

**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 [X]

**BETWEEN**

**MZ**

Applicant

**AND**

**JK**

Respondent

**DECISION**

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

**Introduction**

[1] Mr MZ, who is a lawyer, has applied for a review of a determination by the [Area] Standards Committee [X] (the Committee) that the conduct of Mr JK was unsatisfactory.

**Background**

[2] Mr JK acted for ABC Limited (ABCL). ABCL was vendor of a unit in a unit title development in central [City] known as Unit 1D/21 [street], also described as Unit 3, Lot 2 (Unit 1D).

[3] On 12 October 2010, the trustees of the MZ Family Trust (the Trust) entered into an agreement with ABCL to purchase Unit 1D and a parking space described in the sale and purchase agreement prepared by the real estate agent as [alphanumeric code]. Mr MZ acted for the Trust in the purchase.

[4] As Unit 1D was a unit in a body corporate development, a certificate of proprietor's liability was obtained pursuant to s 36 of the Unit Titles Act 1972 from Body Corporate Specialists Limited (BCSL), acting as Secretary to Body Corporate [number] (the Body Corporate). The certificate was dated [date] (the Certificate). The Certificate certified various matters, including that the Body Corporate would be unable to issue a license to the new owner of Unit 1D for any car park located on Lot 4 until the legal position of the body corporate had been determined. Lot 4 was a basement car park at [address], which the Body Corporate did not own. The certificate also said that although the Body Corporate had not received any notice that any proceedings were pending against it, there "is communication relating to a possible dispute over access to Lot 4".

[5] BCSL said the Body Corporate was offering a licence to parking spot 8, apparently at [address]. It appears BCSL provided Mr JK with some information about the dispute mentioned in the Certificate, although it is not entirely clear what that information was, or how complete or accurate it was. Nonetheless, Mr JK appears to have passed on the gist what he had been told to Mr MZ, which was to the effect that BCSL's view was that the dispute had no legal substance and, at that stage, the owners of Lot 4 had not formally pursued any dispute.

[6] Despite, or perhaps because of, the ambiguity over what was on offer from the Body Corporate, Mr MZ, who has many years of experience as a commercial lawyer, appears to have chosen not to communicate directly with BCSL or the Body Corporate. Instead, he liaised with Mr JK, who did not represent BCSL or the Body Corporate.

[7] On settlement day Mr JK sent Mr MZ an email referring to previous communications, and saying:

in anticipation of settlement today, I undertake to forward to you following settlement, the original Car park Licence, Deed of Assignment + S 36 Cert (plus additional Body Corp documents). Our edealing undertakings will be faxed to [name] at [lawfirm] this morning.

[8] Mr MZ replied with more questions about the car park, seeking Mr JK's assurances and saying that the provision of the car park was an essential component of the contract for the Trust. He confirmed he understood that ABCL would be unable to guarantee the Trust quiet enjoyment because the Body Corporate was unable to issue a licence. Mr MZ suggested the following further condition on settlement:

in the event that the BC refuses or cancels the car park licence tendered or creates any penalty or charge or adverse consequences in relation to the same due to the dispute re Lot 4 then my client is entitled to exercise all its remedies against all interested parties including [DEF Limited] and including but not

limited to rescission of the sale and purchase agreement. Please advise whether this condition is acceptable.

[9] Mr JK sent copies of the settlement undertakings he had earlier sent to [law firm], and told Mr MZ he had discussed the matter at length with ABCL. Mr JK said he had been instructed as follows:

Premised on discussions with [Mr GT] of Body Corporate Specialists Limited, a fresh Car park Licence is being prepared as between the Body Corporate as Licensor and the MZ Family Trust as Licensee, notwithstanding the provisions of para (e) of the relevant Section 36 Certificate.

Notwithstanding this, our Vendor client acknowledges and accepts the contents of your e-mail, as a condition of formal settlement today, but on the following **express basis**:

- In the event that the High Court determines (if formal proceedings are issued by the complainant), that the Lot 4 carpark cannot be legally used for that purpose (as reflected in the various Carpark Licenses issued) (the "catalyst event"), then the MZ Family Trust will be entitled to elect either of the following:
- full rescission of the Agreement for the contractual price of \$260,000; **or**
- Monetary damages to a maximum sum of **\$10,000.00**, reflecting penalties, charges and/or adverse consequences" (as referred to in your e-mail this morning) that are incurred, as a consequence of the catalyst event.

[10] Mr JK asked for Mr MZ's confirmation that he approved of that arrangement so that settlement could proceed that afternoon.

[11] Mr MZ replied:

Based upon your client's previous representation through you that any successful challenge to or loss of the car park is unlikely, the purchaser accepts the undertakings in your email. I suggest also that in the event that the car park cannot be legally used after High Court determination, the vendors and BC will use best endeavours to secure an equivalent alternative carpark in the building (no 21) for the purchaser. For clarity, it is assumed that the new license between the BC and the purchaser will be at the expense of the vendor.

[12] Mr JK passed on the Body Corporate's "unequivocal acceptance" of the terms proposed by Mr MZ, and confirmed on behalf of his client that settlement of the sale and purchase could proceed on that basis.

[13] Mr MZ confirmed he had made payment.

[14] Mr JK confirmed settlement had been completed on 19 November 2010.

[15] Mr MZ then contacted Mr JK several times over the weeks that followed, asking him to provide a copy of the new license issued by the Body Corporate. Mr JK said he would follow up with his client, but did not send a licence. It is not clear

whether Mr MZ made the same request of the Body Corporate or BCSL, or whether Mr JK's client had given him instructions in relation to the new licence.

[16] By March 2011, conflict had emerged between those claiming the right to park in the space Mr MZ wanted to claim for the Trust.

[17] Mr MZ reverted to Mr JK wanting him to confirm that the Body Corporate owned the license, had transferred it to the Trust and had the right to do so. He also requested confirmation that the "Body Corporate will license the car park" to the Trust.

[18] Mr MZ took the position that the Trust settled on the basis of Mr JK's solicitor's undertakings in relation to the original carpark license, deed of assignment and the fresh car park licence that was to be prepared between the Body Corporate as licensor, and the Trust as licensee. Mr MZ contended the difficulties over parking were more substantial than he had been led to believe and laid a complaint to the New Zealand Law Society (NZLS) about the part Mr JK had played in events.

### **Complaint**

[19] Mr MZ says Mr JK gave him an undertaking that he would provide a fresh car park licence between the Body Corporate and the trustees of the Trust and Mr JK breached that undertaking. Mr MZ says he believes Mr JK grossly misrepresented the Body Corporate's rights over Lot 4. He contends Mr JK misled the Trust into paying \$20,000 for a licence that has no legal basis and is of no value. Mr MZ objected to the delay of several months in Mr JK providing him with a licence from the Body Corporate.

[20] The Committee made three determinations that there had been unsatisfactory conduct on the part of Mr JK pursuant to s 12(c) of Lawyers and Conveyancers Act 2006 (the Act) for conduct in contravention of four rules of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) <sup>1</sup>

#### *Rule 10.3*

[21] The Committee was uncertain as to the precise terms of the alleged undertaking. However, as Mr JK had not provided the "fresh licence" to Mr MZ for several months, it concluded Mr JK had breached that part of the undertaking, and decided Mr JK had contravened r 10.3 of the Rules.<sup>2</sup>

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<sup>1</sup> Standards Committee determination, 27 March 2013.

<sup>2</sup> At [31].

*Rules 10 and 10.1*

[22] The Committee considered the delay in providing Mr MZ with a fresh licence marked a failure on Mr JK's part to promote and maintain proper standards of professionalism in his dealings with Mr MZ. The Committee considered Mr JK had also failed to treat Mr MZ with respect and courtesy by not responding to his repeated requests for the licence. The Committee found Mr JK had contravened rr 10 and 10.1.<sup>3</sup>

*Rules 10, 10.1 and 11.1*

[23] The Committee found that Mr JK had not disclosed an email he received from Mr GT of BCSL, at 12.31 pm on the day of settlement. The email suggested the dispute over car parking may have been more substantial than BCSL had previously acknowledged to Mr JK. The Committee considered Mr MZ had been "far too trusting", and "let himself be persuaded to accept a different car park". Nevertheless, the Committee decided that by not disclosing the email Mr JK had contravened rr 11.1, 10 and 10.1.<sup>4</sup>

**Application for Review**

[24] Mr MZ applied for a review. He is satisfied with the three determinations of unsatisfactory conduct, but he wants Mr JK to pay compensation to the Trust. He also considers the Committee should have clearly stated that Mr JK had given him a solicitor's undertaking and what the terms of that undertaking were.

[25] Mr JK was prepared to accept the Committee's findings, but as there is to be a review, in a letter dated 7 June 2013, he asks that two particular matters are noted:

- (a) The Committee made a finding (at [31]) that Mr JK received a copy of the licence issued by the body corporate to Mr MZ's client by fax at 1:39 pm on the day of settlement. The Committee held that the licence was issued prior to settlement on that day (at [42]) and that Mr JK had a professional duty to provide a copy of the licence to Mr MZ before settlement (at [51]). These findings are based upon an error of fact. While Mr JK had received an email from Mr GT at 12:31 pm on 19 November 2010 prior to settlement being completed, he did not receive the licence from the body corporate until after the settlement had been completed.
- (b) The Committee held that the undertaking in Mr JK's email to Mr MZ at 6:32 am on 19 November 2010, to provide documents to Mr MZ after settlement, was modified by an email sent by Mr JK to Mr MZ at 12:31 pm on that day. If the committee found that the email of 12:31 pm was an amendment to the earlier (and quite different undertaking), which is not accepted by Mr JK, then we submit that the committee was clearly

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<sup>3</sup> At [37].

<sup>4</sup> At [52].

wrong to do so. The email of 12.31 does not contain words which show an intention to modify his earlier undertaking. Instead, the email merely intends to communicate information he had just received from his client to Mr MZ.

[26] Mr JK emphasises that while his conduct may have misled Mr MZ, he did not knowingly mislead. Mr JK accepts that there was a seven-month delay between settlement and him sending any license to Mr MZ. However, he says any delay on his part had no impact on the Trust's remedies against the vendors.

### **Review hearing**

[27] The parties attended a review hearing on 7 September 2017. Mr JK was represented by Mr RB.

### **Nature and scope of review**

[28] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:<sup>5</sup>

... 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.

[29] More recently, the High Court has described a review by this Office in the following way:<sup>6</sup>

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.

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<sup>5</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

<sup>6</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

## Discussion

[30] Mr JK acted for ABCL. ABCL's instructions to Mr JK are confidential and privileged. Mr JK was obliged to be independent and free from compromising influences or loyalties when providing services to ABCL, and to prioritise its interests over the interests of others, including the Trust, BCSL and the Body Corporate. On review, Mr MZ's complaint and review application must be viewed from that perspective.

### *Alleged undertaking*

[31] The authors of *Professional Responsibility in New Zealand* say that an undertaking is a clear promise, with an express or implied time for performance, given in a practitioner's professional capacity.<sup>7</sup>

[32] As clarity is prerequisite to an undertaking, if an alleged undertaking is not clear, it is less likely to be an undertaking. The fact that Mr MZ wanted the Committee to specify the terms of the alleged undertaking is a concession to a lack of clarity, which suggests it is not an undertaking in fact or law. The alleged undertaking also says nothing about timing, so any timeframe for performance would have to be implied, which is not a function of this Office. On the basis that the alleged undertaking was probably not an undertaking, Mr JK cannot be said to have contravened r 10.3. The Committee's determination of unsatisfactory conduct on the basis that Mr JK contravened r 10.3 is reversed.

### *Misleading and deceptive conduct*

[33] It was suggested by Mr MZ that Mr JK's conduct before settlement was misleading and/or deceptive. Misleading and deceptive conduct are concepts drawn into the rules from the Fair Trading Act 1986. Rule 11.1 prevents a lawyer from engaging in conduct that is misleading or deceptive or likely to mislead or deceive anyone on any aspect of his or her practice.

[34] The Committee seems to have accepted that r 11.1 applied directly to what Mr JK told Mr MZ, and that Mr JK was "misleading and deceptive" over the car park. The Committee's view was that Mr MZ had been "far too trusting", and "let himself be persuaded to accept a different car park".

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<sup>7</sup> Matthew Palmer (ed) *Professional Responsibility in New Zealand* (online looseleaf ed, LexisNexis) at 130,030.

[35] The first point to note is that Mr MZ is a commercial lawyer with many years of experience. I very much doubt he is overly trusting or readily persuaded to act in a manner that may be inconsistent with his client's best interests.

[36] Second, r 11.1 relates to "any aspect of the lawyer's practice" and is directed at the administration and conduct of a lawyer's practice. It replaces the previous, more specific, rules relating to such matters as a firm's name, its letterhead, and advertising.<sup>8</sup>

[37] With reference to the Rule and to specific provisions of the Act<sup>9</sup>, the authors of the text *Ethics, Professional Responsibility and the Lawyer*<sup>10</sup> say:

With that foundation, it appears that there is no longer any need for specific rules on matters such as advertising, firm names, and letterheads.

With respect to advertising, the Lawyers and Conveyancers Act 2006 creates offences for misleading descriptions of non-lawyers or lawyers claiming to have particular expertise.

[38] The substance of Mr MZ's complaint in this regard, is that Mr JK breached the rule by making misleading or deceptive statements about the licence or the car park.

[39] If, as the Committee accepted, Mr JK was making statements that had no foundation in the truth, then any person detrimentally affected would have remedies in tort for misrepresentation or other legal remedies. The remedy is not to be found in a complaint based on a breach of r 11.1.

[40] The difficulty for Mr MZ with this aspect of his complaint is that he expressly recorded his understanding before settlement that ABCL could not guarantee the Trust quiet enjoyment of a parking space because the Body Corporate was unable to issue a licence. What followed was an attempt to get the best deal for the Trust, despite the Body Corporate's earlier-stated position on the licence.

[41] As r 11.1 does not readily apply, the Committee's determination based on its contravention is reversed.

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<sup>8</sup> Rules of Professional Conduct for Barristers and Solicitors (7th ed, New Zealand Law Society, Wellington, 2008), rr 2.01, 2.02.

<sup>9</sup> Lawyers and Conveyancers Act 2006, ss 22 and 23.

<sup>10</sup> Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at 404.



*Professionalism, respect and courtesy*

[42] Mr JK did not act for Mr MZ's trust, BCSL or the Body Corporate. Mr JK owed only very limited professional obligations to Mr MZ and his client. In the circumstances, Mr JK was obliged to:

- (a) maintain proper standards of professionalism in his dealings with others — r 10; and
- (b) treat other lawyers with respect and courtesy — r 10.1.

[43] A number of matters can reasonably be assumed from Mr MZ's experience in commercial legal practice. First, that Mr MZ understood that ABCL had its own agenda. Second, that Mr JK was not obliged to act in the interests of the Trust. Third, that Mr MZ acted diligently and competently for his client. Fourth, that Mr MZ knew he could communicate directly with BCSL or the Body Corporate whose interests did not necessarily align with ABCL's. Fifth, that if Mr MZ did not understand the implications of something, such as the qualification on the Certificate, the prudent course was to obtain advice elsewhere, such as from a lawyer who did understand and who was not bound to act in ABCL's interests, as Mr JK was.

[44] Although Mr JK's instructions from his client are confidential and privileged, it is obvious that his job was to get the sale of Unit 1D over the line.

[45] Mr MZ's job was to get the best deal for the Trust. If that meant cancelling the agreement, so be it. If that meant concluding the deal on the basis of some uncertainty, it must be assumed that even without certainty over the car park, the benefits of settling the transaction outweighed the costs and risks of any uncertainty over the car park.

[46] The central focus of this aspect of Mr MZ's complaint is that Mr JK said he would give him documents and it took him months to do that. At the review hearing Mr JK readily accepted that his delay was discourteous to Mr MZ. Mr JK says he was consumed by another matter of some substance and significance, and distracted by that from the task of providing documents to Mr MZ.

[47] That said, Mr JK had not said when he would provide the new original car park licence. The licence from the Body Corporate to ABCL was not transferable and was not going to be assigned, so was ineffective. From Mr JK's perspective, other than providing the new original licence, he had completed his obligations on settlement. With no pressure and no deadline for providing the new licence, there was no particular

urgency for Mr JK to respond to Mr MZ, whose client was in a direct legal relationship with the Body Corporate after settlement.

[48] If certainty over the car park was as important to Mr MZ's client as he said it was, it is not clear why he did not wait until he had the new licence before he paid out the settlement funds. After settlement, there is no reason to believe Mr MZ could not have obtained the new licence to the Trust directly from the Body Corporate, unless that did not suit his purposes. The fact that some weeks later Mr MZ wanted Mr JK to confirm that the Body Corporate owned the licence, had transferred it to the Trust, and had the right to do so, suggests Mr MZ wanted to rewrite the arrangement he had made with Mr JK before settlement.

[49] Mr JK's instructions, as conveyed to Mr MZ before settlement, had been that settlement would proceed on the basis of the Body Corporate issuing a new licence, which would make the licence between the Body Corporate and ABCL redundant, which was consistent with it not being transferrable. Mr MZ settled on that basis, so his request is puzzling because although he appears to acknowledge that he had willingly settled on the basis of some uncertainty over the car park and the licence, somehow Mr JK or his client was responsible for him having done that. Mr JK was open about the fact that there were uncertainties over the car park before settlement.

[50] Further, Mr JK did not commit himself to a particular timeframe for providing the new original car park licence to Mr MZ. With settlement completed, other than sending a document to Mr MZ that Mr MZ could have got directly from the Body Corporate, his retainer with his client was over. While Mr JK could have responded to Mr MZ more promptly, the delay of several weeks does not warrant a determination of unsatisfactory conduct in circumstances where Mr MZ was willing to proceed with settlement without certainty over the Trust's legal right to a car park and could have got the licence elsewhere.

[51] I do not consider that the evidence supports a determination that Mr JK contravened rr 10 or 10.1, or that his conduct otherwise fell below a proper professional standard. In the circumstances the Committee's decision is reversed.

[52] Without a finding of unsatisfactory conduct, there is no statutory basis on which to make orders pursuant to s 156 of the Act. Thus, the orders made by the Committee fall away, and there is no basis on which to make the order for compensation sought by Mr MZ.

**Decision**

[53] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determinations that there has been unsatisfactory conduct on the part of Mr JK are reversed.

**DATED** this 21<sup>ST</sup> day of December 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 MZ as the Applicant  
Mr JK as the Respondent  
Mr RB and Ms NP as the Representatives for the Respondent  
Mr BJ as a related person  
[Area] Standards Committee [X]  
New Zealand Law Society