

# How far should you go in following your client's instructions? A Cautionary Tale

GRANT FEARY, SENIOR SOLICITOR, LAW CLAIMS

Solicitors cannot follow their instructions blindly in all cases, especially where the rights of the beneficiaries of a trust may be affected.

Following his client's instructions cost a New Zealand solicitor, Charles Fletcher, over \$1.3 million in damages and costs, plus an untold amount for his own costs and fees foregone. Not only that, the findings made against Mr Fletcher meant that he was not indemnified by his professional indemnity insurer, and, just to put the icing on the cake, Mr Fletcher was also censured and suspended from practice for two years by the NZ Lawyers and Conveyancers Disciplinary Tribunal.

Clearly, therefore, there are limits beyond which solicitors should not go in following the instructions of their clients.

The proceedings in question<sup>1</sup> related to claims against a trustee, Mr Hohepa, for breach of trust and conversion, and claims against his solicitor, Mr Fletcher, for breach of fiduciary duty, knowing receipt and dishonest assistance.

## BACKGROUND FACTS

Mr Hohepa was the trustee of the Eden Refuge Trust (the Trust), which owned a property in Auckland that was used as a place of worship. The congregation that worshipped at the property splintered into several groups. Mr Fletcher's initial instructions from Mr Hohepa related to providing an opinion regarding the deed of trust and the implications of a sale of the property and how the proceeds of sale were to be dealt with in accordance with the deed of trust. Mr Fletcher was aware of the Trust's claim to charitable status.

Following the splintering of the congregation, Mr Hohepa emigrated to Spain and later instructed Mr Fletcher to sell the property. Notwithstanding his knowledge of the terms of the Trust, Mr Fletcher carried out Mr Hohepa's instructions to pay the bulk of the sale proceeds to Mr Hohepa personally. Extraordinarily, more than \$50,000 of the sale proceeds were used to offset payments made on account of Mr Hohepa (including hotel bills in Madrid!) by Mr Fletcher via Mr Fletcher's credit card.

## THE PROCEEDINGS

When the remainder of the congregation that worshipped at the property became aware of the sale, an interim injunction froze the remainder of the proceeds of sale, and proceedings against Mr Hohepa and Mr Fletcher were commenced.

It was unarguable that Mr Hohepa had breached his obligations as trustee by benefitting personally from the sale of the property. The plaintiffs in the proceedings however also alleged that although these breaches were personal to Mr Hohepa and actionable against him, they arose because Mr Fletcher facilitated them.

Mr Fletcher's case at trial and on appeal was that he was not dishonest and was only acting on his client's instructions as he was obliged to do by s.89 (1) of the New Zealand *Law Practitioners Act*. Mr Fletcher also placed reliance on the NSW Court of Appeal decision in *Adams v Bank of New South Wales*<sup>2</sup> where it was held, in relation to a provision equivalent to s.89 (1), that a solicitor was required to comply with the instructions of a client who was a trustee in respect of funds held in the solicitor's trust account.

Both the trial judge and the Court of Appeal found that, whether the test for

dishonest knowing assistance be subjective or objective,<sup>3</sup> the actions of Mr Fletcher were dishonest in the relevant sense. The Court found that Mr Fletcher's actions were not the actions of an honest person or an honest solicitor. This amounted therefore to dishonest assistance for the purposes of the second limb of *Barnes v Addy*.

Further, this finding of dishonesty meant that Mr Fletcher could not rely on his obligation (as contained in s.89 (1)) to act on his client's instructions as to the disposition of the trust assets.

Sending trust funds offshore for Mr Hohepa was not consistent with the terms of the deed of trust. Mr Fletcher's fiduciary breaches therefore enabled Mr Hohepa to gain access to the trust funds and misapply them. The Court was also satisfied that liability for knowing receipt was proven by accepting payment of legal fees incurred in circumstances where trust funds were being paid in breach of trust.

The Trust was awarded \$253,445, being the gross sale price of the Property as monetary relief in respect of which Mr Hohepa and Mr Fletcher were jointly and severally liable. The Court also made a punitive award of \$10,000 exemplary damages against Mr Fletcher as well as ordering he pay compound interest and costs. To add insult to injury as far as Mr Fletcher was concerned, the Court of Appeal also made an award of indemnity costs against him.

Mr Fletcher's professional indemnity insurer refused to indemnify him because of the allegations of dishonesty. Mr Fletcher sued the insurers claiming that they were not entitled to refuse to indemnify him. These proceedings were eventually withdrawn by Mr Fletcher by reason of the finding of dishonesty, with Mr Fletcher having to pay his insurer's costs.

## DISCIPLINARY PROCEEDINGS

The final round of this matter was played out in front of the NZ Lawyers and Conveyancers Disciplinary Tribunal (the Tribunal), which suspended Mr Fletcher from practice as a lawyer for two years.

Before the Tribunal Mr Fletcher acknowledged that he had made mistakes in acting in this matter and submitted that his actions resulted from "a temporary lack of focus" on his part and that over a period of no more than a few weeks he had lost his objectivity in the way he handled Mr Hohepa's express instructions. This seems to be something well short of a full expression of contrition by Mr Fletcher and does not appear to demonstrate a proper appreciation of what he had done.

In light of the unhesitating characterisation by the Court of Appeal of Mr Fletcher's actions as dishonest it might be thought that the two-year suspension from practice was lenient.

## CONCLUSION

Solicitors must act with loyalty and fidelity to their clients. Although instructed by Mr Hohepa as trustee, Mr Fletcher was also acting for the trust, not just Mr Hohepa. Accordingly, Mr Fletcher was obliged to:

- refuse to act on instructions from a trustee that would be likely to result in harm or loss to the trust;
- ensure the trust's property is dealt with in accordance with the law; and
- ensure that the trustee's instructions are not contrary to the trust deed.

It will be no excuse to say, "but the trustee told me to ..."

It might appear to some that Mr Fletcher was just doing what he was told. Such an argument would have been stronger had Mr Fletcher had no knowledge of the trust. Mr Fletcher did however know of the trust, and that level of knowledge was such that the Court found it insupportable that he could not know that he was assisting a clear breach of trust.

When a trustee abandons the obligations of the trust, the beneficiaries can be

significantly disadvantaged. For this reason, the level of honesty and fidelity required of a trustee, and by extension, of those advising the trustee, is high.

## (Endnotes)

- 1 *Eden Refuge Trust v Hohepa* [2011] 1 NZLR 197 – High Court judgment
- Eden Refuge Trust v Hohepa* [2011] 3 NZLR 273 – High Court judgment (quantum)
- Fletcher v Eden Refuge Trust* [2012] NZCA 124 – Court of Appeal
- Waikato Bay of Plenty 356 Standards Committee v Charles Fletcher* [2013] NZLCDT16 – New Zealand Lawyers and Conveyancers Disciplinary Tribunal
- 2 [1984] 1 NSW LR 285
- 3 In this regard the NZ Court of Appeal noted that it is not a straightforward matter to reconcile all aspects of the decisions in *Royal Brunei v Tan* [1995] AC 378 *Twinsectra Ltd v Yardley* [2002] 2 AC 164, *Barlow Clowes International Ltd (In Liq) v EuroTrust International Ltd* [2006] 1 WLR 1476 and *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] 230 CLR 89 however it was unnecessary for that issue to be addressed.

## NEW AIDS FOR PRACTITIONERS: RISKWATCH NEWS / LIMITATION SCHEDULE

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