Conflicts of interest

To act or not to act?
To restrain or not to restrain?

WITH CHRISTINE SMYTH

The Australian Solicitor Conduct Rules (ASCR) commenced on 1 June 2012 in Queensland,[2] replacing the Legal Profession (Solicitors) Rule 2007 (Solicitors Rules).

Before that, reliance was primarily on the common law to direct us in our duties. The common law very much looks to community standards as a measure against which rights and wrongs are defined. Remembering, only as recently as 2017 the gay panic defence was abolished in Queensland law.[3]

If you practise law long enough you get to experience these type of fundamental shifts, especially in how law is practised and the standards against which we are judged. However, for most, few areas of practice will have you concerned about a file you managed six years ago, or even a decade ago, unless you practise as a succession lawyer.

Why? Because that will you drafted yesterday may not be acted on for decades, and much can happen in that time, such as the introduction of the ASCR in 2012 to replace the Solicitors Rules, noting specifically ASCR rules 10 and 11, which replaced rules 4 and 8 in the Solicitors Rules, and all of which relate to conflicts of interest concerning former and current clients.

Prior to the 1980s, 1990s and much of 2000s, it was not uncommon for lawyers to act for related parties, not for nefarious reasons, but simply because most lawyers and law firms were a part of our local community, operating in our local towns for families, often down the generations.

There was a connectedness to community and clients that many now pine for, but which rarely exists today. The difficulty is that between then and now much has changed in the way law is practised, including the rules and standards by which our courts judge our performance.

> **'Rights can be considered wrongs, depending on who is judging.'**[1]

It is against this history that I profile the matter of *Hutchinson v Timmins*: *Estate of Kevin Henry Fox* (Deceased) [2018] NSWSC[4] (*Hutchinson*), with a view to identifying for practitioners, both new and long-standing, how easily will instructions can descend into the murky waters of should you or shouldn't you have, many years, if not decades, later.

Hutchinson explores the longtail impact of will instructions, how they can wrap their wrongdoings around the rights and reputations of others, exposing the risks in taking will instructions from two will-makers in circumstances where there is evidence of a mutual will agreement between them – all of this compounded by the Daedalus nature of acquiring law firms, their files and employing their people.

The application that gave rise to this decision was for enforcement of a subpoena and an application to restrain a successor law firm from acting in the estate of Kevin Fox. The plaintiffs were the daughters of the late Joyce Fox, who was married to the late Kevin Fox for 38 years.[5]

This proceeding was one of a number they issued against the estates of their late mother and late stepfather.[6] In reaching its decision, the court found it necessary to scrutinise the pleadings in the "revocation proceedings". The revocation proceedings sought to set aside a settlement in the "FPA proceedings" on the grounds that the release in the FPA proceedings was "procured [by] the release of their rights by misleading and deceptive and unconscionable conduct, and non-disclosure of material facts ('impugned conduct')".[7]

The daughters' revocation proceedings against Kevin's estate included allegations that the solicitor for their mother and subsequently their stepfather, Mr Mitchell, was an active party in the impugned conduct.[8] Their submission was that by virtue of the evidence thrown up by the subpoena, Mr Mitchell (employed by Mason Lawyers) was a material witnesses to the revocation proceedings, ergo the firm Mason Lawyers ought to be restrained from acting.

During her lifetime Joyce made a number of wills, all prepared by Mr Mitchell[9] while he was with the firm Thomas Mitchell Solicitors (and the former firm, Thomas, Mitchell & Co.).[10] Joyce and Kevin owned a home together in joint tenancy which formed the bulk of her estate.[11] In 2011, Joyce consulted Mr Mitchell, who gave advice about severance of tenancy of the matrimonial home.[12]

Joyce instructed that she and Kevin agreed Kevin would change his will to ensure her daughters would benefit from his estate should she predecease Kevin and that he would not change his will thereafter. With that in mind, she did not sever the tenancy.

Afterwards, the firm Thomas Mitchell Solicitors dissolved. Mr Mitchell took on the files and records of that firm and he carried on (for a short time) as a sole practitioner, at which time, his sole practice and the records held, were acquired by Mason Lawyers Pty Ltd. Mason Lawyers Pty Ltd employed Mr Mitchell on a full-time basis for a number of years, reducing to a casual consultancy, at the time of this proceeding.

About three months after Joyce gave her instructions, by which time Mr Mitchell was in sole practice, Kevin attended Mr Mitchell and gave instructions for his will that reflected the agreement referred to by Joyce.[13] Joyce subsequently fell ill, was diagnosed with dementia and within a year of the diagnosis was admitted to hospital where she died 10 days later on 24 June 2014.[14]

During the period of her illness and just prior to her death, Kevin attended on Mr Mitchell (who by this time was employed by Mason Lawyers Pty Ltd) and changed his will. There was evidence that, at the time Mr Mitchell was taking these subsequent instructions from Kevin, Mason Lawyers knew Joyce had dementia, provided Joyce's daughter Gail a copy of her power of attorney[15] and that Kevin instructed Mr Mitchell not to send material related to his will instructions to the matrimonial home.[16]

After Joyce died, her daughters issued proceedings seeking further provision from her estate. Mason Lawyers acted in that matter on behalf of Kevin. The daughters entered into an agreement with Kevin on that claim, which was then resolved by way of consent orders.

At the time of the agreement they said they were of the belief that they were beneficiaries of Kevin's estate. Part of the recitals to the deed included a denial by Kevin that there was any agreed promise between him and Joyce, and that the parties acknowledged the recitals to the deed were correct to the best of their knowledge, and that Kevin had received legal advice.[17]

Less than a year after the consent orders issue, Kevin died on 19 May 2016. His executor, Mr Timmins, then instructed Mason Lawyers to act in Kevin's estate[18] to seek a grant of probate. Joyce's daughters filed a caveat against Kevin's will in the probate proceedings, issuing a subpoena. During the disclosure process in response to the subpoena, despite evidence of an extensive search, it becomes apparent that the controversial will file to Kevin's 2011 will could not be located.[19] With that, the plaintiff daughters brought their application for compliance with the subpoena and seeking the restraint.

In respect of the subpoena, the court, found that "all the searches that could reasonably be expected"[20] had been done and that "a simple order now for Mason Lawyers to comply with the subpoena is pointless: *Quach v Vu* [2009] NSWSC 131 at [7]".[21]

On the restraint issue, both parties argued their positions around the principles "as stated by Brereton in *Kallinicos* at [76], together with the subsequent authorities such as Burrell", with the court applying those principles:[22]

"• The test to be applied in this inherent jurisdiction is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice;

- The jurisdiction is to be regarded as exceptional and is to be exercised with caution;
- Due weight should be given to the public interest in a litigant not being deprived of the lawyer of his or her choice without due cause;
- The timing of the application may be relevant, in that the cost, inconvenience or impracticality of requiring lawyers to cease to act may provide a reason for refusing to grant relief."

In coming to its conclusion, the court noted issues related to the quality of the daughters' pleadings in the revocation proceedings and as well as noting possible issues around the quality of advice they received in the FPA proceedings. However, the court found that at critical times Mr Mitchell was involved in the events the subject of the revocation proceedings[23] as such, "Mr Mitchell's personal performance of various retainers is going to come under close scrutiny and criticism. He will be a highly material witness in these proceedings. He is still a casual employee of Mason Lawyers…the Court is concerned about the extent of the criticism of his conduct that is likely to arise and that may ultimately flow over to the firm Mason Lawyers defending its own reputation, whilst he and the firm attempt to defend his reputation."[24]

Taking into account that the application was "made early, so as to minimise any disruption to the defendant",[25] the court ordered that Mason Lawyers be restrained from acting on and from the conclusion of all issues relating to the defendant's strike-out motion filed on 7 September 2017.[26]

It remains a reasonably common practice that firms act for spouses in their will instructions, and this reality is recognised by the QLS Ethics and Practice Centre in its ethics note on mirror wills, which provides suggestions on how to manage the issue of changed instructions after separation or divorce.[27]

It points out that ASCR Rule 10.2 permits the taking of instructions in this circumstance. However, there is a significant caveat in the rule and that is where to do so *would not be detrimental* to the interests of the former client.

And therein is the crux of the issue when deciding whether you ought to act or not act. If you choose to act, then your actions may be sheeted home to your colleagues, who in addition to the former client and their beneficiaries, you also owe a duty. And so in the words of Woody to Buzz Lightyear: conflicts, conflicts everywhere…

Postscript:

If a picture paints a thousand words, then a time-line table reduces a lengthy complex judgement of 12,334 words into a digestible format for time-poor readers and publishers with limited space. I have produced a table to assist practitioners process the labyrinthine factual matrix of *Hutchinson v Timmins*: *Estate of Kevin Henry Fox* (Deceased) [2018] NSWSC. It can be accessed by this link at **qls.com.au/successionseptember2019**.

Notes

1 Suzy Kassem, *Rise Up and Salute the Sun: The Writings of Suzy Kassem*.
2 New South Wales did not adopt the ASCR until 1 January 2014, at which time it replaced the Professional Conduct and Practice Rules (Solicitors Rules) (NSW).
3 Criminal Law Amendment Bill 2017 section 304.
4 *Hutchinson*– my thanks to QLS Ethics Solicitor Shane Budden for drawing this case to my attention.
5 At [5].
6 At [29] family provision proceedings 2015/98270;at [37] caveat in probate proceedings no 2016/175383; at [40] statement of claim (proceedings 2017/137987) (the revocation proceedings).
7 At [2].
8 At [3].
9 At [6].
10 The firm changed its name in 1985, see [6].
11 At [12] – noting in NSW jointly owned real property can be caught by the notional estate provisions of the NSW *Succession Act* – see section 80.
12 At [13].
13 At [13]-[15].
14 At [17].
15 At [21]-[26].
16 At [25].
17 At [77].
18 At [36], application for probate of Kevin Fox's last will (proceedings no 2016/175383) (the probate proceedings).
19 At [53]-[60].
20 At [80].
21 At 82.
22 Noted at [91] applied by the court at [102]-[125].
23 At [104].
24 At [103].
25 At [123].
26 At [126].
27 qls.com.au/ethics > Ethics resources > Conflicts concerning former clients > Mirror wills…

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