

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

BD

Applicant

AND

FG

Respondent

DECISION

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

Introduction

[1] Mr BD has applied for a review of a decision by the [City] Standards Committee [X] to take no further action in respect of his complaint concerning advice provided to him by Ms FG.

[2] The issue considered on review is whether Ms FG's conduct fell below the standard provided for in s 12(a) of the Act which defines unsatisfactory conduct as:

conduct of the lawyer or incorporated law firm that occurs at a time when ... she ... is providing regulated services and is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; ...

Background

[3] Mr BD wrote to Ms FG requesting advice in relation to actions by his former colleague, a Mr IJ, in the following terms:

You have been referred to me as someone who could provide me with the legal advice necessary to determine if, in NZ an offence of stealing and receiving

stolen property has been committed, property that I am the owner of; and I need to be sure of before I make any decision.

...

If you accept to assist me, I will post the necessary information for you to determine if as I believe, a criminal offence has been committed...

[4] Ms FG accepted Mr BD's instructions, and payment in advance. He supplied her with some information, and she provided her opinion on the prospects of a successful prosecution based on that information. Ms FG's opinion did not include the definitive statement that a criminal offence had been committed that Mr BD had hoped for.

[5] Mr BD was unable to accept Ms FG's opinion. A series of emails followed in which Mr BD and Ms FG discussed various facts, and her opinion. Ms FG attempted to explore other options with Mr BD. However, Mr BD remained dissatisfied with Ms FG's opinion and laid a complaint to the New Zealand Law Society (NZLS).

Complaint

[6] In his complaint Mr BD objected to Ms FG's opinion, and what he perceived as unjustifiable changes in her position.

[7] Ms FG's reply explained that her advice focused on the difficulties that would arise in proving Mr IJ's intention, rather than on what he was alleged to have done. Ms FG said her advice included consideration being given to the pursuit of other remedies in the civil, rather than criminal, jurisdiction.

Committee's Decision

[8] The Committee determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) that no further action on the complaint was necessary or appropriate, primarily because Mr BD could not complain only because Ms FG did not provide him with the advice he had hoped for.

Application for review

[9] Mr BD applied for a review of the Committee's decision on the grounds that the Committee was mistaken in its framing of the advice he had sought from Ms FG. He maintains she has not answered his question, and says all he wanted to know was whether Mr IJ had committed an act of theft.

[10] Ms FG relies on her submissions to the Committee, and remains of the view that while Mr IJ may have breached his agreement with Mr BD, Mr BD would be likely to face difficulties proving Mr IJ was guilty of theft.

Review hearing

[11] Mr BD attended a review hearing by telephone on 21 June 2017. Ms FG was not required to attend, and the review was determined in her absence with her consent.

Nature and scope of review

[12] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:¹

... 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.

[13] More recently, the High Court has described a review by this Office in the following way:²

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.

[14] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee’s determination, has been to:

¹ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

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

- (a) Consider all of the available material afresh, including the Committee's decision and Mr BD's comments at the review hearing; and
- (b) Provide an independent opinion based on those materials.

Analysis

[15] At the review hearing Mr BD said he had wanted Ms FG's advice on whether Mr IJ had stolen his idea (the physical representation of which was the ([product] mould), and had received money for it unlawfully. Mr BD said he did not want advice on whether Mr IJ had stolen his [product] mould. He says Ms FG was wrong to say he wanted advice about the [product] mould because he had never said or considered Mr IJ had stolen his [product] mould.

[16] In his instructions to Ms FG he simply referred to "property". Mr BD did not specify whether the property was the mould, his design, or the money he says Mr IJ received from others who used the mould without Mr BD's permission. It is fair to say that on the basis only of the documents available on review, there is some ambiguity around what "property" Mr BD was concerned about.

[17] In his complaint Mr BD said his instructions to Ms FG were to provide her opinion on whether Mr IJ had committed two distinct types of criminal offence, theft of property and receiving stolen property. Mr BD provided the specific sections of the Crimes Act that he wanted Ms FG to apply to the facts he had disclosed to her.

[18] It was necessary for Ms FG to consider two elements in relation to the criminal offences Mr BD believed Mr IJ had committed: act and intent. It is assumed that the evidence of Mr IJ's actions consists of Mr BD's evidence and the documents he provided to Ms FG and the Standards Committee. Assuming Mr IJ did not contest that evidence, there does not seem to have been any particular difficulty over proving what Mr IJ did.

[19] The next and more difficult question, and the focus of the part of Ms FG's advice that has been disclosed, would have been to prove beyond reasonable doubt that Mr IJ had the requisite criminal intention to constitute either of the criminal offences. There was considerable doubt about what Mr IJ might say regarding his understanding of his arrangements with Mr BD. The way I read the explanations of Ms FG's advice, her opinion was that there were potentially significant evidential barriers standing in the way of a successful criminal prosecution.

[20] Mr BD says his primary objective in obtaining Ms FG's advice was to use it to scare Mr IJ into paying him back. Although Ms FG suggested alternatives by which he might recover the losses he alleged, as her advice did not conclude unequivocally that Mr IJ was guilty of a criminal offence, it did not serve Mr BD's main purpose. In terms of Ms FG's professional obligations however, whether the advice furthered Mr BD's purposes is not the proper measure.

[21] Whether Ms FG met her professional responsibilities is not contingent on whether her opinion was right, wrong or met Mr BD's expectations. Ms FG was obliged to apply herself competently and diligently to the task of providing her legal opinion, to the standard Mr BD was entitled to expect of her, as a reasonably competent lawyer.

[22] Mr BD provided the facts. Ms FG had regard to those. Mr BD provided the law. Ms FG had regard to that. There is no reason to believe Ms FG had regard to the wrong offence provisions because Mr BD's initial instruction was very specific as to the sections of the Crimes Act that he wanted her to consider.

[23] The fee Ms FG received was very modest, and would not have supported a wide ranging enquiry. In any event, that was not what Mr BD had instructed her to do. Mr BD wanted specific limited advice, with a particular purpose in mind. Although the advice did not serve his purpose, Ms FG was not professionally obliged to tailor her advice to meet Mr BD's expectations.

[24] Overall, there is no evidential basis on which to say Ms FG's advice fell short of a proper standard, and a reasonably sound basis on which to conclude that it met the required standards of diligence and competence.

[25] In all the circumstances there is no reason to take a different view to the Committee. There is no evidential basis on which further action could properly be taken. The decision is therefore 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 26th day of June 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:

Mr BD as the Applicant
Ms FG as the Respondent
[City]Standards Committee 1
The New Zealand Law Society
Secretary for Justice