

CONCERNING

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

AND

CONCERNING

a determination of Standards Committee

BETWEEN

LP

Applicant

AND

NB

Respondent

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

DECISION

Introduction

[1] LP applied for a review of the determination dated 11 May 2012 by Standards Committee which followed a decision by this Office to refer an earlier determination of the Committee back to it for reconsideration.

[2] Following its reconsideration of the complaint, the Committee again determined that NB's fees were fair and reasonable but:¹

conceded that in light of the LCRO's interpretation of RCCC 3.4 and 3.7 NB's failure to provide a 'terms of engagement' was a breach of his professional obligations under Rule 3.4 and accordingly determined that there had been unsatisfactory conduct on the part of NB pursuant to s 152(2)(b) of the Act on this issue alone.

[3] The Committee considered that the conduct in respect of which the finding of unsatisfactory conduct had been made was "in essence a technical breach of [the] rule"² and at "the lower end of the scale".³ It therefore resolved that no penalty should be imposed.

¹ Standards Committee determination dated 11 May 2012 at [12].

² At [13].

³ At [14].

[4] LP sought a review of the determination with regard to the fees and the penalty imposed following the finding of unsatisfactory conduct.

The breach of rules 3.4 and 3.5

[5] LP is a qualified lawyer who, whilst living in Australia, instructed NB to assist him in relation to a number of banks in New Zealand deciding to no longer offer services to him.

[6] In reliance on the exceptions to the application of rules 3.4 and 3.5⁴ provided by rule 3.7, NB did not provide the requisite client information to LP. The relevant exception is contained in rule 3.7(a) which reads:

Rules 3.4 and 3.5 do not apply-

- (a) where the lawyer is instructed by another lawyer or by a member of the legal profession in an overseas country, unless the fee information or other advice is requested by the instructing lawyer or member of the legal profession, as the case may be;....

[7] There is no dispute that LP is a qualified lawyer. His letterhead records that he holds the qualifications of JD, BSc, PhD(Hons) and that he is:

licensed to practice law in US State and Federal Courts; Assoc Member Queensland Law Society; AU- Foreign Lawyer; & Assoc Member Auckland District Law Society, NZ – Foreign Lawyer.

It would also seem that LP was known to NB.

[8] As noted, after reconsidering the matter, the Standards Committee determined that NB was in breach of the requirements of rules 3.4 and 3.5.

Mediation

[9] In the course of this review, the parties were provided with, and accepted, the opportunity to mediate the issues between them. That resulted in agreement between the parties as to the quantum of NB's fees and an arrangement for payment of same.

[10] The Deed of Settlement which recorded the mediated agreement, included a withdrawal by LP of his complaint against NB "in full and in all respects".⁵

[11] However, the Deed then went on to record:

⁴ Rules 3.4 and 3.5 require a lawyer to provide certain information to a client in advance and prior to undertaking significant work for a client.

⁵ Deed of Settlement (29 April 2013) at 3.1.

3.2 [LP] agrees that he does not oppose application by NB for review of the determination of the Standards Committee under number 3298, issued on 11 May 2012, in relation to the applicability or otherwise of Rules 3.4 and 3.7 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, and this Par.3.2 is evidence of same.

[12] Applying the provisions of s 200 of the Lawyers and Conveyancers Act 2006 (which directs the LCRO to conduct any review “with as little formality and technicality... as is permitted...”) I have proceeded on the basis that the review remains alive in relation to the finding of unsatisfactory conduct against NB, and the penalty (or lack of penalty) consequent on that finding.

[13] NB subsequently provided submissions in support of his contention that he did not have any obligation to provide LP with the required client care information because LP was “a member of the legal profession in an overseas country”.

Was NB required to provide LP with client care information?

[14] NB argues that rule 3.7 should be given its literal meaning and that as LP is a lawyer or member of the legal profession in an overseas country, NB did not need to provide him with the information required by rules 3.4 and 3.5. The position argued for by NB is that the “plain meaning” rule of interpretation applies to rule 3.7, namely that the legal meaning of rule 3.7 corresponds to its literal meaning.

[15] NB further submits that penal statutes should be construed strictly and not extended beyond their literal meaning. I do not agree that the professional regulatory regime is properly considered penal in the same way that statutes which create criminal offences clearly are. Professor Webb, in his text, *Ethics, Professional Responsibility and the Lawyer* (2nd ed) notes:⁶

Professional discipline is quite distinct from a criminal process, so it is inappropriate to draw analogies between the two. The main distinction is that the function of the disciplinary process has no significant punishment element and the focus of the proceeding is ensuring the public’s protection.

This reinforces the purpose of the rules as set out in [18] below.

[16] Section 5(1) of the Interpretation Act 1999 provides that the meaning of an enactment must be ascertained from both its text and in light of its purpose. Further guidance was provided in *Commerce Commission v Fonterra Co-operative Group Ltd*⁷ where it was stated that even if the meaning of the text appears clear in isolation, it

⁶ *Ethics, Professional Responsibility and the Lawyer*, Duncan Webb (2nd ed, Lexis Nexis, Wellington, 2006) at 152.

⁷ *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36.

should be cross-checked against the purpose to ensure the two requirements of s 5 are met.⁸

[17] The purpose of rules 3.4 and 3.5 is to ensure that clients receive the prescribed information relating to the delivery of services by a lawyer. The most common exception envisaged by rule 3.7 is where a barrister is instructed by a solicitor on behalf of a client. In those circumstances, it is the obligation of the instructing solicitor to provide information in respect of the barrister's services and charges. It does not operate to mean that the client does not receive the relevant information at all.

[18] In support of his argument that rule 3.7 applied to his instructions from LP, NB argues that the purpose of the Rules and legislative framework of which they are a part:

is for the protection of members of the public where they are uninformed about what matters including what services are to be provided to them and such things as their rights of complaining if they are dissatisfied.

[19] NB goes on to say that LP was not an "uninformed member of the public" and was fully aware of the legal services he had asked NB to provide, the principles of charging, and his right to make a professional complaint. This submission by NB has no basis, as neither the Act nor the Rules make the provision of client care information discretionary depending upon the knowledge of the member of the public who seeks legal services.

[20] The preface to the Rules provides that:

Whatever legal services your lawyer is providing, he or she must ... provide you with information about the work to be done, who will do it and the way the services will be provided...

[21] I note the word "must". There is no doubt that NB was LP's lawyer and that consequently he should have provided information to LP regarding the work that was to be done and the basis on which it would be completed, as per rule 3.4.

[22] It is my view that the literal interpretation of rule 3.7 that NB seeks is not appropriate in light of the current approaches to statutory interpretation. When one considers the consumer protection purpose of the Rules and the Act, it is unarguable that the exception provided by rule 3.7 cannot provide a defence to NB's failure to provide the necessary client care documents to LP. LP was the actual client in this case, and not an instructing lawyer in the sense of being an agent or conduit for through which the advice would be passed.

⁸ Above n 7 at [22].

[23] For the above reasons, I do not accept NB's submissions.

[24] However, although NB's failure to provide the required information to LP does constitute unsatisfactory conduct,⁹ his failure to do so appears to have been based upon a genuine, albeit misplaced, belief that rule 3.7 applied to the situation. I agree with the Committee that, in all of the circumstances, no penalty is warranted.

Decision

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

DATED this 19th day of December 2014

O W J Vaughan
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:

LP as the Applicant
NB as the Respondent
Standards Committee
New Zealand Law Society

⁹ I refer NB to the discussion of the concept of "unsatisfactory conduct" on the LCRO website.