

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2015-404-3185
[2017] NZHC 2277**

BETWEEN PING LIU
Plaintiff

AND YU HUA LV
First Defendant

XIAO AN CHEN
Second Defendant

JING CHEN
Third Defendant

YUE LI
Fourth Defendant

CIV-2016-404-90

BETWEEN XING LI
Plaintiff

AND YUE LI
First Defendant continued over

Hearing: 24 August 2017. Further submissions on 31 August 2017

Appearances: N J Scampion for the Plaintiffs
WGC Templeton for the Defendants

Judgment: 20 September 2017

JUDGMENT OF MUIR J

This judgment was delivered by me on Wednesday 20 September 2017 at 9.30 am Pursuant to Rule 11.5 of the High court Rules.

Registrar/Deputy Registrar

Date:

JING CHEN
Second Defendant

YU HUA LV
Third Defendant

XIAO AN CHEN
Fourth Defendant

Counsel/Solicitors:
N J Scampion, Barrister, Auckland
WGC Templeton, Barrister, Auckland

Introduction

[1] The plaintiffs Xing Li and Ping Liu (“the Lis”) are the parents of the defendant Yue Li and are based in the United States of America. Yue Li and defendant Jing Chen are married and reside in Auckland together. Yu Hua Lv and Xiao An Chen (also defendants) (“the Chens”) are the parents of Jing Chen and also reside in Auckland.

[2] The defendants apply for orders barring Ms R Reed, counsel for the plaintiffs, from continuing to act and from appearing as a witness. They also seek to bar Prestige Lawyers Ltd, Ms Reed’s firm, from acting for the plaintiffs.

Factual background

[3] Yue Li and Jing Chen, who are both young Auckland doctors, are the registered owners of 2B Hauraki Road, Takapuna, which was purchased using the Lis’ funds in 2015. Soon after settlement they say they also expressed an interest in purchasing a Takapuna commercial property as the future site of a medical practice. The particular property they say they had in mind was due to be auctioned on 23 September 2015. They further depose that they arranged for the Chens to see Ms Reed on their behalf on 18 September 2015 to obtain some preliminary legal advice in that respect.¹ Ms Reed had been recommended to them but there was no existing solicitor/client relationship. The Lis also attended the meeting. In her affidavit Ms Reed says that the Lis were in fact the main participants and it was they who expressed an interest in purchasing the relevant property as an investment. She says they sought assistance in the translation of relevant documents which she was able to provide.

[4] There is conflicting evidence about what was said at this meeting which it is not possible to resolve on the affidavits. The Chens say that, in the context of possible financing arrangements, they told Ms Reed that Yue Li and Jing Chen owned their own mortgage-free property in Takapuna and that Ms Reed suggested in passing that consideration should be given to placing this in a family trust for protection. Ms Reed says there was no discussion about anyone’s financial position

¹ Their professional commitments apparently precluded their own attendance.

as she does not like to do so with Chinese in a first meeting and says the only discussion was about the commercial property. She says that the meeting was left on the basis that the Lis would consider whether to bid on the commercial property and that they would instruct her if successful. However, they did not engage her as their solicitor at that time.

[5] On 22 September 2015, the Lis met with Ms Reed at her offices alone. Ms Reed says that at this meeting she was engaged as their lawyer and that she was instructed to prepare documents to establish a family trust in relation to 2B Hauraki Road. Ms Reed's firm accordingly prepared:

- (a) a Deed of Trust establishing the Yue Li family trust;
- (b) a client authority and instruction for the electronic transaction for the transfer of 2B Hauraki Road;
- (c) a sale and purchase agreement for 2B Hauraki Road identifying Yue Li and Jing Chen as vendors and the trustees of the Yue Li Family Trust (again Yue Lie and Jing Chen) as purchasers; and
- (d) a waiver of independent legal advice.

[6] The waiver was in terms which recorded:

1. We are the proprietors of 2B Hauraki Road, Hauraki, Auckland.
2. We have different interests from Ping Liu and Xing Li.
3. We are entitled to independent legal advice and it is advisable for me (sic) to employ my (sic) own lawyers.
4. We are under no obligation to sign any documents.
5. We have agreed to authroise (sic) PRESTIGE LAWYERS LIMITED to transfer the property to the YUE LI FAMILY TRUST as per family arrangement with Ping Liu and Xing Li.
6. In addition, we indemnify PRESTIGE LAWYERS LIMITED from any claims or proceedings which may arise from the carrying out of my (sic) instructions and I (sic) agree not to lodge any claims or proceedings against PRESTIGE LAWYERS LIMITED for carrying out our instructions.

It provided for signature by Yue Li and Jing Chen.

[7] On the evening of 22 September 2015, the Practice Manager of Prestige Lawyers, Kanako Shinde, brought the documents to the Chens' address, where the Lis were staying. Ms Reed deposes that she did not brief Ms Shinde on the contents of the documents as it was not necessary for Ms Shinde to discuss them with the Lis. She says that Ms Shinde was instructed "to explain to our clients [the Lis] where to sign". That is consistent with Ms Shinde's evidence that "I showed Liu Ping and the man [who had let her into the house and who is accepted as having been Mr Li] where they needed to sign the documents and told them they would need to find a witness". She says that she told them if they had any questions they were to contact Ms Reed and then left.

[8] Yue Li and Jing Chen in turn depose that the plaintiffs tried to get them to sign the documents by the front door and then renewed their request inside the house in front of Ms Shinde. They say they knew nothing of the intended trust arrangements and were totally surprised by the visit. They say that they were taken aback because the documents provided for the sale of their own house to a family trust which had purportedly been drafted on their instructions. They noted that the trust deed identified the Lis as settlors and reserved to them a power to appoint and remove trustees.

[9] As a result, they declined to sign the documents. An argument then broke out and the Lis arranged immediately to return to the United States. The families have been at loggerheads since.

The claims

[10] The plaintiffs have filed two sets of proceedings against the defendants.

[11] The first, CIV-2015-404-3185 (statement of claim dated 23 December 2015), is brought by Ms Ping Lui and relates to various household goods, clothing and jewellery that the plaintiff says belong to her but are in the defendants' possession. The plaintiff invokes two causes of action, namely conversion and detinue. The

defendants in their statement of defence say that the items were gifted to Yue Li and Jing Chen.

[12] The second proceeding, CIV-2016-404-90 (statement of claim dated 20 January 2016), is brought by Mr Xing Li and relates to 2B Hauraki Road, Takapuna. The plaintiff says that he purchased the property but it was put in the names of Yue Li and Jing Chen. He says that Yue Li and Jing Chen now refuse to recognise that he is the beneficial owner of the property. He seeks an order declaring that a constructive trust or a resulting trust arose over the property at the time of purchase, and Yue Li and Jing Chen therefore hold the property on trust for him. The defendants in their statement of defence state that the funds were gifted to them to enable them to purchase 2B Hauraki Road, and the Lis were never interested in purchasing investment properties in New Zealand.

[13] On 23 June 2016, Doogue AJ directed that the proceedings be heard together.

The interlocutory application

[14] The defendants now seek orders:

- (a) barring Ms Reed from continuing to act as counsel for the plaintiffs in the present proceedings (both CIV-2015-404-3185 and CIV-2016-404-90);
- (b) barring Prestige Lawyers Ltd from continuing to act as barristers and solicitors for the plaintiffs in the present proceedings (both CIV-2015-404-3185 and CIV-2016-404-90); and
- (c) barring Ms Reed from acting as a witness for the plaintiffs (if called) in the present proceedings (both CIV-2015-404-3185 and CIV-2016-404-90).

[15] They seek the barring orders on the following grounds:

- (a) Neither Ms Reed nor Prestige Lawyers obtained the prior informed consent of Yue Li and Jing Chen before purporting to act for them in establishing a family trust and preparing a transfer of their family home to the proposed trust (in breach of rr 6.1.1, 6.1.3 and 6.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (“the Rules”));
- (b) Ms Reed and Prestige Lawyers acted for more than one client on a matter where, in the circumstances, there was more than negligible risk that both the lawyer and the firm were unable to discharge the obligations owed to one or more clients (in breach of r 6.1 of the Rules);
- (c) Ms Reed and Prestige Lawyers are acting in proceedings where their conduct and advice is an issue in the matter before the Court covered by the proceedings (in breach of rr 13.5.3, 13.5 and 13.5.1 of the Rules);
- (d) Ms Reed by being engaged in litigation as counsel for the plaintiffs has not maintained her independence at all times given that she has acted previously for Yue Li and Jing Chen (in breach of r 13.5 of the Rules);
- (e) Ms Reed and Prestige Lawyers acted in breach of their duty to protect and hold in strict confidence all information concerning their clients, namely Yue Li and Jing Chen, when such information was acquired in the course of their professional relationship (in breach of rr 8 and 8.1 of the Rules);
- (f) Prestige Lawyers directly contacted Yue Li and Jing Chen in a way that was inappropriate (in breach of rr 11.2(a) and 3.4 of the Rules);

- (g) Ms Reed and Prestige Lawyers used information that was confidential to Yue Li and Jing Chen for the benefit of other persons, namely the plaintiffs (in breach of r 8.7 of the Rules);
- (h) Ms Reed and Prestige Lawyers acted for clients (namely the plaintiffs) against a former client (namely Yue Li and Jing Chen), when both Ms Reed and Prestige Lawyers held confidential information relating to Yue Li and Jing Chen (in breach of rr 8.7, 8.7.1 and 8.7.4 of the Rules);
- (i) Prestige Lawyers engaged in misleading or deceptive conduct or conduct that was likely to mislead or deceive Yue Li and Jing Chen when presenting the family trust documentation without disclosing the legal fees involved and who would be responsible for them (in breach of rr 5.4 and 5.4.1 of the Rules); and
- (j) Prestige Lawyers provided information to a client, namely Yue Li and Jing Chen, in a manner that was not clear but rather was misleading (in breach of r 1.6 of the Rules).

The jurisdiction

[16] This Court has an inherent jurisdiction to restrain a barrister from continuing to act as counsel for a particular party in proceedings before the Court.² The leading authority remains *Black v Taylor*,³ where the plaintiff had brought proceedings against the estate of his late uncle alleging breach of an agreement as to reciprocal wills and also making a claim under the Law Reform (Testamentary Promises) Act 1949. The plaintiff sought an injunction to restrain a solicitor from acting as either solicitor or counsel for the estate. The solicitor in question had previously acted for the plaintiff's uncle and at times the plaintiff himself, and the plaintiff therefore alleged conflict of interest.

² *Black v Taylor* [1993] 3 NZLR 403 (CA) at 408; for a more recent example see *Tietjens v Quigley* [2015] NZHC 3276, [2016] NZAR 154.

³ Referred to as the leading authority in *Tietjens v Quigley*, above n 2, at [26]; and *Deliu v Auckland Standards Committee (Counsel: Debarment)* [2014] NZHC 2530, [2014] NZAR 1473 at [14].

[17] Richardson J commented:⁴

The High Court has an inherent jurisdiction to control its own processes except as limited by statute. As an incident of that inherent jurisdiction it determines which persons should be permitted to appear before it as advocates. In determining what categories of person may appear it does so in accordance with established usage and with what is required in the public interest for the efficient and effective administration of justice ...

Another aspect of the inherent jurisdiction is the control of a particular proceeding in the Court. There the Court's concern is with the administration of justice in a particular case and in the generality of cases and with the associated basic need to preserve confidence in the judicial system. The right to a fair hearing in the Courts is an elementary but fundamental principle of British justice. It reflects the historical insistence of the common law that disputes be settled in a fair, open and even-handed way ...

The integrity of our system of justice depends on its meeting those standards. The assessment of the appearance of justice turns on how the conduct in question - here Mr Gazley's wish to be able to act as a counsel for the defendants against MA Taylor - would appear to those reasonable members of the community knowing of that background.

In making that assessment the Court will also give due weight to the public interest that a litigant should not be deprived of his or her choice of counsel without good cause. The right to the choice of one's counsel is an important value. But it is not an absolute.

[18] His Honour in turn noted that a finding of misconduct was not necessary in order to disqualify a solicitor from acting:⁵

Disqualification will ordinarily be the appropriate remedy where the integrity of the judicial process would be impaired by counsel's adversarial representation of one party against the other. The decision to disqualify is not dependent on any finding of culpable conduct on the lawyer's part. Disqualification is not imposed as a punishment for misconduct. Rather it is a protection for the parties and for the wider interests of justice. The legitimacy of judicial decisions depends in large part on the observance of the standards of procedural justice.

[19] McKay J commented:⁶

It is essential to the functioning of the Court as a Court of justice that it must be able to prevent a barrister acting as counsel in a matter in which he has a conflict of interest, or in which he appears to have a conflict of interest such that justice will not be seen to be done ...

⁴ At 408–409.

⁵ At 412.

⁶ At 418.

The position in New Zealand is accurately expressed in the following passage in the judgment of a Divisional Court of the Ontario Court (General Division) in *Everingham v Ontario* (1992) 88 DLR (4th) 755 at p 761:

"It is within the inherent jurisdiction of a superior court to deny the right of audience to counsel when the interests of justice so require by reason of conflict or otherwise. This power does not depend on the rules of professional conduct made by the legal profession and is not limited to cases where the rules are breached."

[20] On the facts, the Court of Appeal was satisfied that the solicitor should be barred from acting for the estate. He had obtained significant confidential information from the plaintiff over the years, including details of his personal finances and financial plans, details of his estate planning, his position and concerns arising after the termination of his employment, and his attitude towards and relationship with his deceased uncle. Richardson J concluded:⁷

I am satisfied that reasonable members of the public knowing of Mr Gazley's association with MA Taylor would consider that justice would not be seen to be done if, when dissension developed within the Taylor family, Mr Gazley acting as counsel took sides and acted against MA Taylor.

[21] In *Official Assignee v Brodie*, Young J set out three situations in which it may not be appropriate for counsel or solicitors to act:⁸

- (1) Where the lawyer (or legal firm) in question has had a prior professional association with an opposing party;
- (2) Where it may be suggested that the lawyer (or members of the lawyer's firm) have been guilty of misconduct or negligence in respect of the subject-matter of the litigation; and
- (3) Where the lawyer (or a member of the lawyer's firm) may have to give evidence in the case.

[22] *Black v Taylor* was in the first category. An example in the second is *Kooky Garments v Charlton*,⁹ where a critical document in dispute was a letter written by a partner of counsel appearing. At District Court level this was held to be a letter of acceptance indicating an intention to be bound by the terms of the lease. On appeal it was argued that it was a counter-offer. Counsel could not, in that context,

⁷ At 412.

⁸ *Official Assignee v Brodie* (2000) 15 PRNZ 89 at [37].

⁹ *Kooky Garments Ltd v Charlton* [1994] 1 NZLR 587 (HC).

represent the client with the level of objectivity it required. As Thomas J held the tenant was entitled to:¹⁰

... independent advice untrammelled by considerations of personal liability on the part of the solicitors concerned.

[23] Examples in the third category include *Official Assignee v Brodie and Beggs v Attorney-General*.¹¹ In the latter case the Court held:¹²

Because the Court will not lightly remove existing counsel at the instance of an opposing party, it is incumbent on the applicant to do more than speculate that it will call counsel. It must establish that counsel is likely to be required as a witness. There are two elements to that requirement: a plausible assertion that counsel is a material witness, and confirmation that the applicant presently intends to call counsel.

[24] In respect of applications for removal based on conflict of interest or inability to represent with objectivity, the threshold is likewise high requiring something “extraordinary” or,¹³ as Fisher J expressed it in *Clear Communications Ltd v Telecom Corp of New Zealand Ltd*, “truly egregious misconduct likely to infect future proceedings”.¹⁴ This reflects the fact that a litigant should not be deprived of the counsel of his or her choice without good reason and that the Court should guard against allowing removal applications to be used as a tactical weapon to disadvantage the opposing party.¹⁵ Moreover, although lawyers’ professional obligations as set out in the Rules may be relevant to a Court’s decision to debar counsel,¹⁶ it is important always to bear in mind that removal of a lawyer is not “a retrospective sanction for past misconduct but a prospective measure to safeguard the future conduct of the particular proceedings.”¹⁷ Likewise care must be taken not to visit upon the lawyer sins which may essentially be those of the client.¹⁸

¹⁰ At 589.

¹¹ *Beggs v Attorney-General* [2006] 2 NZLR 129 (HC).

¹² At [41].

¹³ *Accent Management Ltd v Commissioner of Inland Revenue* [2013] NZCA 155, [2013] 3 NZLR 374 at [32].

¹⁴ *Clear Communications Ltd v Telecom Corp of New Zealand Ltd* (1999) 14 PRNZ 477 (HC) at 483.

¹⁵ *Accent Management Ltd v Commissioner of Inland Revenue*, above n 13, at [32].

¹⁶ *Accent Management Ltd v Commissioner of Inland Revenue*, above n 13, at [32].

¹⁷ *Clear Communications Ltd v Telecom Corp of New Zealand Ltd*, above n 14, at 482.

¹⁸ *Clear Communications Ltd v Telecom Corp of New Zealand Ltd*, above n 14, at 482.

The present case

Conflict of interest and informed consent

[25] Mr Templeton says that the trust documents prepared by Prestige Lawyers described Yue Li and Jing Chen as “clients” of the firm and that the firm also acted for the Lis. He therefore says that Ms Reed and Prestige Lawyers acted for more than one client on a matter where, in the circumstances, there was more than negligible risk that both the lawyer and the firm were unable to discharge the obligations owed to one or more clients.

[26] Mr Templeton further says that neither Ms Reed nor Prestige Lawyers obtained the prior informed consent of Yue Li and Jing Chen before purporting to act for them in establishing a family trust and preparing a transfer of their family home to the proposed trust. Their informed consent was required, he says, because Prestige Lawyers was acting for more than one party in respect of the same transaction.

[27] He refers to rule 6 of the Conduct and Client Care Rules:

Conflicting duties

- 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.
 - 6.1.1 Subject to the above, a lawyer may act for more than 1 party in respect of the same transaction or matter where the prior informed consent of all parties concerned is obtained.
 - 6.1.2 Despite rule 6.1.1, 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.
 - 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 been or will be breached.

[28] In order for a lawyer to be conflicted, he or she must act for more than one client. The critical question in determining whether or not a conflict of interest arose here is therefore whether Ms Reed could be said to have ever “acted” for Yue Li and Jing Chen.

[29] In *Bartle v GE Custodians*,¹⁹ a solicitor argued that there was no relationship of solicitor and client at the time of his first meeting with the Bartles, where he gave some preliminary investment advice. The question was whether a contract of retainer existed at that point between the solicitor and the Bartles. Randerson J set out the relevant law as follows:

[130] ... A contract of retainer may arise either expressly or by implication. As Scott LJ observed in *Groom v Crocker* [1939] 1 KB 194 (CA) at 222:

The relationship is normally started by a retainer, but the retainer will be presumed if the conduct of the two parties shows that the relationship of solicitor and client has in fact been established between them.

[131] In *Dean v Allin & Watts* [2001] EWCA Civ 758, [2001] 2 Lloyd’s Rep 249 Lightman J (delivering the leading judgment) said:

[22] ... an implied retainer could only arise where on an objective consideration of all the circumstances an intention to enter into such a contractual relationship ought fairly and properly to be imputed to the parties.

[132] Consideration is not essential since a solicitor acting pro bono for a client also owes a duty of care to the client ... Nevertheless, relevant factors include whether the party is liable for the solicitor’s fees and whether the solicitor has opened a file. Whether a contractual relationship between the parties has existed in the past may also be a relevant factor ... Of course, none of these factors are determinative.

[30] Randerson J concluded that no contract of retainer existed between the solicitors and the Bartles after their initial meeting. This was because the meeting was preliminary in nature and for the purpose of clarifying for the Bartles the questions they had about aspects of the contemplated investment. The Bartles had not made any decision to proceed with the transaction. They did not give the solicitor any instructions to undertake legal work on their behalf and it appeared the

¹⁹ *Bartle v GE Custodians* [2010] 1 NZLR 802 (HC). The case went on appeal to the Supreme Court (see *GE Custodians v Bartle* [2010] NZSC 146, [2011] 2 NZLR 31) but the Supreme Court judgment did not deal with the initiation of the solicitor-client relationship.

solicitor did not charge a fee for the initial meeting. It was not clear at that stage that the solicitor would be instructed to act on behalf of the Bartles if they decided to proceed with the investment. Randerson J held that:²⁰

At most, there was a prospect that a solicitor and client relationship would be established in the event of the Bartles determining to proceed with the investment.

[31] Ms Reed states in her affidavit that the 18 September consultation with the Lis and the Chens was an initial consultation only, its purpose being to discuss and translate auction documents relating to the commercial property into Mandarin for the Lis. It appears that no fees were charged and no terms of engagement issued. The impression she was left with was that the Lis would consider whether to bid at the auction for the commercial property, and would become her clients if successful. She did not take a file note of the meeting.

[32] These facts are sufficiently similar to those in *Bartle* that I do not consider that a solicitor-client relationship can be said to have arisen either with the Lis or with the Chens/Yue Li/Jing Chen at this initial meeting. No letter of engagement was provided, so there was no written contract between them at that stage. Nor is there any basis for inferring intention to enter into a contract of retainer on the part of the Lis, the Chens or Ms Reed. After the consultation, a staff member of Prestige Lawyers emailed the auction documents to the Lis and included the contact details for a banker at ANZ who could assist with a mortgage. However, that was the only contact between them and neither the Lis nor the Chens instructed Ms Reed to undertake any ongoing legal work at that stage. It appears that the matter was put on hold until the Lis (or on the applicants' approach, the Lis and the Chens) decided whether and how to proceed with the purchase of the commercial property.

[33] Four days after the initial consultation, on 22 September, the Lis again came to see Ms Reed, this time without the Chens. At this meeting, Ms Reed issued a letter of engagement and the Lis officially engaged Prestige Lawyers. I consider that at this point a solicitor-client relationship arose between the Lis and Ms Reed/Prestige Lawyers.

²⁰ At [135].

[34] Ms Reed then prepared trust documents, including an agreement for sale of 2B Hauraki Road to the family trust, and presented them to Yue Li and Jing Chen for signature. She did so on the instructions of her clients, the Lis. Mr Templeton takes issue with the fact that Ms Reed described Yue Li and Jing Chen as the vendors and Prestige Lawyers Ltd as the vendors' solicitors in the agreement for sale and purchase. He says that Ms Reed purported to act for Yue Li and Jing Chen and did not obtain their informed consent before doing so. In presenting those documents for signature, Ms Reed may have been offering to act for Yue Li and Jing Chen. However, Yue Li and Jing Chen did not sign those documents as they were not happy with their contents. They declined Ms Reed's offer to act for them. I cannot say that a solicitor-client relationship arose between Ms Reed and Yue Li and Jing Chen in those circumstances.

[35] Moreover, Ms Reed provided a waiver of independent legal advice for Yue Li and Jing Chen to sign in the terms previously referred to.²¹

[36] It was appropriate for Ms Reed to advise Yue Li and Jing Chen that the Lis' interests diverged from their own and that they should seek independent legal advice. In doing so she was seeking Yue Li and Jing Chen's informed consent pursuant to rule 6.1.1. Whether she should have sought such consent in person, having explained the implications of the Lis having reserved a power to appoint and remove trustees to the trust, is not something I consider it necessary for me to determine. There is currently a complaint before the New Zealand Law Society about these and other issues and its processes should be respected. However, I cannot see how Ms Reed's actions, even if amounting to misconduct, seriously "infect" the future proceedings. To debar her from appearing would in my view be to sanction her for past (possible) misconduct which does not materially affect her ability to represent the Lis with objectivity in the future. The most that can be said is that Yue Li and Jing Chen bear apparent animus towards her, regarding her as partly responsible for the way events unfolded on 22 September. They would not be the first litigants to hold such adverse views of opposing counsel.

²¹ At [6] herein.

[37] In summary, therefore, I consider that Ms Reed was acting for the Lis throughout and not for Yue Li and Jing Chen. Although she offered to act for Yue Li and Jing Chen, the trust documents were never actually signed and the arrangements never actually finalised. Consequently I do not consider that Ms Reed is in a position of conflict which would prevent her from acting for the plaintiffs.

[38] My conclusions on this point also dispose of Mr Templeton's argument that Ms Reed, by being engaged in litigation as counsel for the plaintiffs, has not maintained her independence at all times given that she has acted previously for Yue Li and Jing Chen. As noted above, I do not consider that she has "acted previously" for Yue Li and Jing Chen.

Confidential information

[39] Mr Templeton says that Ms Reed and Prestige Lawyers acted for clients (namely the plaintiffs) against a former client (namely Yue Li and Jing Chen), when both Ms Reed and Prestige Lawyers held confidential information relating to Yue Li and Jing Chen. He relies on rule 8.7 of the Conduct and Client Care Rules, which provides:

Use of confidential information prohibited

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.

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.

- 8.7.2 Rule 8.7.1 is not breached where there is an effective information barrier between the lawyer who holds the confidential information of the former client and the lawyer who proposes to act for the new client.
- 8.7.3 An information barrier is effective when, in all the circumstances, there is a negligible risk that the confidential information in respect of the former client will be or has been disclosed to the new client or to any lawyer acting for the new client.
- 8.7.4 Unless the lawyer is unable to contact the former client, particulars of any information barrier must be disclosed to the former client prior to the lawyer commencing to act for the new client.
- 8.7.5 For the purposes of this rule 8.7, confidential information is presumed to be held by a practice when any lawyer who is a member of the practice has been a member of another practice that held the confidential information when that lawyer was a member, unless the lawyer concerned can demonstrate that he or she is not aware of the relevant confidential information.

[40] I have noted above that I do not consider that Yue Li and Jing Chen were ever “clients” of Ms Reed or Prestige Lawyers. However, rule 8.1 clarifies that a lawyer’s duty of confidence “commences from the time a person makes a disclosure to the lawyer in relation to a proposed retainer (whether or not a retainer eventuates).” In other words, a duty of confidentiality may arise in respect of information which was disclosed at the initial consultation on 18 September. That consultation could fall within the category of discussions “in relation to a proposed retainer”. Although Yue Li and Jing Chen were not present at this meeting, the first and second defendants (the Chens) were present.

[41] The protection of confidential information is wide-ranging. The footnote to r 8 clarifies that even matters of public record can be confidential information:

Information acquired in the course of the professional relationship that may be widely known or a matter of public record (such as the address of the client, criminal convictions, or discharged bankruptcy) will nevertheless be confidential information.

[42] Mr Templeton says that the following confidential information relating to Yue Li and Jing Chen was imparted at the 18 September meeting:

- (a) the fact that Yue Li and Jing Chen owned 2B Hauraki Road; and
- (b) Yue Li and Jing Chen's family financial background, personal information and future property plans (including their intended purchase of a commercial property).

[43] Despite the broad definition of confidential information, it does not in my view extend to cover material in these categories, at least in the circumstances imparted. Ms Reed acquired the information in the course of a consultation where both the plaintiffs and two of the defendants were present. It was information known to both the Lis and the Chens. Indeed the Lis had funded the acquisition of 2B Hauraki Road and they were obviously fully conversant with possible plans to purchase the commercial property. I accept Mr Scampion's submission that what the defendants are in essence saying is that even though the plaintiffs could pass the information to Ms Reed (or any other lawyer) there is a risk Ms Reed could pass that information to the plaintiffs or use it, and his further submission that this is not what is contemplated by r 8.7.

[44] Moreover, Ms Reed states in her affidavit that the Chens were generally quiet at the 18 September consultation, sitting passively and not saying much. The majority (if not all) of the allegedly "confidential" information seems to have come from the Lis. However, even if the Chens did provide some information, it could not be said to have been communicated to a lawyer in confidence, given that the Lis were also present.

[45] Further, Ms Reed disputes that there was any discussion about the personal financial information of the Lis or any of the defendants at the initial consultation. She says that the only subject of discussion was the commercial property. Insofar as there is a conflict in the evidence on this point it is unable to be resolved on the present application given that Ms Reed was not called for cross-examination on her affidavit.

Inappropriate contact

[46] Mr Templeton says that Prestige Lawyers directly contacted Yue Li and Jing Chen in a way that was inappropriate. He relies on rule 11.2(a) of the Conduct and Client Care Rules:

Direct solicitation

11.2 A lawyer must not directly contact a prospective client—

(a) in a way that is intrusive, offensive, or inappropriate; or

...

[47] I do not consider that the conduct of Prestige Lawyers in delivering the documents to the Chens' home for signature can be described as "intrusive, offensive or inappropriate". Ms Shinde, the Practice Manager of Prestige Lawyers and the person who delivered the documents, deposes that she briefly discussed how to sign the documents with the occupants of the house, including where to sign and the witnessing requirements. She told them that if they had any questions they should contact Ms Reed. Mr Templeton says that the Lis refused to allow Yue Li and Jing Chen to take independent legal advice at the time the documents were presented and insisted that they sign immediately. If that is the case, that was entirely the plaintiffs' doing. There is no suggestion that any representative of Prestige Lawyers placed inappropriate pressure on Yue Li and Jing Chen. I note again Fisher J's comment in *Clear Communications* that "care must be taken not to visit upon the lawyer sins which may be essentially those of the client".²²

Misleading or deceptive conduct

[48] Mr Templeton says that Ms Reed and Prestige Lawyers engaged in misleading or deceptive conduct, or conduct that was likely to mislead or deceive, in the following respects:

(a) acting as if Yue Li and Jing Chen were their clients when there had been no instructions and no discussion in relation to the trust

²² At 482.

arrangements or the purchase price stated in the agreement for sale and purchase;

- (b) acting as Yue Li and Jing Chen's lawyers when they were to lose their legal interest in their home to a trust, which was not in their interests;
- (c) acting as if Yue Li and Jing Chen would "waive" their entitlement to independent legal advice without any prior discussion or advice on that issue at all;
- (d) requiring Yue Li and Jing Chen to "agree" not to sue Prestige Lawyers for any legal consequences of their agreement to have Prestige Lawyers act on their behalf without any explanation (this refers to a statement in the waiver form);
- (e) expecting to receive the signed authority from Yue Li and Jing Chen to register the transfer of 2B Hauraki Road to the trust, which would be controlled by the plaintiffs, without any disclosure of that fundamental control;
- (f) failing to provide any explanation of the "family arrangement" that was alleged to be the basis of the client authority form; and
- (g) making no attempt to advise Yue Li and Jing Chen in writing of the legal consequences of the above when they were acting at the same time for the plaintiffs, who were paying their fees and were the only party that stood to benefit from the transaction.

[49] Mr Templeton relies on rule 11.1 of the Conduct and Client Care Rules, which states:

Misleading and deceptive conduct

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

[50] The footnote to that rule confirms that the words used are identical to those in the Fair Trading Act 1986 and the commentary on that legislation should be used for guidance.

[51] I have previously indicated that the criticism of Ms Reed presenting a large number of complex and significant documents to Yue Li and Jing Chen without explanation and offering to act for them on transfer of the Hauraki Road property does not in my view sufficiently impinge on the future conduct of the proceedings to warrant Ms Reed's removal and that the complaints against her should run their course before the Law Society. However, I note that I do not accept Ms Reed's submission (advanced in her response of 4 August 2017 to the Law Society) that the documents were provided to the Lis on the evening of 22 September 2015 as drafts and that if they were happy with them she would in turn discuss the matter with Yue Li and Jing Chen to see if they wished to instruct Prestige Lawyers and have her explain the documents to them. If that were the case then it seems unlikely that Ms Reed would have asked her Practice Manager to explain to the Lis where to sign or that her Practice Manager would have done so. Such would have been premature until such time as Yue Li and Jing Chen had had an opportunity to review the drafts, instruct her and indicate a willingness to sign.

[52] Moreover, provision of the documents in draft would more typically be undertaken by email or at least under cover of separate correspondence delivered to Yue Li and Jing Chen on the evening of 22 September.

[53] In my view the documents were likely despatched with the expectation that they would be signed by all parties that evening, or at least in circumstances where Ms Reed should have appreciated that Jing Chen and Yue Li would come under pressure to do so. That is consistent with Ms Reed's evidence that there was "urgency" in relation to the transaction because "the Lis were leaving the country in a few days". There was no point in having the Lis sign the documents and leave if the documents were then to be the subject of ongoing negotiation by Jing Chen and Yue Li in the Lis' absence.

[54] I do not think this approach constitutes best practice and have reservations about whether it was indeed acceptable practice but I cannot see, as Mr Templeton suggests, that any misconduct in this sense (whether or not a breach of the Fair Trading Act) impinges on Ms Reed's objectivity in future representation, at least any more than will always be the case when an historic complaint is being litigated before the Law Society in parallel with civil proceedings against the complainant by clients of the lawyer concerned. Again, the Court should in my view be wary of elevating the removal jurisdiction to one of retrospective sanction for past (alleged) misconduct.

Lawyer's conduct and advice in issue

[55] Finally, Mr Templeton says that Ms Reed and Prestige Lawyers are acting in proceedings where their conduct and advice is an issue in the matter before the Court. He points specifically to the conduct of Prestige Lawyers in preparing the trust documentation and presenting it urgently for signature. He says that this conduct "caused the family argument to erupt and the issue of the High Court proceedings".

[56] He relies on rule 13.5 of the Conduct and Client Care Rules:

Independence in litigation

13.5 A lawyer engaged in litigation for a client must maintain his or her independence at all times.

13.5.1 A lawyer must not act in a proceeding if the lawyer may be required to give evidence of a contentious nature (whether in person or by affidavit) in the matter.

13.5.2 If, after a lawyer has commenced acting in a proceeding, it becomes apparent that the lawyer or a member of the lawyer's practice is to give evidence of a contentious nature, the lawyer must immediately inform the court and, unless the court directs otherwise, cease acting.

13.5.3 A lawyer must not act in a proceeding if the conduct or advice of the lawyer or of another member of the lawyer's practice is in issue in the matter before the court. This rule does not apply where the lawyer is acting for himself or herself, or for the member of the practice whose actions are in issue.

...

[57] It is clear from rule 13.5.1 and from cases such as *Official Assignee v Brodie* that a lawyer must not continue to act if the lawyer may be required to give evidence of a contentious nature in the matter.

[58] In this case, as Mr Scampion points out, the key issues in the present proceedings are:

- (a) whether Mr Li intended to gift the property at 2B Hauraki Road or funds used to acquire it to Yue Li and Jing Chen in July 2015; and
- (b) whether Mrs Liu subsequently intended to gift chattels to Yue Li and Jing Chen.

[59] The conduct of Prestige Lawyers in drafting the trust documents and presenting them for signature (on the instructions of the Lis) may have *provoked* the falling out between the parties, but it does not in my view relate to any of the substantive issues in the proceedings. I cannot therefore see how Ms Reed's evidence in respect of it could be material, and Mr Scampion confirms she will not be called as a witness by the plaintiffs.

[60] Mr Templeton says it may however be necessary to subpoena her in respect of evidence as to when she was told by the Lis about United States gift tax problems arising out of the way in which the purchase of 2B Hauraki Road was structured. He says that if such problems emerged after settlement then it may have considerable bearing on the key issues in the proceeding to the extent that the Lis considered it necessary to revisit what was originally intended as a gift for financial reasons.

[61] Clearly if an attempt was made to elicit any such evidence, issues of privilege would arise. I take into account also the fact that although a prior fixture was allocated for these proceedings, no subpoena issued in the run up to trial. I do not accept that Ms Reed should be debarred from appearing on the basis of speculation that she may be a witness. I think it unlikely that she would be in a position to provide relevant and admissible evidence.

Conclusions

[62] Ultimately, the question is not whether Ms Reed and Prestige Lawyers breached their professional obligations under the Conduct and Client Care Rules. This is not a disciplinary proceeding. Rather, the question must be whether Ms Reed's continued representation of the plaintiffs in these proceedings creates an appearance of injustice such that she (and her firm) should not be permitted to act. In that context it is the future conduct of the proceedings which is in issue.

[63] Mr Templeton says that Ms Reed was "intimately part of the factual matrix which caused the family dispute" and that this compromised her ability to act objectively and independently. I do not consider that to be the case. Ms Reed acted on the instructions of her clients, the Lis, throughout. She was never instructed by any of the defendants, and therefore no conflict of interest arose. Nor do I consider that she used confidential information belonging to the defendants inappropriately. While her conduct in presenting trust documents for signature to Yue Li and Jing Chen (in which she offered to act for them) without any prior explanation or discussion is a matter of concern, I do not consider that this compromises her independence (or appearance of independence) to such an extent that she should be barred from acting for the plaintiffs. Yue Li and Jing Chen did not sign the documents. Nor did they become her clients.

[64] In my view, reasonable members of the public would not consider that the integrity of the judicial process is undermined if Ms Reed continues to act for the plaintiffs. I am not therefore persuaded to grant the orders sought.

[65] I do however consider that Ms Reed should reflect carefully on whether her continued engagement as counsel, may, as a result of the animus directed towards her, reflect negatively on the prospects of settlement and whether this will ultimately be in her clients' best interests. The case is clearly one where there is a more than usual premium on constructive discussions, in respect of which her continued role may be an impediment to a successful outcome.

[66] In the event the defendants choose to subpoena Ms Reed to give evidence and such subpoena survives any application to set it aside, I reserve the right for them to re-apply for orders barring Ms Reed in the unlikely event that was necessary.

Result

[67] I decline the defendant's application.

Costs

[68] I award costs against the defendants on a 2B basis. In the unlikely event they cannot be settled by agreement, memoranda may be filed.

Muir J