

CONCERNING

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

AND

CONCERNING

a determination of the [City] Standards Committee [X]

BETWEEN

AI

Applicant

AND

AJ

Respondent

DECISION

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

Introduction

[1] Dr AI seeks a review of the [City] Standards Committee [X] decision to take no further action in respect of his complaint against Mr AJ. The Committee determined to take no further action on the complaint pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act).

Background

[2] Dr AI is a New Zealand citizen but resides in Europe. In May 2011 he was engaged in a relationship property dispute with his former wife.

[3] A friend of Dr AI's recommended that he engage Mr AK, a [City] based barrister to represent him. Dr AI made email contact with Mr AK, and subsequently had discussions with Mr AK on Skype.

[4] Dr AI instructed Mr AK.

[5] Mr AK estimated his fee for progressing the matter to conclusion to be \$6,900 which he required to be paid in advance. Dr AI paid the full fee directly to Mr AK shortly after he had confirmed his instructions.

[6] Those funds were paid prior to Mr AJ confirming his agreement to act as Mr AK's instructing solicitor.

[7] Mr AK informed Dr AI that he could not take instructions directly from him. He made arrangements for Mr AJ then a staff solicitor in the [City] legal practice of AL, barrister and solicitor, to fulfil the role of his instructing solicitor.

[8] Mr AJ had previously been Mr AK's instructing solicitor on a number of files. Mr AJ advised that when his firm first received a request from Mr AK to act as his instructing solicitor in February 2010, enquiries were made of the New Zealand Law Society and the Society confirmed that Mr AK held a practising certificate.

[9] Mr AJ provided Dr AI with a letter of engagement on the 19th of May 2011. He confirmed in that letter of engagement that he would not be charging fees for his services. He also recorded that the legal services he would be providing were confined to "instructing Mr AK to act in property relationship proceedings".¹

[10] The relationship property proceedings were before the Court on the 9 June 2011, at which time directions were made for the filing of evidence. A further court date was set for 21 July 2011.

[11] Prior to the July hearing, it came to Mr AJ's attention, that Mr AK had not renewed his practising certificate. That certificate fell due for renewal on the 30 June 2011. Mr AK could not progress the court matter without being certified to practice. Fresh counsel had to be instructed.

[12] Dr AI attempted, without success, to recover the fees he had paid to Mr AK.

[13] Dr AI approached Mr AJ to assist with recovering the fees paid to Mr AK, together with Court costs that Dr AI had been ordered to pay.

[14] Mr AJ instructed Mr AK to seek independent legal advice.

The complaint and the Standards Committee Decision

[15] On the 28th of July 2011, Dr AI lodged complaints with the New Zealand Law Society Complaints Service (NZLS). The complaints service opened separate complaint files (AK/AJ).

[16] The complaint against Mr AJ can be summarised as follows:

- (1) Complaint that Mr AJ failed to take responsibility for Mr AK's actions.

¹ Letter of engagement, 19 May 2011.

(2) Complaint that Mr AJ refused to assist Dr AI to recover fees from Mr AK.

[17] Dr AI advises that his complaint in respect to Mr AK is still under consideration by NZLS.

[18] The [City] Standards Committee [X] delivered its decision in respect to the AJ complaint on 6 December 2011. It is difficult on reading that decision, to precisely identify how the Committee characterised the nature of the complaint(s) made in respect to Mr AJ.

[19] The Committee's decision provides a comprehensive factual background, details the respective parties' positions, and reaches conclusion to take no further action. In arriving at that view the Committee appears to have focused its enquiry primarily on those aspects of Dr AI's complaint which were critical of Mr AJ's refusal to assist Dr AI in endeavouring to recover fees paid to Mr AK.

[20] My view of Mr AI's complaint was that it was not limited to a complaint concerning Mr AJ's reluctance to pursue Mr AK for fees, but rather traversed a broader canvas in that it alleged that Mr AJ had breached his professional obligations to protect Dr AI's interests.

[21] The Committee, in determining to take no further action on the complaint, concluded that:

- (1) Mr AJ's role as instructing solicitor was limited to providing instructions for the Court case.
- (2) Mr AJ had made efforts to retrieve Dr AI's file, and had sought reimbursement of funds from Mr AK.
- (3) Mr AJ, in the face of complaint lodged by Dr AI, was correct to refer Dr AI to new counsel.

Application for Review

[22] On 28 December 2011 Dr AI filed an application for review.

[23] Dr AI's grounds in support of his review application were set out in his accompanying letter of 28 December 2011. Dr AI makes complaint that:

- (1) Fees paid should have been channelled through Mr AJ's trust account.
- (2) Mr AJ failed to assist in recovering fees.

- (3) Mr AJ continued to engage in a professional relationship with Mr AK, when it transpired that Mr AK had been subjected to professional disciplinary sanction in another jurisdiction [(overseas)].
- (4) Mr AJ should have been aware that Mr AK did not hold a practising certificate.
- (5) Mr AJ should have discussed his terms of engagement directly with Dr AI.

[24] The expansive nature of the complaints detailed by Dr AI lends support to the view that the Standards Committee may have adopted an unduly narrow approach to the complaint.

Role of the LCRO on review

[25] The role of the LCRO on review is to reach his own view of the evidence before him. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting his or her own judgement for that of the Standards Committee, without good reason.

[26] In *Deliu v Hong* it was noted that a review is:²

...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.

Reverse Briefs

[27] Mr AK was a barrister sole. Rule 14.4 of the Conduct and Client Care Rules³ provides that a barrister sole must not accept instructions other than through a solicitor.

[28] A practice has arisen around compliance with the intervention rule which has come to be known as a “reverse brief” whereby a barrister sole will arrange for a solicitor to act as his or her instructing solicitor. There is no issue with that in itself. But the practice falls down when neither the barrister nor the lawyer who accepts the reverse brief fulfils their obligations in terms of the Conduct and Client Care Rules and the barrister deals directly with the client as if he were instructed directly.

Issues

- (a) *Should Mr AJ have ensured that fees received were channelled through his account?*

² *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [41].

³ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[29] It is unfortunate that Dr AI has suffered financial loss as a consequence of the barrister he instructed being unable to conclude the work that he had been retained to complete.

[30] However, I do not consider that criticism can be fairly made of Mr AJ for the dilemma that Dr AI faces in respect to the loss of his fees.

[31] Importantly, Dr AI elected to make a payment to Mr AK before Mr AJ agreed to take on the role of instructing solicitor. Dr AI did not instruct Mr AK on Mr AJ's recommendation. Nor was it the case that Dr AI made a random decision to instruct Mr AK. Dr AI approached Mr AK on the basis of a friend's recommendation.

[32] Further, Dr AI had an opportunity to discuss his case with Mr AK prior to confirming his instructions, and agreed to deposit funds to Mr AK's account immediately those instructions had been confirmed.

[33] Mr AJ advises that he had no knowledge that Mr AK had extracted his fees from Dr AI prior to commencing work, and notes that he would have been concerned if he had known that was the case.

[34] Dr AI argues that Mr AJ's letter of engagement records that Mr AJ is to have the "overall responsibility" for the services provided, and suggests that the scope of that responsibility should have extended to ensuring that payment of Mr AK's fees was channelled through Mr AJ's trust account.

[35] That argument is not persuasive. Mr AJ quite properly in his letter of engagement records the limited scope of his involvement in the file, which was confined to instructing Mr AK. Nor is it reasonable to impose obligation on Mr AJ to have the initial responsibility for managing payment of fees, when Dr AI had, without Mr AJ's knowledge, reached an agreement to pay fees directly to Mr AK prior to Mr AJ being engaged.

(b) Should Mr AJ have assisted in recovering fees?

[36] Soon after being advised that Mr AK was unable to continue acting, Dr AI traversed with Mr AJ the option of Mr AJ continuing with the litigation. That option seems to have been quickly rejected, and fresh counsel was instructed.

[37] Dr AI moved promptly to lodge complaints with the complaints service. The Court was advised that Mr AK was unable to represent Dr AI on the 21 July 2011. On 28 July 2011 Dr AI filed his complaints.

[38] Quite appropriately, the moment that Mr AJ received notice that complaint had been made, he stepped back from the file.

[39] Dr AI acknowledges in his review application, that when he was advised that Mr AJ would require reimbursement if he was to progress the litigation, he elected immediately to instruct new counsel. Inference can be fairly drawn that Dr AI may have been prepared to instruct Mr AJ, if Mr AJ had been prepared to complete the work without rendering further fee. That would have involved Mr AJ accepting responsibility for Mr AK's default, a responsibility he was not obliged to assume.

[40] It would have been inappropriate for Mr AJ to proceed with attempts to recover fees from Mr AK, when Mr AJ received notice that he was the subject of complaint.

(c) *Should Mr AJ have notified Dr AI of Mr AK's adverse disciplinary findings?*

[41] Dr AI argues that Mr AJ should have been aware of adverse disciplinary findings that had been made against Mr AK. He questions why Mr AJ would engage in a professional relationship with a lawyer who had been professionally sanctioned in another jurisdiction.

[42] This raises question as to the extent to which an instructing solicitor has obligation to examine the background of any barrister instructed by the solicitor.

[43] It would be so obvious as to approach the trite to emphasise that an instructing solicitor should exercise caution before agreeing to fulfil the role of instructing solicitor, if the solicitor has reservations regarding the barristers competency or ability to do the job, or concerns that the barrister has been the subject of disciplinary sanction, which may reflect on the barristers competency, character, or suitability.

[44] At minimum, it would be expected that a solicitor who instructs a barrister in the knowledge that the barrister has been subject to significant disciplinary sanction, should secure the barrister's consent to disclosing those matters to their client.

[45] Mr AJ advises, that prior to initially agreeing to act as Mr AK's instructing solicitor, his firm made enquiry of the Law Society and was advised that Mr AK held a current practising certificate. The Society advised that Mr AK was able to be instructed by Mr AJ in accordance with the intervention rule.

[46] That enquiry appears to have been precipitated by concerns Mr AJ's principal had, concerning files he had taken over from the office of a suspended practitioner. The suspended practitioner had instructed Mr AK on a number of files. Mr AJ's office inherited those files.

[47] To secure a practising certificate, a party must satisfy the Society that they are a "fit and proper person" to hold a certificate.

[48] Section 55 of the Act, records the factors to be considered in determining whether a person is a fit and proper person to practice law.

[49] Included is consideration as to whether a person has been subject to disciplinary proceedings in another jurisdiction.⁴

[50] Information from the Standards Committee file would indicate that in December 2006 the [Overseas] Supreme Court suspended Mr AK from practising law for a period of one year, that suspension effective from 19 February 2007.

[51] It is unclear when Mr AK was admitted to practice in the New Zealand jurisdiction, and I have no knowledge as to whether Mr AK's previous disciplinary history was considered when a decision to grant a practising certificate was made, or whether the New Zealand Law Society granted that certificate with full knowledge of his previous disciplinary history.

[52] What is clear, is that prior to agreeing to act as Mr AK's instructing solicitor, Mr AJ's firm took steps to confirm that Mr AK held a current practising certificate. On receiving confirmation that he did, Mr AJ was entitled to place reliance on the fact that he could confidently assume that Mr AK had, in obtaining that certificate, satisfied the Law Society that he was a fit and proper person to hold a practising certificate.

[53] I can appreciate, that Dr AI is disconcerted by the fact that subsequent to engaging Mr AK, he discovered that Mr AK had a history of professional misdemeanours of sufficient gravity to lead to him being struck off for a period of time.

[54] However on receiving advice that there was no impediment to Mr AJ acting as instructing solicitor, Mr AJ cannot be criticised for agreeing to do so.

[55] Nor is it the case that Mr AJ "should have known" that Mr AK did not hold a practising certificate. At the time Mr AJ agreed to act as Mr AK's instructing solicitor, Mr AK did hold a current certificate. Nor is it the case that Mr AK's certificate was suspended or discharged during the time of his engagement with Mr AJ and Dr AI. Practising certificates fall for renewal before June 30 each year. Mr AK did not renew his certificate for reasons that are unclear, but it would have been entirely reasonable for Mr AJ to have the expectation that a practising barrister would renew his practising certificate when it came time to do so.

(d) *Should Mr AJ have discussed his terms of engagement directly with Dr AI?*

[56] Dr AI is critical of Mr AJ for failing to discuss his terms of engagement directly with him.

[57] I accept that Mr AJ could have provided a better explanation to Dr AI as to the nature of the relationship between barrister and instructing solicitor.

[58] It would have been helpful for Mr AJ to clarify the limited scope of his engagement, and to clarify the procedure for payment of fees.

[59] The letter of engagement provided to Dr AI is a standard letter of engagement which it would be assumed, is in a format and style that Mr AJ commonly provided to his own clients.

[60] The letter of engagement records that Mr AJ assumes overall responsibility for the services provided, and understandably has prompted Dr AI to raise questions as to the extent to which Mr AJ is responsible for Mr AK's actions.

[61] The instructing letter does emphasise that the scope of the services being provided is limited to instructing Mr AK, and in correspondence accompanying the letter of engagement, Mr AJ emphasises that "we are simply instructing Mr AK to act as a barrister on your behalf".⁵

[62] I do not accept that Mr AJ can be criticised for failing to contact Dr AI directly. Dr AI was residing overseas. At the point at which Mr AJ agreed to act as instructing solicitor, Dr AI had already discussed his case with Mr AK, had paid initial fees, and had instructed Mr AK to set the proceedings in motion. Bearing in mind that Mr AK had been given overall responsibility to run the file, I don't consider that Mr AJ can be criticised for failing to engage "person-to-person" with Dr AI. A letter of engagement was sent to Dr AI which was signed by him and returned.

[63] Mr AJ emphasises that it was his practice to meet with Mr AK regularly to discuss files.

[64] It is not the case, that this was a file which was progressed over a lengthy period of time. Shortly after he had taken on the role of instructing solicitor, it came to Mr AJ's attention that Mr AK had not renewed his practising certificate. Considering the relatively short period of time between providing his letter of engagement and discovering that Mr AK was unable to continue to act, I do not consider that criticism can be made of Mr AJ that he failed to sufficiently engage with Dr AI.

Conclusion

[65] It is regrettable that Dr AI has incurred loss as a consequence of Mr AK failing to fulfil his obligations.

⁴ Lawyers and Conveyancers Act 2006, s 55(1)(f)(i)(ii).

⁵ AJ to AI, 19 May 2011.

[66] A solicitor who takes on the role of instructing solicitor in those circumstances which are commonly described as a “reverse brief” must be scrupulously attentive to their obligations to their client and cautious to ensure that the manner of the instructions does not seduce them to the belief that their normal obligations to a client are diminished.

[67] Mr AJ’s firm made enquiries of the Law society as to whether there was any impediment to instructing Mr AK and was advised there were none. Mr AK held a practising certificate at the time he was instructed. Mr AK took fees from Dr AI before Mr AJ was asked to act, and without Mr AJ’s knowledge. Shortly after being briefed, Mr AK failed to renew his practising certificate. That could not have been anticipated by Mr AJ. Dr AI resided overseas. It was not possible for Mr AJ to arrange a face to face meeting but he promptly despatched an engagement letter to Dr AI which made clear that Mr AK was to assume responsibility for the management of the proceedings, an arrangement that Dr AI himself had confirmed with Mr AK. Things went wrong very quickly. This was not a case where Mr AJ had failed, over a period of time, to provide an appropriate degree of supervision over the file.

[68] I do not consider that Mr AJ has breached his professional obligations to Dr AI.

Decision

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

DATED this 21st day of November 2014

R Maidment
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:

Dr AI as the Applicant
Mr AJ as the Respondent
Mr AL as a related person
[City] Standards Committee
The New Zealand Law Society
Secretary for Justice