

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

BR

Applicant

AND

EP

Respondent

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

DECISION

Background

[1] BR is a Consultant Psychologist.

[2] In 2008 and 2009 he was pursuing a claim against Accident Compensation Corporation (ACC) for fees. These fees had been incurred in respect to counselling services BR had provided to a client of ACC's over a number of years.

[3] ACC refused to pay BR'S fees. BR sought a review of the ACC's decision.

[4] BR was supported by the Medical Society (MS) who instructed counsel (Mr UV) to assist BR in the review proceedings.

[5] BR became disgruntled with his counsel. He raised his concerns with MS. MS instructed EP to conduct a review of the case.

[6] Following receipt of EPs' report, MS asked EP to provide further assistance to BR, but on a limited basis. EP was instructed to attempt to negotiate a settlement with ACC.

[7] Attempts to negotiate a settlement were unsuccessful. EP's involvement ceased at that point.

[8] BR lodged complaints with the Lawyers Complaints Service against both EP and counsel appointed by MS to assist BR.

The Complaint and the Standards Committee Decision

[9] There were two aspects to EP's involvement with BR. Firstly, he was instructed to review BR's file. Secondly, he was engaged in attempts to negotiate a settlement for BR. BR's complaint relates to criticism of EP's performance in conducting the review. He makes no complaint regarding EP'S efforts to negotiate a settlement with ACC.

[10] BR's complaint is comprehensively set out in the Committee's decision. The complaint made against EP to some extent intermingles with complaints made against CD.

[11] The kernel of BR's complaint against EP is allegation that EP's review was unfair and unbalanced. Of particular concern to BR, is that EP did not, when completing his review, consult with BR.

[12] In response, EP submits that:

- (i) BR has no standing to lodge a complaint against him. MS, not BR, was his client.
- (ii) He owed no duty of care to BR.
- (iii) He is unaware of any principle of law by which BR could legitimately assert he was owed a duty of care, nor could he sustain complaint that he had breached any professional ethic duty or standard of care owed to BR by reference to provisions in the Conduct and Client Care Rules.¹
- (iv) His legal advice to MS is a privileged communication that privilege attaches to MS who have indicated their unwillingness to waive the privilege.

[13] In its decision delivered on 5 December 2011, the Committee determined pursuant to section 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) to take no further action in respect to the complaint.

[14] Pivotal to the Committee's decision was its conclusion that EP was instructed by MS. BR was not, the Committee emphasised, EP's client.

¹ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

Application for review

[15] BR applied to review the decision of the Standards Committee. He submitted that:

- (i) He was prepared to concede that he “was not, technically, EP’s client”.² EP nevertheless had an obligation to ensure that the review was “conducted fairly and produced truthful outcomes”.³
- (ii) The review process was fundamentally flawed and unfair to BR, particularly in that EP consulted with CD, but failed to consult with BR.
- (iii) MS had implicitly waived its right to privilege of the review prepared by EP.
- (iv) The Standards Committee failed to cite relevant case law to support its findings.
- (v) The Committee interpreted EP’s obligations as an Officer of the Court in a narrow and restrictive way.

[16] In the conclusion to his written submissions, BR records the nub of his complaint as follows:⁴

... [t]he essence of my complaint against EP was that if my complaints against CD are valid then it follows that my complaint against EP is valid.

Review Hearing

[17] At the hearing, BR expanded on his written submissions. He accepted that if he was to succeed in his complaint, he would need to overcome argument that EP, as counsel instructed by MS, had no duty to BR which could give rise to a disciplinary complaint.

[18] GH appeared at the hearing for EP and provided written submissions prior to the hearing. Those submissions in large part traversed arguments which had been addressed by EP in his initial response to the Standards Committee.

[19] GH argued that BR's complaint was fatally flawed as there was no lawyer client relationship between BR and EP.⁵

² Attachment to the application for review dated 12 January 2012 at [9].

³ Above n 2 at [10].

⁴ Above n 2 at [30].

⁵ GH's submissions dated 28 July 2014 at [9-11].

BR says in his review document that he concedes he "*was not, technically, EP's client*".

That is a submission or contention that cannot go unanswered. It is not a technical or nontechnical point. There either was a solicitor/client relationship or there was not. BR was not and on the facts could not have been, EP's client. Most importantly, there was no provision by EP of regulated services so the Lawyers and Conveyancers Act 2006 and the client care aspects of the Conduct and Client Care Rules are not engaged. That therefore must be the end of that issue.

So, if BR now accepts that he was not EP's client, the only basis upon which he could complain is by contending that somehow EP owed separate and independent duties to him. Alternatively, EP has conducted himself vis-a-vis BR in some manner that breaches the duties contained in the conduct parts of the Conduct and Client Care Rules. None had been identified by BR.

[20] GH submitted that BR's complaint was so misguided as to warrant consideration to a substantial award of costs being made in favour of EP.

[21] He contends that the complaint was improperly and unreasonably brought, frivolous and vexatious, and totally lacking in merit.

Role of the LCRO on review

[22] The role of the Legal Complaints Review Officer (LCRO) on review is to reach his own view of the evidence before him. Where the review is of an exercise of a discretion, it is appropriate for the LCRO to exercise particular caution before substituting his own judgement for that of the Standards Committee without good reason.

Analysis

[23] Whilst there have been extensive submissions filed in this review, the argument can be concisely dealt with.

[24] EP was instructed by MS. His obligations are to his client. It is to MS that he owes his primary duties, not to BR.

[25] EP was under no obligation to interview BR. The scope and parameters of his enquiry were matters for him, under instruction from his client.

[26] The circumstances in which a lawyer may owe a duty to a non-client have been described as "exceptional".⁶

[27] BR endeavours to embrace EP in an obligation of duty through argument that MS had waived its privilege in respect to the report prepared by EP. There is no evidence

⁶ Duncan Webb *Ethics, Professional Responsibility and the Lawyer* (2nd ed, LexisNexis NZ, 2006) at 179.

to support argument that privilege had been waived, and in any event if that was the case, I do not accept that would have any impact on the issue as to whether EP owed a duty to BR.

[28] Whilst it is compellingly apparent that a lawyer's obligations are primarily to their client, there is a broader obligation on lawyers to promote and maintain proper standards of professionalism in their dealings.⁷

[29] This obligation to behave in a professional manner to third parties, can often reduce to a lawyer's obligation to observe basic courtesies in their dealings. There is no suggestion made that EP has behaved discourteously to BR.

[30] Nor can argument be sustained that EP has, in some fashion, breached his obligations as an officer of the Court. EP was not acting as counsel engaged in litigation. He was preparing a report on the instructions of his client.

[31] The extent to which a lawyer's duties and obligations are harnessed to their client when conducting litigation was considered in *Allied Finance and Investments Limited v Haddow & Co* where it was noted that:⁸

.... the relationship between two solicitors acting for their respective clients does not normally of itself impose a duty of care on one solicitor to the client of the other. Normally the relationship is not sufficiently proximate. Each solicitor is entitled to expect that the other party will look to his own solicitor for advice and protection.

[32] It is almost inconceivable that a lawyer could owe a duty of care to a third person against whom his or her client is litigating.⁹

[33] In this case, EP was not engaged in litigation. He was not representing BR or a party engaged in litigation with BR, but the manner in which a lawyer's duties are circumscribed when engaged in litigation, does illustrate the difficulty BR encounters when raising argument that EP owes a duty to him.

[34] In large part, BR's argument is premised on, and driven by, his contention that EP should have interviewed him when MS instructed EP to review the progress of the ACC litigation.

[35] He may feel aggrieved that he was not consulted, but he is misguided when he channels his dissatisfaction into complaint that EP has committed a professional breach which merits disciplinary sanction. EP was obliged to follow his client's instructions. Clearly MS did not require EP to interview BR. If they had wanted BR to

⁷ Above n 1, Rule 10.

⁸ *Allied Finance and Investments Limited v Haddow & Co* [1983] NZLR 22 (CA).

⁹ Above n 6.

be interviewed, no doubt they would have made request of EP to do so. The basis upon which they required EP to proceed his enquiry was entirely a matter for their instruction.

[36] BR suggests that EP was obliged, as a matter of fairness, to seek his views. His failure to do so lays foundation suggests BR, for argument that EP has breached duties owed to him.

[37] EP was under no obligation imposed by general principles of "fairness". His duty was to carry out his clients instructions. If BR wished to pursue complaint that the review process was unfair, his option was to pursue that complaint directly with his insurer.

[38] There is no basis to the allegation that EP breached any duty or obligation owed to BR.

Costs

[39] The Cost Orders Guidelines issued by the office of the LCRO note that costs may be awarded in favour of a practitioner against a complainant, however the power to award costs in those circumstances is one which will be exercised sparingly.

[40] A costs order may be made against the party to review (whether a practitioner or a layperson) in favour of the other party where there has been some improper conduct in the course of the review. Such conduct may exist where a party has acted vexatiously, frivolously, improperly, or unreasonably in bringing, continuing, or defending the review. Improper conduct may also exist where a party has ignored or disobeyed an order or direction of the LCRO or breached an undertaking given to the LCRO or another party.

[41] GH submits that a costs award is warranted. He argues that the complaint is entirely lacking in merit.

[42] I accept that BR had little chance of success with this review, but am not inclined to make a costs award. I do not agree that complaint was brought with a frivolous, vexatious or improper motive. BR presented as being genuine and committed in his views.

[43] I am also mindful that the Lawyers and Conveyancers Act 2006 places considerable focus on consumer protection and consistent with that objective is the need to ensure that complainants are not discouraged from pursuing complaints

from concern that they will face costs awards in the event that their review is unsuccessful.

[44] This is not to sanction abuse of the resources of this office, or to underestimate the distress, inconvenience and on occasions expense that practitioners may face when responding to complaints, but rather to emphasise that in this particular case I did not consider that there were grounds to depart from the usual approach adopted by this office when considering a cost application.

Decision

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

Dated this 3rd day of September 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:

BR as the Applicant
EP as the Respondent
GH as the Representative for the Respondent
The [City] Standards Committee [X]
The New Zealand Law Society