

CONCERNING

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

AND

CONCERNING

a determination of the [Area] Standards Committee

BETWEEN

SM

Applicant

AND

JC

Respondent

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

DECISION

Introduction

[1] Ms SM has applied for a review of a decision by the [Area] Standards Committee that further action in respect of her complaint concerning the conduct of Mr JC is not necessary or appropriate.

Background

[2] Mr JC acted for ABC Limited (ABC), which was involved in a dispute with Ms SM under the Construction Contracts Act 2002 (CCA).

[3] Ms SM is a lawyer.

[4] The parties submitted the dispute to adjudication. Ms SM claimed [\$ Amount] from ABC, together with various costs and a producer statement. ABC provided a detailed response dated [Date].

[5] Ms SM was partly successful. The adjudicator's determination, dated [Date], refers to Mr JC having raised a number of objections during the adjudication, many of

which the adjudicator considered had no merit. On that basis, the adjudicator ordered ABC to pay an increased proportion of the costs of arbitration. Nonetheless, Mr JC's clients considered the merits of the dispute were in its favour.

[6] Ms SM also made a complaint to New Zealand Certified Builders Association (the Association) about the conduct of Mr ABC, who was responsible for the building work and a member of the Association. Acting on instructions from Mr ABC, Mr JC advised the Association that the dispute between ABC and Ms SM had been referred to the District Court. Nonetheless, the Association required a response from Mr ABC.

[7] It appears that Mr ABC instructed Mr JC not to speak to Ms SM, but to forward a copy of his response to the adjudication claim, dated [Date], to the Association. Mr ABC's view was that the claims made in Ms SM's complaint were more or less identical to the claims before the District Court. It can reasonably be assumed he considered ABC's reply in the arbitration proceeding was relevant to the conduct that was the subject of Ms SM's complaint. Mr JC's letter to the Association also indicated Mr ABC was intending to supply a personal statement in respect of the complaint, which he did.

[8] Ms SM retained a lawyer to represent her in the District Court proceeding, and advised Mr JC accordingly. She says she told Mr JC that the lawyer was not instructed to act in relation to the complaint to the Association, but Mr JC disregarded her wishes over who he was to communicate with over what.

[9] Ms SM then laid a complaint to the New Zealand Law Society Lawyers Complaints Service (Complaints Service) about Mr JC's conduct.

Complaint

[10] In her complaint, Ms SM objects to Mr JC:

- (a) Failing to treat her, as a lawyer, with respect and courtesy;
- (b) Communicating with her lawyer, in the face of her request that he refrain from doing so; and
- (c) Breaching an obligation of confidentiality imposed by s 68 of the CCA, by producing ABC's response to the Association in the complaints process against Mr ABC.

[11] Ms SM wanted a written apology from Mr JC.

[12] Mr JC and his supervising partner were advised of Ms SM's complaint, and informed of the preliminary view that the likely outcome would be that further action would not be necessary or appropriate. On that basis, neither lawyer provided a response.

[13] For the reasons set out in the decision, in particular that Mr JC was not in breach of any duty owed to Ms SM, was not under any obligation to speak to her, and had not been discourteous to her, the Committee determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act), that further action on the complaint was not necessary or appropriate. The Committee considered the complaints were misdirected, and not a suitable use of the complaints process.

Application for review

[14] Ms SM's application for review focuses on Mr JC having ignored her request that he not communicate with her lawyer about her complaint to the Association, and breached confidentiality by forwarding ABC's reply in the adjudication process to the Association.

[15] Ms SM contends that the evidence supports a determination that Mr JC, and his client, communicated with her lawyer over her complaint to the Association with the sole purpose of inflating her legal costs, knowing she had not instructed her lawyer to act in that matter. Her alternative argument is that Mr JC breached his professional obligations by communicating directly with her over the interconnected matters of her complaint and the District Court proceeding.

[16] As to Mr JC having sent the Association a copy of the reply ABC prepared for the purposes of the adjudication, Ms SM asserts the Committee was wrong to treat the Association as a third party for the purposes of s 68 the CCA. She supplied a copy of an email from the Association returning ABC's reply and her response unopened.

[17] In a reply filed by his employers, it was confirmed that Mr JC had advised Ms SM he could not talk to her because his client had instructed him not to, other than through her lawyer, before he terminated any call. Rule 10.1 of the Lawyers' Conduct and Client Care Rules¹ is said not to have been contravened, because Mr JC was not discourteous in his conduct towards Ms SM.

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

[18] It was contended that, for various reasons, Mr JC's disclosure of ABC's reply in the complaint process was a legitimate use of ABC's information, and did not offend the confidentiality provisions of the CCA.

Review hearing

[19] Ms SM attended a review hearing by telephone on 30 August 2017, with Mr JC being represented by Mr D.

Nature and scope of review

[20] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:²

... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" ...

... the power of review is 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. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[21] More recently, the High Court has described a review by this Office in the following way:³

A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

² *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

³ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

Analysis

Communicating with Ms SM

[22] On review, Ms SM alleges that Mr JC did not treat her with respect and courtesy, by hanging up on her. Ms SM's complaint is based on her being a lawyer, and Mr JC showing a lack of respect and courtesy towards her.

[23] Ms SM's alternative argument on review is that Mr JC breached his professional obligations by communicating directly with her over the interconnected matters of her complaint and the District Court proceeding, knowing she was represented by another lawyer.

[24] Mr JC denies any professional wrongdoing.

[25] Ms SM's complaint alleged that Mr JC had hung up on her twice, and that made her feel disrespected. Mr JC could not prevent Ms SM from phoning him. Whether Ms SM was acting for herself or enjoying the status associated with being a lawyer, Mr JC was not obliged to apologise to her for following his client's instructions.

[26] There is no professional reason that prevented Mr JC sending information to Ms SM's lawyer. Ms SM's view of relevance, in an evidential sense, could well have been inconsistent with that of Mr JC and his client. Having taken issue with Mr ABC's conduct, it was entirely foreseeable that he would take steps to defend himself, even if his defence reflected poorly on Ms SM. It is not clear that this was a situation where a bright line could have been drawn between Ms SM's contractual concerns over the work ABC had or had not done, her complaint about Mr ABC and her own behaviour. The point is that Mr JC was obliged to promote his client's interests even if that meant cost, discomfort or inconvenience for Ms SM.

[27] While Ms SM cannot understand why Mr JC acted as he did, he does not have to account to her for his conduct. The evidence does not support the conclusion that, by his conduct, Mr JC contravened professional standards.

Production of ABC's arbitration reply to Association

[28] Ms SM argues that the Committee was wrong to view the Association as a party to the dispute between Ms SM and ABC for the purposes of s 68 of the CCA.

[29] For Mr JC, various arguments are advanced to the contrary.

[30] The key point to note when considering Mr JC's conduct is that Mr JC was not a party to the arbitration, his client was. Mr JC must be taken to have been acting on instructions from ABC and its director Mr ABC. If there was a problem with the use to which Mr JC's client/s instructed him to put ABC's reply, the available evidence does not raise a professional standards issue for this Office to address in this review.

[31] I have carefully considered the material that is available on review, including comments made at the review hearing. For the reasons set out above, I am unable to identify any basis on which to conclude that further action in relation to Ms SM's complaint about Mr JC's conduct in sending his client's document to the Association is necessary or appropriate. It follows that the Committee's decision is confirmed.

Decision

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

DATED this 31st day of August 2017

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:

Ms SM as the Applicant
Mr JC as the Respondent
Mr D as the Respondent's Representative and the Related Person
[Area] Standards Committee
The New Zealand Law Society