

LCRO 130/2014

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

SW on behalf of COMPANY 1

Applicant

AND

RG, OL and HJ

Respondents

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

DECISION

Introduction

[1] Mr SW (on behalf of Company 1) has applied for a review of a decision of the [Area] Standards Committee to take no further action in respect of his complaints concerning the conduct of the respondents Messrs RG, OL and HJ (the lawyers). The lawyers were, at the relevant time, practitioners in the firm of Law Firm 1. Messrs RG and HJ were partners and Mr OL a staff solicitor in that firm.

[2] At commencement, I must acknowledge that there has been considerable delay in this review being progressed to resolution. I apologise to the parties for that regrettable delay.

Background

[3] The director of Company 1, Mr VL, instructed Law Firm 1 to act on the purchase of a commercial fishing vessel. Approximately two months later the boat was stolen, apparently by another party claiming ownership of the vessel.

[4] Mr RG took steps in the District Court to remedy the situation and an agreement was reached about ownership. However Maritime New Zealand indicated that a High Court order was needed to amend the Register of Ships to record Company 1 as the owner.

[5] Mr RG declined to issue the appropriate High Court proceedings because Company 1 would not pay its fees in full. Law Firm 1 obtained judgment against the company for the unpaid fees, but the judgment was later set aside without opposition. Company 1 has counter-claimed in negligence against the firm and both proceedings have been stayed to await the outcome of the Company 1's complaint to the New Zealand Law Society.

The complaint and the Standards Committee decision

[6] Through Mr SW, Company 1 lodged a complaint with the New Zealand Law Society Lawyers Complaints Service (NZLS) in late 2012. Company 1 complained about aspects of the conveyancing of the fishing vessel and the handling of the dispute over the vessel's ownership. The company also complained about the fees charged.

[7] The practitioners rejected all allegations of breach of their professional obligations.

[8] The Standards Committee distilled the complaints to be considered as being a consideration as to whether the lawyers had:

- been conflicted;
- knowingly presented a false affidavit to the court;
- refused to complete the retainer;
- failed to respond to reasonable requests from the client;
- provided an incompetent service;
- breached their fiduciary duties;

- provided inadequate supervision of Mr OL;
- charged excessive fees.

[9] The Committee delivered its decision on [Date]. The Committee determined that no further action should be taken with the complaints as:

- The complainant could access an adequate remedy elsewhere that it would be reasonable for the complainant to exercise (s 138(1)(f)) of the Lawyers and Conveyancers Act 2006 (the Act)).
- No further action was necessary or appropriate (s 138(2)).

Application for review

[10] Mr SW filed an application to review the Committee's decision on [Date]. He indicated that all aspects of the Committee's findings are challenged. He submits that:¹

- Mr VL had not been adequately advised of his need to seek independent advice.
- The Committee erred in concluding that no conduct issues arose from the filing of the affidavit.
- The Committee erred in concluding that no conduct issues arose from the lawyers' decision to terminate the retainer.
- The Committee mistakenly preferred the lawyers' evidence concerning the nature of the instructions provided by the client.
- The Committee failed to take into account that Mr RG had an obligation to inform his client if the fee estimate was to be exceeded, and failed to give consideration to the fact that the lawyers had embarked on a litigation path which could not achieve a successful outcome.
- The Committee should have reached conclusion that the conveyancing services provided were inadequate.
- The Committee's conclusion that the District Court was the appropriate forum to deal with two issues presented as a failure on the part of the Committee to comply with its statutory duty. Mr SW submits that "the

¹ SW/Company 1 application for review ([Date]) "attached sheet" at [8].

Committee has a statutory obligation to consider matters and has failed to do so adequately".²

[11] The respondents were invited to comment on the review application and indicated they relied on the submissions provided to the Standards Committee.

The role of the LCRO on review

[12] The role of the Legal Complaints Review Officer (LCRO) on review is to reach his own view of the evidence before him. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting his own judgment for that of the Standards Committee without good reason.

[13] In *Deliu v Hong* it was noted that a review is:³

... 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.

[14] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:⁴

... 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.

[15] More recently, the High Court has described a review by this Office in the following way:⁵

² At [7].

³ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [40]-[41].

⁴ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

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.

- [16] Given those directions, the approach on this review will be to:
- (a) Consider all of the available material afresh, including the Committee's decision; and
 - (b) Provide an independent opinion based on those materials.

The Hearing

[17] A hearing, attended by both parties, was convened on [Date]. Mr HM represented the applicant. Both parties filed submissions prior to and following the hearing. The hearing traversed a full day. The parties advanced their cases in comprehensive fashion.

Issues

- [18] The issues to be addressed on review are:
- (a) Did the practitioners fail to competently attend to the conveyance of the vessel, particularly in respect to establishing whether the vendor could provide clear title to the vessel?
 - (b) Did the practitioners commence proceedings in the wrong jurisdiction?
 - (c) Did the practitioners fail to follow instructions?
 - (d) Was Mr OL inadequately supervised?
 - (e) Were the fees charged excessive?
 - (f) Did Mr RG facilitate the filing of an affidavit in court which contained information that he knew to be incorrect?
 - (g) Were the practitioners conflicted in continuing to act for the company, when concerns had been raised about the advice provided?

⁵ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475, at [2].

(h) Did the practitioners refuse to complete the retainer without justification?

Issues (a),(b) and (d):

Did the practitioners fail to competently attend to the conveyance? Did the practitioners commence proceedings in the wrong jurisdiction? Was Mr OL inadequately supervised?

[19] The pivotal issue that underpins a number of the complaints is allegation that Mr OL, at first step, failed to complete an adequate search of the shipping register. It is argued that if that initial work had been competently attended to, the adverse registration would have been identified, and the subsequent problems which arose (specifically the litigation to recover the vessel and rectification of problems with registration) would have been avoided.

[20] Complaint that the practitioners failed to competently search the register leads by direct route to further complaint that Mr OL had not been properly supervised. That in turn directly engages complaint that the practitioners had erred in electing to commence proceedings in the District Court.

[21] The fee complaint is also inextricably linked to complaint that the lawyers failed to carry out the work competently. It is submitted that the lawyers failed to do what they were asked to do, and that the fee charged should reflect their lack of performance.

[22] If conclusion is reached that Mr OL was competent in the steps he took, given the information that had been provided to him, it necessarily follows that no conduct findings could be made against him, nor could argument that Mr OL had been inadequately supervised be made out.

[23] It is submitted that Mr OL failed to carry out an adequate search of the register. It is argued that he should, as a practitioner who held himself out to have particular expertise in the conveyancing of fishing vessels, on receipt of instructions have immediately recognised that he had been provided with an abbreviated version of the vessel's name. This should have prompted him to take steps to search a number of readily accessible databases which would have provided him with the information that he was seeking. The exercise of searching the shipping register is said by the applicant, to be analogous in some respects to the process a conveyancing practitioner undertakes, when searching the title of a residential property.

[24] Mr HM for the applicants submits that the process for checking a ship's register and the steps to be taken in circumstances where a preliminary check fails to disclose the information sought, is straightforward and well-known to practitioners working in the maritime area.

[25] Mr OL's failure to ascertain the details of the ship's registration fell short, it is argued, of the standards of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

[26] Two arguments are advanced by the practitioners in response to this. First, it is contended that Mr OL fulfilled his obligations and that the failure to identify an issue with the ship's registration was directly attributable to his clients providing him with inaccurate information. Secondly, it is argued that as the complainants have commenced proceedings in the District Court asserting civil negligence, it would be inappropriate for the LCRO to make determinations on matters which properly fall within the province of the Court.

[27] Complaint that the practitioners commenced proceedings in the wrong jurisdiction, is driven by argument that rectification of error with the ships registration, could not be achieved in the District Court. Rectification of the registration could only be achieved in the High Court. That appears to be the case.⁶

[28] Mr RG holds resolutely to the view that his decision to initiate proceedings in the District Court was prompted by the urgent need to secure the vessel, and was an appropriate litigation decision. He contends that rectifying problems with the registration could have been subsequently achieved, with minimal cost.

[29] I am being asked to consider whether competent advice was provided, in circumstances where the District Court has extant proceedings before it which are to directly address the applicant's claim that the lawyers acted negligently.

[30] A Standards Committee may determine that there has been unsatisfactory conduct on the part of a lawyer, which is defined in s 12(a) of the Act as being 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.

[31] The District Court proceedings have been adjourned pending the determination of this review. With respect to the District Court, it is my view that the issues before this Office that engage consideration as to whether the lawyers' conduct

⁶ Heather Allen, Deputy registrar of ships and certificate and adviser, file note, 24 February 2011.

fell short of the standard of competence required are more appropriately addressed in the District Court, rather than by way of review to the LCRO. That said, a number of the matters raised by the applicant, are matters directly engaging a consideration as to whether the lawyers have breached their professional obligations, and those inquiries fall properly within the domain of the Standards Committee, and this Office.

[32] In my view, issues (a), (b) and (d) - are more appropriately addressed by the Court. In that jurisdiction, the parties will have opportunity to give evidence and to contest that evidence. It is probable that the parties would seek to adduce evidence from expert witnesses who can comment on the critical issue of the adequacy or otherwise of the conveyancing services. That evidence would also likely address the issue as to whether the lawyers elected to progress the proceedings in the wrong jurisdiction.

[33] This is not a reflection of a disinclination on the part of this Office to assume its responsibility to address all aspects of a review application, but rather to recognise that this particular complaint is somewhat unusual in that another jurisdiction is also seized with the responsibility of making a determination concerning issues relating to competency of advice provided.

[34] In *GI v UE*⁷ it was noted that “the disciplinary process is not a substitute for civil proceedings”, and both Standards Committees and this Office have stated many times that the complaint process is not to be considered as an alternative to court proceedings. It is of course to be noted that the Court has adjourned the proceedings before it, pending resolution of the disciplinary matters.

[35] Section 138(1)(f) of the Act, provides that:

A Standards Committee may, in its discretion, decide to take no action, or as the case may require, no further action, on any complaint if, in the opinion of the Standards Committee –

...

(f) there is in all the circumstances an adequate remedy or right of appeal...that it would be reasonable for the person aggrieved to exercise.

[36] If, the Court determined that Company 1’s allegations of negligence were proven, then it would be open to the applicant to refer the matter back to the Complaints Service, at which time the conduct could be further considered with a view to determining as to whether a disciplinary sanction should be imposed.

⁷ *GI v UE* LCRO 206/2010 at [44].

[37] I do not consider that the Committee's conclusion to decline to enquire further into the competency elements of the complaints is an abdication of its responsibility to address those elements of the complaints, but rather reflective of a realistic and responsible assessment by the Committee that the issues raised could be more comprehensively addressed in the District Court proceedings.

[38] I agree with the Standards Committee decision to take no further action in respect to complaint that Mr RG had failed to act competently, and had failed to adequately supervise Mr OL, and its reasons for declining to do so. I also consider that the question as to whether proceedings were commenced in the appropriate jurisdiction will be an issue that the Court will inevitably consider in the course of its proceedings, and that that issue is also best left to the Court to determine.

Issue (c)

Did the practitioners fail to follow instructions?

[39] The substance of this complaint is contained in allegation that Mr RG's choice of jurisdiction to pursue recovery of the vessel was at odds with the approach preferred and suggested by his client.

[40] This complaint, as with other complaints advanced, is underpinned by allegation that the lawyers gave poor advice.

[41] This complaint, reduced to its essence, alleges that Mr RG was instructed to follow a specific course of action, but failed to do so.

[42] I have difficulty following the reasoning adopted by the Committee on this aspect of the complaint. The Committee concludes at [32] of its decision, that there was no substance to this aspect of the complaint, as Mr RG was entitled to refuse to accept instructions in the face of his clients refusal to pay their fees.

[43] In adopting that approach, the Committee does not address the substance of the complaint, which was that Mr RG had failed to comply with his client's instructions to take a particular course of action to effect recovery of the vessel.

[44] Mr RG's decision to decline to take steps to attend to rectifying the registration issue arose at the conclusion of the District Court proceedings. Whilst the Committee had concluded that Mr RG was able to decline to take further steps whilst his fees remained unpaid, that determination does not specifically address the applicant's

complaint that Mr RG had elected to travel a litigation path which was not favoured by his clients.

[45] A lawyer is obliged to follow their client's instructions on significant decisions in respect of the conduct of litigation.⁸

[46] Mr HM is critical of the Committee's acceptance of argument advanced by Mr RG, in which Mr RG had contended that his clients had, at no time, raised concerns about the choice of Court or the direction of the proceedings. I think it probable that concerns were raised.

[47] However the evidence falls short of establishing that Mr RG was given unequivocal instructions to do something that he failed to do. Allegation that Mr RG failed to follow instructions have not been established to the standard necessary to support a disciplinary finding.

[48] Mr HM observes that:⁹

The purpose of seeing a solicitor is to take legal advice. After having discussed the matter, it is hardly surprisingly the client would take that advice. What is surprising is that the Committee should criticise the client when such advice was wrong and has caused considerable cost.

[49] This does not present as a submission which buttresses argument that Mr RG failed to follow instructions, but rather a reiteration of argument that Mr RG steered the litigation down the wrong path.

[50] I agree, but for different reasons, that it was appropriate for the Committee to take no further steps on this aspect of the complaint.

Issue (e)

Were the fees charged excessive?

[51] There are two elements to Mr SW's fee complaint. Complaint is made that the fee charged exceeded the estimate provided and that the fee could not be considered reasonable when the work had not been competently performed.

[52] I do not consider that any conduct issues have been established arising from allegation that the lawyers provided a fee estimate which was significantly exceeded.

⁸ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 13.3

⁹ Outline for Applicant, August 2015 at [47].

[53] Rule 9.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), requires a practitioner to inform their client if it becomes apparent that the fee estimate is likely to be exceeded.

[54] I accept Mr RG's evidence that he had, on being informed that the vessel had been moved, advised his clients that his initial estimate had to be significantly amended to meet the cost of a litigation response which had not been within the contemplation of the parties. Mr SW confirmed in email correspondence, that an account rendered for costs incurred in seeking injunctive relief, would be paid.

[55] Argument that the fees charged were not reasonable focuses on submission that the conveyancing services were incompetently performed, and that proceedings were filed in the wrong jurisdiction.

[56] Argument returns then to a discussion as to the adequacy of the advice provided, and the competency of the work performed.

[57] The Committee appointed a cost assessor with particular expertise in the area of maritime law. The assessor provided a detailed and comprehensive report to the Committee.

[58] Mr HM was critical of aspects of the assessor's report, emphasising that it was the quality and competence of the conveyancing work which was disputed.

[59] The assessor's report recommended a reduction in the fee on the basis that the lawyers could have taken a more efficient and cost effective path. The Committee took a different view, determining that the litigation strategy adopted by the practitioners laid the pathway for a successful outcome.

[60] If it was determined that the lawyers had provided competent advice, I would be reluctant to interfere with the Standards Committee finding that the fees charged were reasonable.

[61] The Committee had the benefit of a costs assessor's report prepared by a practitioner experienced in the specialist area of maritime law. The extent to which the Committee diverted from the recommendations of the assessor was relatively minor. In saying that, I do not minimise the importance to the applicant of the sum involved in the recommended reduction.

[62] It is pertinent to note that Standards Committees are made up of practising lawyers, familiar with the practice of law including the conduct of litigation in the Courts,

as well as lawyers' duties and obligations and the pressures under which lawyers often find themselves. Standards Committees must also include a lay member. This format allows for a range of views – legal and non-legal – to be considered.

[63] I am mindful of the guidance provided by the High Court in *Deliu*,¹⁰ where it was noted that where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting his own judgment for that of the Standards Committee, without good reason. That said, it is the role of the Review Officer to bring an independent approach to the review process.

[64] It is argued for Company 1 that the Committee's decision on the fee issue is fundamentally flawed, and that the Committee failed to take into consideration that the outcomes achieved were unsatisfactory. How, it is argued, can a fee be deemed to be reasonable if the practitioners failed to adequately search the ships register, and elected to commence proceedings in the wrong jurisdiction?

[65] Whilst the Committee considered it appropriate that the issue as to the adequacy of the legal services provided be left to another jurisdiction to determine (and its discussion on that issue embraced consideration of both the conveyancing services provided and the choice of jurisdiction to commence proceedings) it nevertheless, in upholding the lawyer's fees, clearly had formed a view that the lawyers had achieved a satisfactory outcome in electing to commence proceedings in the District Court.

[66] The Committee's conclusion that the fees were fair and reasonable relies in significant part on the cost assessor's determination. The cost assessor concluded that the fees charged for the conveyancing aspects of the transaction were reasonable.

[67] There has been considerable delay in bringing resolution to these matters, and there will be further delay pending resolution of the District Court proceedings.

[68] In my view, it is appropriate to affirm the Committee's decision in respect to the reasonableness of fees, with emphasis that a determination has been made (as must have been the case with the Committee) on the basis that the fee charged properly reflected the work done, and that the work was competently performed.

[69] I am satisfied that the fees charged represent a fair fee for the work done.

[70] In adopting that approach, I am not oblivious to arguments advanced by the applicants, but rather endeavouring to ensure that the parties are not encumbered by

¹⁰ Above n 3.

the prospect of further delay and endeavouring, for the benefit of both parties, to avoid possibility of further argument concerning the fees returning to the Committee and potentially to this Office, at the conclusion of the District Court proceedings.

[71] I reiterate that having given careful consideration to the assessor's report and the Committee's decision, I agree with the Committee's decision, which is premised on conclusion that the work was competently performed.

[72] If Company 1 is unsuccessful in its negligence proceedings, the issue as to the reasonableness of the fee would have been settled.

[73] If Company 1 is successful in the District Court, it will be able to seek compensation and any orders made by the Court will take into account the applicant's liability to pay for legal costs incurred, if it is established that the lawyers were negligent in the providing of legal services.

Did Mr RG facilitate the filing an affidavit in court which contained information that he knew to be incorrect?

[74] Argument is advanced that Mr RG allowed an affidavit to be put before the Court, when he was aware that the affidavit contained a material error and he had been alerted to the error.

[75] To support this argument, reliance is placed on statements from Mr SW and Mr VL, in which they depose to having advised Mr RG of the error. It is submitted that in the absence of rebuttal evidence from Mr RG, Mr SW and Mr VL's statements should be accepted, and a finding reached that Mr RG had breached his obligations.

[76] It is not the case that the Committee considered the issue in the absence of explanation from Mr RG. The Committee's decision records that it had received explanation from him as to his view of the background to the execution of the affidavit, and that Mr RG had described for the Committee the approach he customarily adopted when preparing affidavit evidence for his clients.

[77] I agree with the Committee that the obligation rests with the party executing an affidavit to ensure that the contents of the affidavit when sworn are true and correct.

[78] It is not possible, at this distance, to draw from the conflicting accounts of the parties', firm conclusion as to the exact circumstances surrounding the preparation, swearing and filing of the affidavit. I am unable to establish with any degree of certainty, whether Mr RG had been advised to amend the affidavit after its execution

but prior to filing, or whether he had received clear instructions not to file the affidavit. I am not able on the evidence provided, to reach comfortable conclusion that Mr RG adopted, as is suggested, a cavalier and indifferent approach to prospect of filing an affidavit with the Court that contained a material error of which he had been made aware.

[79] An adverse finding cannot, and should not, be made against a practitioner, unless the LCRO has sufficient confidence that the facts establish a breach of the Act or the Rules and that an adverse finding is merited.

[80] On the evidence before me, any conclusion reached would be speculative. There is simply not enough evidence. I agree with the Committee that further action in respect to this aspect of the complaint was unnecessary.

Were the practitioners conflicted in continuing to act for the company, when concerns had been raised about the advice provided?

[81] This complaint concerns Mr RG's conduct.

[82] A lawyer must not act or continue to act on a matter, if there is a conflict or a risk of a conflict between the interests of the lawyer and the interests of a client for whom the lawyer is acting or proposing to act.¹¹

[83] Potential for conflict may arise in circumstances where the practitioner is put on notice that a client may have grounds to pursue a claim against the practitioner.

[84] The Conduct Rules engaged are Rule 5.11 and 5.12 which provide that:

5.11 When a lawyer becomes aware that a client has or may have a claim against him or her, the lawyer must immediately—

- (a) advise the client to seek independent advice; and
- (b) inform the client that he or she may no longer act unless the client, after receiving independent advice, gives informed consent.

5.12 A lawyer may resume acting for a former client where the matter in dispute has been resolved.

[85] Company 1 asserts that Mr RG had breached Rule 5.11. It was contended that Mr RG, having been alerted to the concerns his client had regarding the registration issue, failed to advise his client that he could not act unless the client had,

¹¹ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 5.4.

after receiving independent advice, provided his informed consent to Mr RG continuing to act.

[86] It is submitted that when concerns were raised concerning the adequacy of the register search, Mr RG's response was to advance obdurate argument that his firm was not in the wrong. His obstinate and defensive stance was said to have obstructed proper inquiry into the concerns raised.

[87] Mr RG contends that he addressed the concerns raised and provided explanation which was understood and accepted by his client. He argues that he offered his client the opportunity to engage fresh counsel, not because of concerns he had regarding the competency of the advice provided, but because of his strongly held view that it was essential that there be a relationship of trust and confidence between himself and his client, and from a conviction that if that confidence was at all shaken, then his duty was to recommend that alternative counsel be instructed.

[88] Mr RG says that his client confirmed that the concerns raised had been satisfactorily addressed, declined to instruct new counsel and provided further instructions to proceed with the litigation, all of which were clear indications to Mr RG, that his client held no concerns with Mr RG continuing to act.

[89] The raising of concern by a client as to the whether a lawyer's advice has been appropriate, does not automatically trigger a consideration as to whether the lawyer is potentially conflicted. That assessment is arrived at by a consideration of the nature of the issues raised, and the context in which the concerns arose.

[90] There is proper distinction to be drawn between concerns raised which express dissatisfaction with an aspect of services provided, and complaints at the more serious end of the spectrum that raise possibility of a claim being pursued against the practitioner.

[91] Rule 5.11 is triggered when a lawyer becomes aware that a client has or may have a claim against him.

[92] Claim is not defined in the Act, but has been defined as:¹²

the aggregate of operative facts giving rise to a right enforceable by a court, ... the assertion of an existing right, any right to payment or to an equitable remedy, ... a demand for money, property or a legal remedy to which one asserts a right.

¹² Garner, Bryan A *Black's Law Dictionary* (9th ed, Thomson Reuters, St Paul, 2009) at 281 – 282.

[93] Mr HM submits that complaint that a lawyer had failed to responsibly attend to searching a shipping register in circumstances where the ownership of the vessel was in dispute, was a circumstance which should properly alert a practitioner to the possibility of a claim being pursued.

[94] I agree that issues of that substance could be expected to properly engage a practitioner's consideration as to whether Rule 5.11 had application.

[95] The Committee did not in its decision, appear to have addressed Rule 5.11. Its conclusion that Mr RG had not been conflicted was arrived at by:

- (a) A discussion of the response made by Mr RG to the complaint, particularly his assertion that there was no substance to the complaint.
- (b) Noting that Mr RG's clients had accepted his views and instructed him to continue.
- (c) Emphasis on the fact that Mr RG had advised his client of its option to instruct alternative counsel.

[96] The Committee concluded that Mr RG's clients had accepted his position. It is clear that Mr RG's clients elected to continue to instruct Mr RG and rejected his offer to seek new counsel.

[97] I disagree with the Committee's decision to take no further action on this aspect of the complaint. In reaching that view, I have given careful consideration to the purposes and objectives of the disciplinary complaint process, and in particular, its focus on consumer protection.¹³

[98] A careful examination of the purpose and intent of Rules 5.11 and 5.12 is required.

[99] Consistent with the consumer objectives of the Act, the relevant Rules endeavour to provide protection to the consumer of legal services. In circumstances where a practitioner's client has concern that the legal services provided may have been so inadequate as to raise possibility of the client having grounds to pursue a claim against the practitioner, a process is established to ensure that the client has opportunity to make inquiry as to whether there are grounds to pursue a claim. That approach ensures that the practitioner is protected from accusation of conflict, or allegation that the practitioner's decisions and future advice to the client, could be

¹³ *Orlov v New Zealand Law Society* [2013] NZCA 230, [2013] 3 NZLR 562 at [10].

materially influenced by concerns the practitioner may have concerning the possibility of the client pursuing a claim.

[100] A lawyer must consider the possible implications of Rule 5.11, the moment they are alerted to the possibility of a claim. When the lawyer becomes aware that a client **may** (emphasis added) have a claim, Rule 5.11 comes immediately into play.

[101] A practitioner's conviction (as was the case here) that the clients' complaint lacked merit, does not absolve the practitioner of the responsibility to consider whether Rule 5.11 applies. In circumstances where the complaint raised is trivial, or relates to an aspect of the lawyer's conduct which could not reasonably or responsibly give rise to suggestion that the client had proper grounds to pursue a claim, the Rule would have no application. But in circumstances where complaint is made that a practitioner has failed to adequately search a shipping register, and there is possibility that the failure, if established, could be one of sufficient import to have compromised the client's position, there is a requirement for r 5.11 to be followed.

[102] Mr RG considered that no objection could be properly raised to the steps taken, and he was quite entitled to advance that view, but emphatic conviction in the correctness of one's position, does not absolve the practitioner of the need to consider Rule 5.11. It cannot be the case that a practitioner can control the parameters of the Rule, or be provided with complete defence to a failure to follow the rule, by advancing of argument that they had genuine belief that there was no possibility of a successful claim being pursued.

[103] Importantly, the process requires that the client be given independent advice. It is within that context that the client is properly positioned to consider whether he may have a claim to pursue, or is content to continue with his lawyer, views which should be formed independently of the lawyer.

[104] It is important to consider the application of the Rule within the context of the lawyer/client relationship. The professional obligations of lawyers impose stringent duties on them. Clients frequently place a considerable degree of confidence in their lawyers. They rely on them. Not infrequently the client carries expectation that the lawyer will guide them through a labyrinth of legal issues of which the client may have only a limited understanding.

[105] The requirements of rule 5.11 are not met by the practitioner simply advising the client that they are free to seek alternative counsel. Whilst that approach it may be argued fulfils the practitioner's obligations to ensure that there was no potential for

conflict, that response does not satisfy the requirements of Rule 5.11, which specifically directs that a practitioner must, on being made aware of the possible existence of a claim, advise the client to seek independent advice. The Rule imposes obligation on the practitioner to advise their client to seek independent advice, and to inform the client that they are unable to continue to act, unless the client obtains advice and then consents to the practitioner continuing.

[106] Advice to a client that they are free to instruct fresh counsel, is quite different from an obligation to advise a client that they are to seek independent advice in respect to any possible claim, and that the lawyer may not continue to act in the meantime.

[107] If there is potential for a claim, the rule is stringent. The rule has been described as essentially prophylactic in nature, and demanding of the need for a practitioner to recognise, and clearly turn his or her mind to the consequences where a possible claim against the practitioner becomes apparent.¹⁴

[108] The difficulty with argument that the requirements of Rule 5.11, are met by advising the client that they are free to engage fresh counsel, is that it does not satisfy the requirements of Rule 5.11 (b) which requires a practitioner to inform their client that he or she may no longer act unless the client gives informed consent after having received independent advice, and importantly, it is an approach which may present as unpalatable to the client, and an approach which diminishes the client's capacity to make a truly independent and considered judgement.

[109] That may particularly be the case in litigation matters where a decision to change lawyers midstream can present as an intimidating option for the client, raising concerns that newly instructed counsel will be unfamiliar with the twists and turns of the case, and raise reasonable apprehension that the costs of the litigation will be significantly increased if fresh counsel is instructed.

[110] The option of engaging fresh counsel can present as daunting, when the litigation is at a critical juncture and there is need, as was the case here, for immediate steps to be taken as a matter of urgency.

[111] Direction that a client must take independent advice about the possibility of a claim in the course of the litigation, will also present challenges for the client and likely expose the client to further cost and delay, but that is an unavoidable outcome of a practitioner properly advising their client when the spectre of a possible claim is raised.

¹⁴ *Nelson Standards Committee v Bamford* [2015] NZLCDT 39 at [8] and [10].

[112] In considering the obligations imposed on practitioners by the Rules¹⁵ I conclude that Mr RG's failure to advise his client of the need to seek independent advice, breached Rule 5.11(a) and (b).

[113] Section 12(c) of the Act, defines as "unsatisfactory conduct", conduct consisting of a contravention of the Act, or of any regulations or practice rules made under the Act, relating to the provision of regulated services.

[114] A finding of unsatisfactory conduct against Mr RG is established.

Did the practitioners refuse to complete the retainer without justification?

[115] I agree with the Committee's decision to take no further action on this aspect of the complaint. The Committee concluded that a lawyer is justified in refusing to accept instructions if there is good cause to do so, and placed reliance on Rule 4.1.

[116] Rule 4.1 concerns a practitioner's obligations to accept instructions. This was a case where instructions had been accepted, but the lawyer refused to continue to act on grounds that his client had neglected to pay fees.

[117] Rule 4.2 deals with a lawyer's duty to complete a retainer. A similar test of good cause has application under Rule 4.2. Good cause may include the inability or failure of the client to pay a fee on the agreed basis, or in the absence of an agreed basis, a reasonable fee at the appropriate time.

[118] Company 1 had refused to pay its account. The lawyers' decision to terminate the retainer in these circumstances raises no disciplinary issues.

Orders

[119] A finding of unsatisfactory conduct has been made against Mr RG. In light of this I must consider the appropriate penalty. By s 211(1)(b) of the Act, I am able to make any orders that could have been made by a Standards Committee.

[120] In considering appropriate penalty, I conclude that the finding of unsatisfactory conduct, reflects an appropriate response, and that there is no need for imposition of further penalty

¹⁵ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[121] In arriving at the view, I accept Mr RG's evidence that he discussed the concerns raised with his client, and was genuine in his view that in making suggestion to his client that alternative counsel be instructed, he had met his obligations.

Decision

[122] The Standards Committee decision to take no further action in respect to complaint that Mr RG was conflicted is reversed.

[123] Mr RG is found to be guilty of unsatisfactory conduct for a breach of Rule 5.11.

[124] In all other respects, the decision of the Standards Committee is confirmed.

Costs

[125] Where a finding has been made against a practitioner it is appropriate that a costs order in respect of the expenses of conducting a review be made. In making this costs order I take into account the Costs Guidelines published by this Office. Mr RG is ordered to pay costs in the sum of \$1,200.

Orders

[126] The following orders are made:

- (a) Mr RG is to pay \$1,200 in respect of the costs incurred in conducting this review pursuant to s 210 of the Lawyers and Conveyancers Act 2006. Those costs are to be paid to the New Zealand Law Society within 30 days of the date of this decision.

DATED this 3rd day of November 2016

R Maidment
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 SW on behalf of Company 1 as the Applicant
Mr HM as the Representative for the Applicant
Messrs RG, OL and HJ as the Respondents
Mr DB as the Representative for the Respondents
Mr KR as a Related Person under s 213
The [Area] Standards Committee
The New Zealand Law Society