

LCRO 113/2013

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of [City] Standards Committee [X]

**BETWEEN**

**AB**

Applicant

**AND**

**EF**

Respondent

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

**DECISION**

**Introduction**

[1] Mr AB has applied for a review of the determination by [City] Standards Committee [X] to take no further action in respect of Mr AB's complaints about Mr EF.

**Background**

[2] Mr AB is one of three trustees of the [CD Trust] (the Trust). On 2 August 2007 the Trust entered into an Agreement to Lease commercial premises and began renovating the premises with a view to subletting parts. In September 2007 the premises were severely damaged by fire. The landlord did not want the lease to continue and terminated it on the grounds the premises were no longer tenable. The Trust did not accept the termination.

[3] The relationship between the parties was governed by the form of lease marketed by the Auckland District Law Society (ADLS).

[4] Mr AB instructed Mr EF (through an instructing solicitor) to oppose the termination and sought assurances from Mr EF that he was experienced in this area of the law and “an expert in the minutia and practical application of the ADLS commercial lease”.<sup>1</sup>

[5] Mr EF apparently assured Mr AB he had the necessary experience and expertise to act for the Trust in this matter.

[6] Litigation ensued. The landlord made an offer of settlement which the Trust ultimately accepted, only to be advised the offer had been withdrawn.

[7] The matter proceeded to a hearing. The Court upheld the termination and rejected all causes of action pleaded by Mr EF.

[8] Mr AB then instructed different counsel to appeal the District Court judgment which was also unsuccessful.

#### **Mr AB’s complaints and the Standards Committee decision**

[9] Mr AB filed a complaint with the New Zealand Lawyers Complaints Service (the Complaints Service) in June 2012.

[10] The Standards Committee in its decision distilled Mr AB’s complaints as being that Mr EF:<sup>2</sup>

- (a) Failed to act competently.
- (b) Failed to provide information in advance on the principal aspects of the client service.
- (c) Failed to refuse instructions when the services were allegedly outside Mr EF’s fields of practice.
- (d) Failed to protect and promote client interests.
- (e) Overcharged.
- (f) Failed to adequately supervise and manage his practice.

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<sup>1</sup> AB to Lawyers Complaints Service (22 December 2011).

<sup>2</sup> Standards Committee determination (7 March 2013) at [1].

(g) Engaged in misleading or deceptive conduct.

[11] The Committee noted that Mr AB also alleged “unethical and [grossly] unprofessional behaviour”.<sup>3</sup>

[12] Having considered all of the material provided by the parties the Committee addressed each of the identified complaints and determined to take no further action in respect of any of them.

### **Application for review**

[13] Mr AB applied for a review of the Committee’s determination. He said:<sup>4</sup>

... the decision is deeply flawed in its methodology and ... it follows that the Committee’s decision to absolve Mr EF of any and all responsibility for his actions is both careless and null and void.

[14] His issue with the methodology would appear to be that the Committee did not direct Mr EF to answer each and every aspect of Mr AB’s complaints and the determination was so unreasonable as to amount to “a decision which is so outrageous in its defiance of logic ... that no sensible person who had applied his mind to the question to be decided could have arrived at it”.<sup>5</sup> In this regard he refers to the *Wednesbury* test for unreasonableness.<sup>6</sup>

[15] Mr AB is not specific as to his grounds for review, noting that he did “not have the resources currently or the time with recent severe illness to direct the LCRO to individual paragraphs from [his] complaint”.<sup>7</sup>

[16] His lack of specificity would justify a decision from this Office that is brief. In addition, Mr AB did not advise this Office of a change in his contact details during the course of the review which gives the impression that he has abandoned his application.

[17] At the conclusion of detailed submissions to this Office he said:<sup>8</sup>

To sum up the Committee (a) did not address the prime issue and ignored the structure of the Complaint and (b) did not require Mr EF to respond to even one of the issues I had raised but accepted a self-serving timeline (the Response) from him instead and (c) misrepresents my position and that of Mr [GH] and (d)

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<sup>3</sup> At [2].

<sup>4</sup> AB to Legal Complaints Review Officer (LCRO), Application for Review

<sup>5</sup> Submissions from AB to LCRO: Part 2 (24 April 2013) at [2].

<sup>6</sup> See *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.

<sup>7</sup> At [3].

<sup>8</sup> At [55]–[57].

managed all this without keeping me informed or asking a single question of me.

No information as far as I remember was provided to me regarding the experience or probity of the members of this particular Committee. I am asked to accept a decision not from a jury of my peers but from a faceless Committee. I would hope then that I was likewise anonymous or if not it would be appropriate for me to know the names and qualifications and work experience of the Committee members. Please clarify for me.

I ask the LCRO to bear in mind the structure and detailed content of my Complaint the inadequacy and indeed irrelevance of Mr EF's response and the fact the Committee did not ask Mr EF to answer clearly and explicitly the matters at issue and come to a decision that is firmly based in natural justice.

[18] It is appropriate at this juncture to address Mr AB's allegations that the Complaints Service did not "keep him informed or ask a single question" of him.

[19] On 16 July 2012 the Complaints Service sent Mr EF's response to the complaint to Mr AB and requested any response he wished to make by 23 July 2012. Mr AB replied by email on 17 July. From then, until the complaint was considered by the Standards Committee at its meeting on 1 March 2013, the Committee provided and sought further information to, and from, Mr AB.

[20] Mr AB's allegations are not supported by the contents of the Complaints Service file.

### **Procedure on review**

[21] From the outset, this review had been fraught with difficulties. Mr AB was engaged in voluntary work overseas and email communications have been unreliable and infrequent. There were initially difficulties in establishing a correct date by which the review application was required to have been made and then in having Mr AB complete all the requirements to ensure the application was correctly lodged.

[22] In an email to this Office<sup>9</sup> Mr AB advised that a friend was "monitoring" the post office box provided as his address for service in the application but also requested this Office to communicate with him by email only.

[23] Mr AB then raised issues concerning the Guidelines for Parties to Review issued by this Office, asserting they were contradictory, and "biased towards maintaining a Standards Committee decision".<sup>10</sup>

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<sup>9</sup> Email from AB to LCRO (4 May 2013).

<sup>10</sup> Email from AB to LCRO (21 May 2013).

[24] Having undertaken a preliminary consideration of the file, the Review Officer directed that the review should proceed by way of a hearing with both parties and requested Mr AB to advise if and when he expected to be back in New Zealand so that a hearing could be scheduled to accommodate his commitments.<sup>11</sup> However, Mr AB advised he had “no intention of returning to New Zealand in the short to medium term”.<sup>12</sup>

[25] Having received that advice the Review Officer then requested consent from both parties to the review being completed on the material to hand together with any further information or submissions the parties wished to provide.

[26] Mr EF agreed to this course of action. Mr AB questioned how he could provide further submissions when he had “nothing to work with”<sup>13</sup> such as an interim report from this Office but ultimately advised that “[he wished] to be present at a meeting between the parties when a slot becomes available in late 2014 ... or 2015”.<sup>14</sup> This response followed an indication from this Office that it was unlikely a hearing would be scheduled before then.

[27] In further communications throughout 2014, Mr AB took issue with a number of matters relating to the management of the review process. In March 2015 the jurisdiction manager advised Mr AB that the review could be prioritised if he was going to be in New Zealand for a period of time.

[28] Further lengthy communications from Mr AB followed outlining what Mr AB referred to as “disheartening experiences” with this Office. The correspondence did not provide anything further from Mr AB in support of his application but raised issues with the delays being experienced in completing the review. He did not advise he would be in New Zealand at any time but neither did he indicate he had altered his request to attend a review hearing.

[29] The last email received from Mr AB was on 11 March 2015 and no advice of any change to his contact details has been received by this Office.

[30] From June 2017 onwards the jurisdiction manager endeavoured to contact Mr AB to give notice of a hearing scheduled for 20 July 2017. Communications by email to Mr AB have all been returned with the following message: “A problem occurred during the delivery of this message to this email address. Try sending this message

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<sup>11</sup> Email from LCRO to parties (22 November 2013).

<sup>12</sup> Email from AB to LCRO (1 December 2013).

<sup>13</sup> Email from AB to LCRO (6 December 2013).

<sup>14</sup> Email from AB to LCRO (17 February 2014).

again.” The same message was received to all further attempts to communicate with Mr AB by email.

[31] On 26 June 2017 a formal Notice of Hearing was sent to Mr AB by email and by mail to the post office box number provided by him in the application form.

[32] Mr EF advised he would be overseas on the scheduled date. The Review Officer therefore directed that the hearing proceed by way of an applicant only hearing with any matters requiring a response from Mr EF to be taken up with him on his return.

[33] Mr AB did not make contact with this Office after the Notice of Hearing was sent nor did he appear at the scheduled time of hearing.

[34] This review has therefore proceeded on the basis of the information to hand and as the outcome is to confirm the determination of the Standards Committee, no further submissions have been sought from Mr EF.

## **Review**

[35] In the letter accompanying his application for review Mr AB said “I will have to ask the LCRO to read my complaint point by point and connect the dots”. Much of Mr AB’s letter is critical of the Complaints Service and the investigating solicitor. He identified his “prime issue” as being:<sup>15</sup>

... Mr EF could not honestly take the work even if I had made no stipulations at my first meeting with him (please refer to my Complaint) because with his experience – I understand he has been practising for some years – he must have known at that first meeting that the matter was not commercially viable. If he did not know this it can only be proof that he is grossly incompetent. If he knew the matter was not commercially viable then the only honest thing for him to do was to decline the work or at the very least in terms of the best practice asked for a statement signed by all three trustees of the [CD Trust] (the Trust) to the effect that we had no objection to squandering the Trust’s funds ...

[36] It is not clear what Mr AB means by “commercially viable” in his initial correspondence with Mr EF.<sup>16</sup> Mr AB advised Mr EF that he was not interested in embarking on a “legal adventure”. If by that Mr AB meant that he wanted to have a guarantee of success then that cannot be provided by any lawyer engaged in litigation.

[37] Mr EF made it clear to Mr AB on many occasions that there was a risk involved in litigation and that has been detailed by the Standards Committee in its determination.

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<sup>15</sup> Above n 4, at [10].

<sup>16</sup> Letter from AB to EF (22 December 2011).

[38] Mr AB also said he specified that Mr EF must be an expert with regard to the ADLS commercial lease form and Mr EF confirmed he was. As part of this review the Review Officer requested and received Mr EF's files which are contained in two cartons. An examination of these show that there is no support for Mr AB's contention that Mr EF is incompetent. The case was conducted diligently and competently.

[39] Although the District Court and the High Court on appeal did not find for the Trust, Mr EF is somewhat vindicated by a subsequent High Court judgment<sup>17</sup> which he has provided to this Office in which the meaning of "untenantable" was considered. In that case, the Court did not follow the reasoning applied in the Trust litigation, and came to the view that whether or not premises are untenable "is to be judged from the lessee's perspective".<sup>18</sup> This is the submission made by Mr EF for the [CD Trust].

[40] Mr AB says that he made it clear to Mr EF that he did not want to embark on a "legal adventure". However, he instructed different counsel to appeal the District Court judgment and so it would seem he did not at that stage, and with the benefit of alternative legal advice, consider the matter to be an "adventure".

[41] In any event, a lawyer must not, without good cause, refuse to accept instructions<sup>19</sup> and must protect and promote the interests of the client.<sup>20</sup> As noted, a lawyer engaged in litigation can never give an absolute guarantee of success and if Mr EF had refused to promote the interest of the Trust it could well have been he would have been in breach of his other professional obligations to the Trust.

## Summary

[42] In summary, Mr AB's complaints about Mr EF's competence and acting contrary to Mr AB's preconditions cannot be sustained. For completeness, I confirm that all of Mr AB's complaints and the Standards Committee determination have been considered on review. There is no reason to disagree with any part of the Standards Committee determination and its reasoning and I endorse and adopt the determination of the Committee into this decision.

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<sup>17</sup> *New Lynn Compliance Centre Limited & Ors v Birdwood Custodians Limited* HC Auckland, CIV-2011-404-1551, 6 September 2011.

<sup>18</sup> At [36] and [37].

<sup>19</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rule 4.

<sup>20</sup> Rule 6.

**Decision**

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

**DATED** this 31<sup>st</sup> day of 2017

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**D Thresher**  
**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:

Mr AB as the Applicant  
Mr EF as the Respondent  
[City] Standards Committee [X]  
The New Zealand Law Society