

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

[2020] NZLCRO 119

Ref: LCRO 003/2019

CONCERNING

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

AND

CONCERNING

a determination of [Area] Standards Committee

BETWEEN

YR

Applicant

AND

OS

Respondent

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

Introduction

[1] Mr YR complained about the conduct of Mr OS in relation to advice provided to YR's daughter, AF.

[2] The [Area] Standards Committee determined that Mr OS had breached rr 5 and 5.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 and made a finding of unsatisfactory conduct, but determined to take no further action with regard to Mr YR's other complaints.

[3] Mr YR has applied for a review of Part 1 of the determination (the liability determination). Part 2 (the penalty determination) has not been issued pending completion of this review.

Background

[4] In 2001, BF was playing professional rugby in [Overseas]. In that year BF's father (HF) instructed Mr OS to establish a Trust for BF to be known as the "BF Family Trust".

[5] HF was the settlor and settled \$10 on the Trust. The power of appointment and removal of Trustees was vested in BF. The power to appoint additional beneficiaries was also vested in BF.

[6] The Trustees were HF's wife (BF's mother) PF, together with Mr OS. The Deed of Trust provided for both capital beneficiaries and income beneficiaries.

[7] BF was a capital beneficiary. The income beneficiaries included BF as a capital beneficiary together with the spouse of any of the capital beneficiaries.

[8] The Deed was duly executed and dated 19 July 2001. At that time BF had met AF, who was also working in [Overseas].

[9] BF and AF commenced living together in [Overseas] in 2004. Later that year they returned to [NZ] where they looked at a number of properties with a view to buying one as a family home.

[10] AF returned to [Overseas]. BF remained in [NZ] and ultimately purchased a property in the name of the BF Family Trust.

[11] In a letter to Mr OS (dated 26 April 2016), AF's solicitor (Ms [ER]) recorded that the property had been purchased with a substantial advance from BF which was being progressively forgiven by him. His will also provided that any balance outstanding if BF died before gifting was completed would be forgiven and released unto the Trust.

[12] The couple returned to [NZ] again in February 2005 where they were married. Following their marriage, they returned to continue working in [Overseas] where their first child was born.

[13] In March 2006, they gave instructions (in person) to Mr OS to draft wills for each of them. Although the wills were drafted at that time, they were not signed until April 2009. Mr OS was not in the office when the wills were signed and so he did not have any interaction with the couple at the time. It would seem that the wills signed were as drafted in 2006.¹

¹ Mr OS had written to BF and AF on 29 November 2006 asking for confirmation of particular aspects of the wills.

[14] In 2013, BF appointed AF as a Trustee of the Trust and his mother retired as a Trustee. A Deed to record this was signed by all three on 22 February 2013. Their signatures to the document were witnessed by a solicitor in Mr OS's office.

[15] The couple separated in December 2014 and AF was removed as a Trustee by Deed on 25 March 2015. AF was not, however, advised of this, or requested to sign an Authority & Instruction form to transfer ownership of the property until she herself raised the issue with Mr OS in June of that year.

[16] As the family home and other assets² were owned by the Trust, they did not constitute relationship property to be allocated according to the terms of the Property (Relationships) Act 1976.

[17] Mr and Mrs YR provided funds to AF to instruct a lawyer to assist her to claim a share of the Trust assets. That has prompted their complaints against Mr OS, as they argue that the costs of resolving relationship property matters for AF has been greater than would otherwise have been the case if AF had been fully advised by Mr OS of the nature and consequences of the Trust.

Mr YR's complaints

[18] Section 132(1) of the Lawyers and Conveyancers Act 2006 (the Act) clearly establishes that **any person** may complain about the conduct of a lawyer. There is no issue therefore that Mr YR is the complainant, even though it was AF who was Mr OS's client.

[19] Mr YR's complaints are encapsulated in an early section of his letter of complaint.³

.... Mr. OS's negligence in relation to his involvement as the Trust Solicitor of the BF Family Trust ("[BF]FT"), in particular his failure to consider the use of a Property Agreement or other pre-nuptial agreement, resulted in totally avoidable financial loss to me and totally avoidable stress to me, my wife and my daughter, AF when she and her husband BF separated in December 2014. This neglect also resulted in a considerable waste of Court time and expense.

In brief, if Mr. OS had informed my daughter that she was only a discretionary capital [sic] beneficiary in the [BF]FT and would have been left financially destitute and homeless in the event that BF predeceased her or, as has been the case, they separated, she would have been in a position to consider her options and restructure her life accordingly. When AF was appointed a Trustee of the Trust, Mr YR complains that Mr OS "did not explain that role to her".

[20] The underlying issue arising out of the relationship breakdown between BF and AF, is that AF had not been informed that the home and BF's major assets were

² In his complaint Mr YR says that "all of BF's assets were tied up in the Trust".

³ Mr YR, letter to NZLS (8 May 2017).

owned by the Trust, and hence would not be considered to be relationship property in terms of the Property (Relationships) Act 1976.

The Standards Committee determination

[21] The Standards Committee identified the following issues to be determined:

- whether Mr OS had failed to comply with r 3 of the Conduct and Client Care rules by failing to explain to AF her duties as a Trustee when appointed.
- whether Mr OS had failed to meet the requirements of rule 7 when not informing AF she had been removed as a Trustee.
- was Mr OS free from compromising influences and loyalties?
- was Mr OS in breach of his duties by acting for more than one client (BF and AF)?
- by failing to meet his obligations to the couple referred to in the preceding bullet point, had Mr OS failed in his duty of confidence and trust towards AF?
- when completing wills for BF and AF, was Mr OS in breach of his duties to AF when he did not advise her that the house was owned by the Trust and therefore governed by the terms of the wills?

AF's appointment as trustee

[22] Mr OS asserted that he had:⁴

...discussed the Trust and its assets with Mrs AF and her role as a trustee at some length. He states that Mr BF, who was the sole appointer, took no steps to make Mrs AF a capital beneficiary.

[23] The Committee said:⁵

The Committee is of the view that in the circumstances this is a credibility issue and in these particular circumstances is unable to determine the difference in Mr OS's and Mrs AF's accounts of the events. Mr OS is reminded that it is good practice for a lawyer to record his or her advice to clients in writing.

[24] The Committee determined to take no further action with regard to this issue.

⁴ Standards Committee determination (4 December 2018) at [9].

⁵ At [22].

AF's removal as a Trustee

The Committee was of the view that Mr OS was not engaged by anyone other than Mr BF in his capacity as appointer in relation to this matter. He was not therefore acting for the Trustees.⁶

He was not therefore in breach of any obligations to AF.

Compromising influences and loyalties

[25] The Committee determined Mr OS was acting for BF when instructed to remove AF as a trustee. He was also instructed not to advise her of her removal because of "delicate negotiations regarding family matters".⁷

[26] The Committee noted that at the time he received these instructions, Mr OS was also the lawyer for the Trust and said "there was clearly a conflict that ought to have been apparent to him".⁸

[27] It continued:

The Committee is of the view there is a strong argument that Mr OS ought to have advised both clients of the need to take independent advice. ...[However] Mr OS chose to act on Mr BF's request not to provide any information to Mrs AF who was a trustee and was compromised in doing so.

Mr OS was not free from compromising influences and loyalties when following Mr BF's instructions not to tell Mrs AF. This was in breach of his obligations of confidence and trust with Mrs AF in her capacity as a trustee.⁹

[28] The Committee determined that Mr OS was therefore in breach of rr 5 and 5.1 of the Rules.

Conflict – removal of AF as a trustee

[29] The Committee determined that Mr OS was acting only for BF when preparing documentation to remove AF as a trustee, and that therefore he was not acting for more than one client, and was not conflicted.

Confidence and trust

[30] The Committee did not address this issue specifically, but in recording the issues, it said:¹⁰

⁶ At [27].

⁷ At [29].

⁸ At [29].

⁹ At [30]–[31].

¹⁰ At [17].

In the circumstances applying to paragraph b above, Mr OS failed to comply with Rule 5.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, that the relationship between Mr OS and Mrs AF is one of confidence and Trust that must never be [sic] abused.

[31] The Committee therefore made its finding with regard to this matter at that stage.

Conflict – preparation of wills

[32] Mr OS took instructions from BF and AF to prepare wills. He advised the Committee that “he raised with Mrs AF and made her aware that she was not a capital beneficiary”.¹¹ He also subsequently raised the fact that AF was not a capital beneficiary¹² with BF but received no instructions to appoint her as one.

[33] Mr OS was not available when BF and AF called to execute their wills in 2009.¹³

[34] The Committee also noted the different standards applying in 2006¹⁴ which mitigated against making an adverse finding against Mr OS in this regard.

[35] Because of these factors, the Committee determined to take no further action with regard to this issue.

Summary / orders

[36] The Committee made one adverse finding against Mr OS that he had breached rr 5 and 5.1 of the Rules in that he had:¹⁵

...failed to act independently and free from compromising influences or loyalties and in breach of his obligation of trust and confidence when acting on Mr BF's instructions on 25 March 2015 to remove Mrs AF as a trustee of the trust and further at Mr BF's request not telling Mrs AF she had been removed until 9 June 2015.

[37] It then called for submissions from the parties with regard to orders/penalties. However, in the meantime, Mr YR has applied for this review of the determination and consequently (presumably) the Committee has not progressed its decision as to orders/penalties.

¹¹ At [35].

¹² Mr OS, email to BF (21 April 2006).

¹³ It is apparent there was no note with the wills to discuss the fact that AF was not a capital beneficiary of the Trust with them. In any event, Mr OS had raised the matter with BF only and with regard to this matter he regarded BF as his client. He would not therefore have discussed the matter in the presence of both of them.

¹⁴ The Lawyers and Conveyancers Act 2006 came into force on 1 August 2008.

¹⁵ At [41].

The application for review

[38] Mr YR asks for two aspects of the determination to be reviewed:¹⁶

This Application for Review relates to the Committee's decision to take no further action in relation to Mr OS's alleged failure to comply with Rule 3. This appears at paragraphs 18 – 23 of the Notice of Determination.

This also relates to the Committee's decision to take no further action in relation to Mr. OS's alleged failure to comply with Rule 6.1 in relation to the writing of wills in 2006. This appears at paragraphs 34 – 39 of the Notice of Determination.

[39] However, the scope of this review "is much broader than an appeal"¹⁷ and consequently I am not restricted to considering only the issues raised by Mr YR. The High Court has described a review by this Office in the following way:¹⁸

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.

Review

Mr OS's duty to AF

[40] The underlying, and fundamental, issue to be addressed in this review is to examine what duties, if any, did Mr OS have to AF, whether as a client or otherwise.

[41] AF became Mr OS's client when he took instructions from her to prepare her will. In this regard Mr OS was providing regulated services to AF directly.

[42] It is usual for a solicitor when preparing a will to enquire from the client what assets he or she owns. There is no evidence as to whether or not Mr OS did that, but if he had, and AF had referred to her interest in the property, it would have immediately become apparent to Mr OS that she did not know/understand the significance of the fact that the property was held by the BF Family Trust. It is in that situation that Mr OS would most definitely have been required to volunteer information and advice to her.

[43] The situation arose again in 2013 when AF was appointed a trustee of the Trust. At that time Mr OS should again have offered advice and information as to what her duties as a trustee were, together with information about the nature of a Trust, and

¹⁶ Application for review at part 7, supporting reasons for application.

¹⁷ *Deliu v Hong* [2012] NZHC 158 at 41.

¹⁸ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

the BF Family Trust specifically. It is unacceptable to allow a person to assume obligations about which information and advice has not been offered.

[44] Section 12(a) of the Act defines unsatisfactory conduct as “conduct of the lawyer ...that occurs at a time when he or she is providing regulated services and is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer”. The obligations imposed by s 12(a) of the Act apply generally when a lawyer is providing regulated services, and can be owed to both client and non-client

[45] In *Legal Complaints Review Officer v Hong*¹⁹ the Lawyers and Conveyancers Disciplinary Tribunal accepted that the definition of “misconduct”, which also requires the conduct to be occurring at a time the lawyer was providing regulated services, “does not require there to be a subsisting lawyer/client relationship with a particular client.”

[46] Consequently, the definition of unsatisfactory conduct in s 12(a) could apply to Mr OS with regard to his conduct towards AF, even if she was not his client.

[47] A lawyer must be proactive in offering advice. In this regard the courts have made a number of comments, some of which I include here:

“It is now established that a solicitor may owe a duty of care to a third party.”²⁰

“As a matter of general policy it is clearly desirable that the word of solicitors in respect of matters on which they are professionally instructed should be able to be relied on by those persons with whom they are dealing”.²¹

“[While] solicitors’ duties are governed by the scope of their retainer, ... it would be unreasonable and artificial to define that scope by reference only to the client’s express instructions. Matters which fairly and reasonably arise in the course of carrying out those instructions must be regarded as coming under the scope of the retainer.”²²

“Mr J’s hindsight concession he ought to have been more proactive in providing the advice is not a counsel of perfection; it was the bare minimum demanded in circumstances ...”²³

¹⁹ [2015] NZLCDT 27 at [33].

²⁰ *Irvine v Shaw* [1992] ANZ ConvR 83 (HC).

²¹ *Belsham v Arthur* [1992] ANZ ConvR 85 (HC).

²² *Gilbert v Shanahan* [1998] 3 NZLR 528 (CA) at 537.

²³ *J v Auckland Standards Committee 1* [2018] NZHC 2706 at [42].

[48] In his email to AF (14 July 2015) advising of her removal as a Trustee, Mr OS says he “was always available” to her to provide advice about how Trusts operate. However, when asking a client or any other person, to sign a document whereby they assume significant responsibilities, it falls to a lawyer to volunteer advice and information or to ensure that person acquires advice and information independently.

[49] Mr OS did neither.

[50] In his letter to the Lawyers Complaints Service (dated 4 December 2017), Mr WL, on behalf of Mr OS, says:

Mr OS believes that when the individual wills were discussed with BF and AF in 2009 the BF Family Trust position was reiterated.

[51] Mr WL is referring here to when BF and AF attended at Mr OS’s office for the purpose of signing their wills. At that time, Mr OS was unavailable and there is no information as to who they met with at Mr OS’s office. BF’s will is witnessed by a solicitor and law clerk and it is assumed that it is these persons whom Mr WL is referring to.

[52] However, there are no file notes of the detail of any discussion with BF and AF and it is difficult to accept that any person who they met with at the time would have had any in-depth understanding or knowledge of the detail of the Trust or other facts relating to the couple’s situation. Even if a copy of Mr OS’s letter (29 November 2006) to the couple was with the wills, it does not indicate that the property was owned by the Trust or refer to the provisions of the Trust deed.

[53] When Mr OS met with BF and AF in April 2006 to take instructions for their wills, he made notes which were provided to the Lawyers Complaints Service. It is difficult to read Mr OS’s handwriting but in his notes he emphasised that a Memorandum of Wishes was required to give an indication of what was intended to happen with Trust assets. The note includes the words:

Assets to AF \$250,000

Chattels 50% 50% each.

Look at Deed to

[54] There is no indication that Mr OS encouraged AF at that time to take separate advice, as it was clear she was not receiving one-half of what would otherwise be considered to be relationship property. Even if a Memorandum of Wishes had been completed at that time, that would not have ensured that any expression of BF’s wishes were fulfilled unless and until AF was appointed a Trustee, and there is no indication that Mr OS gave advice to that effect.

[55] In any event, the power of appointment and removal of Trustees vested in BF. AF was vulnerable to whatever action BF took pursuant to that power. The seriousness of AF's position required that Mr OS be somewhat forceful to ensure she receive detailed advice from an independent solicitor and there is no evidence that he advised her to do so.

[56] Whether or not AF was Mr OS's client, he owed fiduciary duties to her. In this regard I refer to comments made by Professor GE Dal Pont in his text, *Lawyers' Professional Responsibility*:²⁴

Fiduciary duties owed to non-clients

[21.120] The lawyer-client relationship is presumed to give rise to fiduciary duties: see [4.40]. Yet as fiduciary duties are superimposed upon a relationship in circumstances where a court considers that a party should be protected from another party's potential abuse of position, it stands to reason that lawyers can owe fiduciary duties to non-clients. The danger is that fiduciary duties owed to a client may conflict with those owed to a non-client, placing the lawyer in a no-win situation of being unable to fulfil both. Prudent lawyers will take care not to put themselves in the position of inviting a non-client to place Trust in them, an especial danger where the non-client is another party to the matter or transaction, and is not legally represented: see [6.100], [8.160]–[8.190]. Such a scenario also attracts the risk of a court finding that the non-client has in fact become a client under an implied retainer: see [3.60]–[3.75].

[57] Therefore, either as a client or not, Mr OS owed fiduciary duties to AF to ensure she was fully advised in respect of all matters relating to the Trust, her appointment and removal as a Trustee, her position as an income beneficiary only, and how this would affect her in a number of scenarios, one of which was a marriage breakdown.

[58] Following on from this review, Mr OS's duties to AF are in the nature of a general fiduciary duty and are encompassed in a number of Rules, namely rules 3, 5, 5.1, 5.2, 5.3, 6, 6.1, 6.1.2, 6.1.3 (although no independent advice was obtained), 7, 7.1, 7.5, 7.6, , 10, 11, and 12.²⁵ Each of these rules touch, to a greater or lesser extent, on Mr OS's duties to AF. A precis of these rules is provided in the Appendix to this decision.

Decision

[59] The determination of the Standards Committee is confirmed but modified to include a further finding of unsatisfactory conduct against Mr OS pursuant to s 12(a) of the Act, and to include an extension of the finding pursuant to s12(c) of the Act for breaches of the rules set out in [58] above.

²⁴ GE Dal Pont *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2017).

²⁵ See the appendix of this decision for a precis of these Rules.

Consequences

[60] The modification of the Part 1 determination by the Committee by this decision will need to be considered by the Committee when addressing what penalties to impose.

DATED this 20th day of JULY 2020

O 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 YR as the Applicant
Mr OS as the Respondent
Mr TG as a Related Person
[Area] Standards Committee
New Zealand Law Society

Appendix – precis of rules referred to in [59]

Rule 3: A lawyer must always act competently ...consistent with the terms of the retainer and the duty to take reasonable care.

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

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

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

Rule 5.3: A lawyer must at all times exercise independent professional judgment on a client's behalf.

Rule 6: ...a lawyer must ...protect and promote the interests of the client to the exclusion of the interests of third parties.

Rule 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 a lawyer may be unable to discharge the obligations to 1 or more of the clients.

Rule 6.1.2: ...if a lawyer is acting for more than 1 client in respect of a matter and it becomes apparent that the lawyer will no longer be able to discharge the obligations owed to all of the clients for whom the lawyer acts, the lawyer must immediately inform each of the clients of this fact and terminate the retainers with all of the clients.

Rule 6.1.3: Despite rule 6.1.2 a lawyer may continue to act for 1 client provided that the other clients concerned, after receiving independent advice, give informed consent to the lawyer continuing to act for the client and no duties to the consenting clients have or will be breached.

Rule 7: A lawyer must promptly disclose to a client all information that the lawyer has or acquires that is relevant to the matter in respect of which the lawyer is engaged by the client.

Rule 7.1: A lawyer must take reasonable steps to ensure that a client understands the nature of the retainer and must keep the client informed about the progress of the retainer...

Rule 7.6: When a matter is completed the lawyer must advise the client accordingly, provide a brief summary of the work undertaken ...and, where appropriate, identify any necessary future action by the client of the lawyer.

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

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

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