

LCRO 300/2013

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 1

BETWEEN

LD TRUST

Applicant

AND

CN

Respondent

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

DECISION

Introduction

[1] Mr VH, a member of the Board of trustees of LD Trust ([Text removed]), has applied for a review of a decision by the [Area] Standards Committee in which the Committee decided that further action was not necessary or appropriate, having regard to all the circumstances of the complaint, which dealt with Mr CN's conduct in relation to instructions he had received about trust governance issues.

Background

[2] LD Trust was initially formed under the moniker BL Trust. For the purposes of this review, BL Trust and LD Trust are generally referred to as the Trust.

[3] In the course of this review, Mr CN has provided a copy of a recent report by [Law Firm] to the Deputy Solicitor General, dated 27 [Month] 2016 (the Report), which refers to a range of governance issues arising from the operation of the Trust, and the

relief sought by those who brought complaint to the Crown seeking resolution. The Report includes the following:

...

9. The principal concerns alleged relate to the circumstances under which the 2000 Trust Deed, pursuant to which the BL Trust had been operating,³ was varied very substantially in [Month 2012], and the legal effects and consequences of the variation. In particular, it is alleged that:

9.1 individuals who have not been properly appointed are purporting to act as Board members;

9.2 changes to the 2000 Trust Deed were made in [Month 2012] by those members:

9.2.1 without reference to the Community Council established under the 2000 Trust Deed, in circumstances where the agreement of the Community Council was required; and

9.2.2 in circumstances where insufficient Board members were present to pass such a resolution;

9.3 the Board of Trustees registered the changed deed as a deed of variation (the 2012 Trust Deed) and is now purporting to act in accordance with that trust deed which is, in fact, invalid.

10 The complainants seek the following relief:

10.1 directions to the Registrar of Incorporated Societies and Charitable Trusts and the Charities Registration Board to remove the entry of the 2012 Trust Deed;

10.2 a direction to the Trust's auditors to finalise the Trust's financial statements for the years to 31 March 2012 and 31 March 2013 on the basis of the 2000 Trust Deed applying;

10.3 that the Attorney-General apply under s 60 of the [Charitable Trusts Act 1957] for:

10.3.1 directions giving effect to the outcome of the enquiry;

10.3.2 an order that the trustees responsible for the irregularities pay the costs and disbursements of the complainants.

...

16. The 2000 Trust Deed was varied substantially by deed of variation dated 22 September 2012. The significant changes have been highlighted by the complainant as:

16.1 change of name to LD Trust (reflecting a change of focus from BL Trust to the wider [Area] area);

16.2 removal of provisions for membership of the Trust to be drawn widely from community organisations and for the representatives of those members to appoint a Community Council;

16.3 removal of the Community Council, with (instead) a new Advisory Committee to be appointed by the Board itself;

- 16.4 that the composition of the Advisory Committee differs from that of the Community Council;
- 16.5 a new power to amend the trust deed;
- 16.6 a new power to approve financial accounts;
- 16.7 a new power to resettle trust funds.

[4] The Report refers to difficulties in implementing the 2012 changes that led in practice to “uncertainty as to who was on the Community Council”, which in turn had “implications for the validity of appointments to the Board of Trustees made at Community Council meetings” in 2012. The Report says that meetings were not held in accordance with the trust deed, and an audit could not be completed “because of differences that had arisen in relation to the direction and operation of the Trust”. At some point, the CEO, Ms TY is reported to have disclosed concerns to the Ministry of Social Development about appointments made in March 2012, apparently resulting in a response from the Ministry indicating the Trust’s financing may be at risk.

Mr CN’s Involvement

[5] In the early 1990s Mr CN acted on instructions to form the Trust, and attend to its incorporation as a charitable trust.

[6] Ms TH, since deceased, was described at the review hearing as a founding trustee, and appears to have been involved in its governance in various capacities until she died.

[7] Mr CN says he acted more than once for the Trust, including in 2000 when variations were made to the trust deed. He says he ceased acting in 2013, and that at no stage has he received an authority or a request to uplift any of the Trust’s documents. From that he assumes that he had acted continuously for the Trust since its initial formation, although he does not discount the possibility that instructions may have been also issued elsewhere.

[8] The substance of the complaint at the heart of this review relates to Mr CN’s conduct in 2012.

[9] By that stage Ms TH had ceased to be a trustee of the Trust,¹ but had assumed the role of Chair of the “Community Council”. It is understood that the Community Council was established as the result of the contested variation to the trust

¹ Review Hearing, evidence of Ms TY.

deed made in 2000, and one of its functions was to undertake the appointment of members to the Board of Trustees of the Trust. Thus, while members of the Community Council did not control the Trust, they exercised the power of appointment, and appear to have been a community voice representing the interests of at least some of the stakeholders, and providing a measure of internal accountability by the Board.

[10] Presumably the Community Council had rules around its purposes, and how often its members were expected to meet. There is some evidence to suggest that there were rules around notices of meetings of the Community Council, the quorum, and how decisions were to be made.

[11] There is also some evidence around the Board of Trustees, including that it had a minimum number of members, how long a trustee's appointment might last, and reappointment.

[12] Presumably the entire Board of Trustees cannot remove itself, although perhaps the Community Council can.

[13] A letter dated 13 [Month] 2012, apparently written by Ms TH to members of the "BL Trust Board of Trustees and Community Council", helps to illuminate the situation as she saw it at the time of Mr CN's involvement in 2012. That letter says:

Community Council Members.
Trustees
BL Trust

Notice of a meeting of members of the Board of Trustees and Community Council

I am calling a joint meeting of the Community Council and Trustees to "reset" the governance of the Trust prior to meetings with members (refer to the Trust Deed clause 17).

**The meeting will be held at the office of
[Mr CN's Law Firm], [Address],
On Thursday [Date 2012].
From 4 p.m.**

As you probably know, the governance of the Trust was confused earlier in the year when some people reversed decisions they had made about holding office in the Trust and parallel governance processes began to emerge.

The purpose of the meeting is to establish the legitimate Board of Trustees for the Trust and reasonable lines of communication between the Community Council and Trustees. It is not a decision making meeting, and all discussion will be on a *without prejudice* basis.

The Council and Board will need to meet separately once each has a better appreciation what the other is intending to do.

This approach is based on advice from [Mr CN's Law Firm], the law firm that drafted the Trust Deed.

Two events in particular, led me to seek advice from [Mr CN's Law Firm]:

- Mr NT and Ms TE accepted appointment as Trustees in March, on the understanding that they would focus on developing constructive working relationships with the community and help identify suitable successors. Soon afterwards they resigned. At the time I thought this reduced the number of Trustees to three, one less than the minimum required by the Trust Deed.
- I believed there were only three trustees because a meeting on 24 [Month]2011 both Mr VH and Mr RN suggested or agreed they would retire or seek reappointment after twelve months in office. That period had ended. Later I learnt that Mr VH and Mr RN had decided to reverse their decisions and continue as Trustees to the end of the terms allowed by the Deed.

[Mr CN's Law Firm] have perused the information available to the Community Council, and provided the following advice:

- Mr VH and Mr RN are not bound by their earlier agreement and can continue as trustees. This decision raises the question of when the terms of four of the current Trustees expire.
- The trustees of the Trust are: Ms JT, Ms MV, Mr VH, Mr RN and Ms LT. This implies that there has not been a valid meeting of the Board of Trustees since Mr NT and Ms TE resigned.
- The governance of the Trust needs to be "reset".
- The most efficient way to do this is by discussion and agreement, avoiding if possible legal proceedings, at first publicity for the trust, and the use of clause 10.8.

I have received communication from some caucuses that their General Council members have changed. There were also indications at the Annual General Meeting that changes are proposed. If caucuses want to change their members I should be notified before this meeting with a written assurance from the caucus that an appropriate process has been used to select the new member(s).

I am calling this meeting for a specific purpose. At the March meeting of the Community Council decisions were made to maintain continuity of governance in the absence of information from Trustees. This meeting is to ensure we can be reliably informed before the next appointments are made. This includes ensuring we have a good understanding of the Trust Deed, consequently the Trust lawyers will be in attendance.

Ms TH

Chair
Community Council
BL Trust

13 [Month] 2012

[14] It appears from that letter that although by [Month] 2012 Ms TH may not have been a trustee, she remained involved in the BL Trust community, and was the Chair of the Community Council.

[15] As it appears that the Community Council was constituted pursuant to the terms of the trust deed as part of the Trust's governance structure,² it is reasonable to assume the Community Council and the Board of Trustees shared the same interests in ensuring that the Trust was properly managed in accordance with the trust deed, and variations to that.

[16] The position advanced by Mr VH is that the Board of Trustees, of which he was a member, was Mr CN's client, or former client. The proposition put it is that Mr CN accepted instructions from the Community Council to act against the Trust's interests.

[17] Mr VH also asserts that Mr CN has information relating to the Trust that he has used to advise the Community Council, and in relation to an auditor's audit of LD Trust. Mr VH's concern is that there is a conflict of interest between the Community Council and the Board of Trustees, and a breach of confidentiality by Mr CN.

[18] It appears that members of the Board of Trustees have had to respond to inquiries from the registrar of Incorporated Societies arising from disputes with members of the Community Council.

Standards Committee Decision

[19] The Committee referred to advice Mr CN provided to the Trust in 1994 and 2000, including having drafted amendments to the original trust deed and incorporated those into a fresh deed made in 2000, and to drafting further amendments in 2012.

[20] The Committee concluded that Mr CN had provided advice to the Trust and its governing council.

[21] It noted Mr VH's complaints on behalf of the Board of Trustees about Mr CN's use of information, and his request of the Committee to obtain Mr CN's files and investigate the alleged breaches.

[22] The Committee considered whether any conflict of interest arose.

² Letter [Law Firm] to Deputy Solicitor General (27 [Month] 2016).

[23] Mr CN's denials that a conflict of interest arose are noted, as is his view that he was properly instructed by the Trust. Mr CN referred to a query over the validity variations made to the deed in 2000, and says he expressed the view that those amendments were not validly made.

[24] The Committee noted rule 8.7.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 which says:

- 8.7.1 A lawyer must not act for a client against a former client of the lawyer or of any other member of the lawyer's practice where—
- (a) the practice or a lawyer in the practice holds information confidential to the former client; and
 - (b) disclosure of the confidential information would be likely to affect the interests of the former client adversely; and
 - (c) there is a more than negligible risk of disclosure of the confidential information; and
 - (d) the fiduciary obligation owed to the former client would be undermined.

[25] The Committee considered the competing interests contended for, Mr CN's involvement in the matter, and that the complaint was based on "a legal technicality that the Trust remains the same legal entity despite a change in name" from BL Trust to LD Trust. The Committee declared itself satisfied that the factual reality was that Mr CN acted for a group comprising BL Trust and its governing council. While there was clearly a dispute between the groups associated with the Trust, the Committee was satisfied that Mr VH's complainant was on behalf of a "separate group for whom Mr CN had not acted".³

[26] The Committee was not satisfied that it was appropriate for Mr CN to produce his files, and was of the view that the Trust would already have been in possession of relevant documentation if Mr CN had acted for it. The Committee did not consider there was sufficient information available to support the complainant's allegation against Mr CN.

[27] In the circumstances, the Committee decided that further action was not necessary or appropriate.

[28] Mr VH disagreed and applied for a review.

³ Standards Committee decision at [9].

Review Application

[29] In his application for review Mr VH, on behalf of LD Trust, asks that this Office hold Mr CN accountable for his actions, and order him to pay damages for the costs and expenses LD Trust incurred.

[30] Mr VH's application for review proceeds on the basis that the changes to the trust deed in 2000 and 2012 were effective. He says:⁴

Mr CN was the formal legal advisor to [LD Trust] (albeit under a different name). Mr CN subsequently took instructions from a group called [BL Trust] in respect of the dispute against LD Trust.

[31] Mr VH says confusion is possible because of the two names: LD Trust and BL Trust. He also contended that Mr CN took instructions from B CN to advise him in relation to an audit of the Trust by B CN.

[32] Mr VH's application is made on the grounds that the Committee misinterpreted who Mr CN had formerly acted for, and therefore incorrectly determined that he did not contravene rule 8.7.1.

[33] Mr VH says that Mr CN acted for LD Trust in 1994 and 2000, albeit the trust was then known as BL Trust. He says that the name was changed to LD Trust in 2012, and refers to the Trust being the "legal entity/body, being a client Mr CN had previously acted for, did not change or cease to exist". He says that is not a legal technicality, but a commonplace and commercial decision by an entity to rebrand its image.

[34] On that basis, Mr VH says LD Trust "undeniably remained a former client of Mr CN" so that rule 8.7.1 was applicable in the event Mr CN received instructions to act against LD Trust, his former client.

[35] Mr VH disputes that Mr CN took instructions from a group "comprising of the BL Trust and its governing council". Mr VH's view is that Mr CN "took instructions from a new client – not the client that is formerly known as BL Trust he had acted for including in 1994 and 2000".

[36] Mr VH says that confusion over the names and the similar individual representatives of Mr CN's new client is understandable but incorrect in fact and law.

[37] Mr VH says that, combined with the factual background, the nature of the instructions leads to the reasonable conclusions that:

⁴ Application for review, 10 October 2013 at [2].

- (a) Mr CN must hold information confidential to LD Trust (as its former legal advisor including in 1994 and 2000).
- (b) Key interests of LD Trust would be adversely affected by disclosure of the information, particularly in the context of a dispute in respect to the management and governance of LD Trust – being matters Mr CN had previously advised on.
- (c) There is more than a negligible risk of disclosure of the information.
- (d) The fiduciary obligation owed to LD Trust by Mr CN would be undermined.

[38] Based on similar logic, Mr VH says that Mr CN also breached rule 8.7.1 by acting on instructions from the auditor in respect of the audit of LD Trust.

[39] Mr VH considers the Committee did not properly investigate the complaint. He says:⁵

The Standards Committee's note that "it would be likely that [LD Trust] would already have been in possession of the relevant documentation, had Mr CN acted for it" is irrelevant to the question of whether Mr CN held any information confidential to the [LD Trust] and the questions that follow. In addition [LD Trust] would not have in its possession any material generated by Mr CN after he ceased to act for [LD Trust] and was later engaged by some former members of it under the name of [BL Trust] to act against [LD Trust].

[40] Mr VH provided a copy of a certificate of incorporation showing the Trust's registration as a charitable trust with the change of name filed on 13 [Month] 2012. He also provided minutes of a meeting headed "Community Council Members, Trustees, BL Trust" for a meeting dated [Date 2016, 14 days later] at 4 pm, held at Mr CN's offices. That is the meeting referred to earlier, called on 13 [Month] 2012 to "reset" the governance of the trust after it "was confused earlier in the year when some people reversed decisions they had made about holding office in the Trust and parallel governance processes began to emerge".

[41] It is apparent from the concluding paragraph of that letter that not all of those involved in governance of the Trust were of one mind about the way the Trust was operating.

[42] There is also correspondence from the Board of Trustees referring to disagreements over the validity of documents. Mr CN's fees were rejected as not having been sanctioned by the Board of Trustees, under Mr VH's direction. In subsequent correspondence, mediation was proposed as a method of resolving issues around governance of the Trust and its assets. The correspondence mentions

⁵ At [7.2.2].

“ongoing activities of a faction purporting to be the Board of Trustees, including registering a change of name of the Trust and intention to change the Trust Deed”⁶ along with advice received from Mr CN as trust solicitor. It appears the Community Council resolved to remove the Board of Trustees for failing to adhere to the Community Council’s strategic direction. The Community Council says the strategic direction is consistent with the philosophy of the trust deed, but the Board of Trustees’s changes and proposals are not.

[43] Mr CN is said to have been disentitled from advising “the people claiming to be the community council” because he had previously acted for the Board of Trustees.⁷

Mr CN’s Response

[44] Mr CN confirms that his firm was instructed by BL Trust “pertaining to issues relating to changes of the Trust Deed”.

[45] He speaks of LD Trust purporting to be the Trustees of the Trust’s properties, noting LD Trust had engaged its own solicitor in relation to changes made to the trust deed.

[46] Mr CN says that he does not act, and has not acted, for B CN, the auditor of the Trust.

[47] Mr CN refers to potential conflict of interest which precluded him from acting in a particular matter, but which is unrelated to the present situation.

[48] An opinion by Mr QW on the Trust’s issues was provided on review, but had not been produced to the Committee.⁸ That opinion deals with issues around the alterations to the trust deed, whether those were effective, and if so what consequences followed. It speaks of the altered constitution, remedial action that might be available to members of BL Trust and persons in the community who are affected by alterations made to the trust deed. In particular, the question of whether the “purported alterations made to the trust deed affected the ownership and power to control the use or change of ownership of the building” owned by “the trust, the BL Trust at [Address]”.⁹

⁶ Letter BL Trust Community Council to Mr VH (and others) ([Month] 2012).

⁷ Letter Mr VH to LCRO ([Month] 2013).

⁸ Mr QW opinion [Month] 2013].

⁹ At 1.

[49] Mr QW's letter helpfully sets out the background, refers to the trust deed, trust meetings, membership, objects of the trust, change of name, the appointment and retirement of trustees, invalidities in procedure and the involvement of the registrar and Charities Commission. The opinion concludes with the view that there have been procedural irregularities, and that application should be made to the Attorney General pursuant to the Charitable Trusts Act to remedy the situation, after a meeting is held to explore resolution, if possible.

[50] Mr CN subsequently provided a copy of a report prepared by [Law Firm] Office pertaining to the Trust's internal strife.

[51] That Report records the Deputy Solicitor General's proposed remedial action, resetting the trust to revert to the 2000 trust deed, if necessary with directions from the High Court and the appointment of interim trustees while the Community Council and Board of Trustees reconstitute it. The key concern was to ensure that the whanau centre continued the provision of services in the community while the Trust's governance issues were resolved. In particular, the report refers to the possibility that the Board of Trustees might need to be supervised after fresh elections occur and trustees are removed and replaced. The report also recognises that there are two views within the Trust on the variation.

Review Hearing

[52] Mr CN attended a review hearing in Wellington on 7 November 2016. Mr VH's application was argued by Mr DN, and Ms TY, CEO to the Trust, attended and participated in the review hearing.

Nature and Scope of Review

[53] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:¹⁰

... 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" ...

¹⁰ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

... 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.

[54] More recently, the High Court has described a review by this Office in the following way:¹¹

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.

[55] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

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

Analysis

[56] The key to determining this review is to identify Mr CN's client, and the interests that are said to have conflicted at the time he was acting.

[57] Back in the 1990s Mr CN was involved in the formation of the Trust. The Trust was registered as a charitable trust pursuant to the Charitable Trusts Act 1957. It became an incorporated body, established to benefit the community it was formed to serve. At that stage the trust deed provided for the Trust to be governed by a Board of Trustees.

[58] In 2010 the trust deed was amended. As I understand the position, those involved in the Trust at that time resolved to revise the Trust's governance structure, dividing responsibilities, powers and so forth between the Community Council, and the Board of Trustees. The Community Council assumed responsibility for several key matters, including setting the strategic direction for the Trust and appointing members

¹¹ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

to the Board of Trustees. While the Community Council could not remove individual members of the board, it had the power to remove the entire Board of Trustees in certain circumstances.

[59] The Board of Trustees was responsible for managing the Trust's affairs in accordance with the trust deed, excluding matters reserved to the Community Council.

[60] The key point is that the Community Council and the Board of Trustees were established as components of the same governance structure within the same incorporated body. Although the Trust was incorporated under the Charitable Trusts Act 1957, the 2010 amendments to the trust deed created a partition within that incorporated body.

[61] Mr CN is correct, therefore, when he says he acted for the Trust: not the Community Council; not the Board of Trustees: the Trust. It came to pass that members of the Community Council and members of the Board of Trustees were at odds, with tension mounting in 2012. Certainly, until [Month] 2012, and apparently thereafter, Mr CN's involvement and advice had been clearly targeted at resolving the internal conflicts so that the Trust could continue to perform according to the aims and objectives set out in the trust deed.

[62] It is difficult to see how internal strife meets the broader interests of the community to be served. However, rifts were not healed. The Trust's governance issues were not resolved. Mr CN gave up in early 2013, and finally, on [Date] 2013 "persons claiming to be the rightful trustees and the Secretary of the board ... asked the Attorney General to consider taking action" under the Charitable Trusts Act 1957.¹² That process does not seem to have yet been concluded. In the meantime, efforts have been made to ensure the beneficiaries do not suffer.

[63] Against that background, Mr VH, and then Ms TY who appeared at the review hearing as CEO of the Trust, asks this Office to make a determination that Mr CN has contravened his professional obligations to his client.

[64] Mr CN says he has not acted for the Trust since 2013, when he ceased acting for personal reasons.

[65] While on one hand it could be, and has been, argued that Mr CN could only act for the Board of Trustees, the internal bifurcation of governance structures in 2010 casts a cloud over that position that cannot be dispersed by this Office.

¹² Letter [Law Firm] to Deputy Solicitor General (27 [Month] 2016).

[66] Ms TY considers the Trust's interests were not met by Mr CN lending his support to some but not others in the dispute. That is a matter of perspective. Ms TY is concerned that the Trust's reputation was damaged by its appearing disorganised and ineffectual as a result of its internal strife. Blame for those failings cannot fairly be laid at Mr CN's door. Those are the interests argued to have been affected. They do not constitute a conflict of interests for Mr CN. Nor is there evidence he has breached the Trust's confidentiality. I accept his evidence that he did not act for B CN. There is no reason to believe he did.

[67] I have carefully considered all of the material available on review, including everything that was put to me at the review hearing by way of evidence and submission. None of the evidence or submissions provided on review persuade me that there is a proper evidential basis on which the view could responsibly be formed that Mr CN's conduct fell below a proper professional standard. Contrary to the position espoused by Mr DN at the review hearing, there is no good reason to inquire further.

[68] In the circumstances, there are no grounds on which to depart from the Committee's decision.

Decision

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

DATED this 29th day of November 2016

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:

LD Trust as the Applicant
Mr CN as the Respondent
Mr PC as a related party
[Area] Standards Committee
The New Zealand Law Society