on review including the hearing over which Mr Hesketh presided. In my view there is no reliable basis on which to form a different view to that formed by the Committee, the essence of which is that further action on the complaint is not necessary or appropriate.

Decision

[86] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the Standards Committee's decision is confirmed.

DATED this 5TH day of June 2019

D Thresher
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:

Mrs LJ and the trustees of the M LJ Family Trust as the Applicants
Ms GW QC and Mr LK as the Representatives for the Applicants
Mr PY as the Respondent
Mr VZ and Mr HR as the Representatives for Mr PY
Mr DE as a related person
[Area] Standards Committee [X]
New Zealand Law Society