

CONCERNING

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

AND

CONCERNING

a determination of the Standards Committee

BETWEEN

CM
Applicant

AND

RG
Respondent

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

DECISION

Introduction

[1] Mr CM has applied for a review of a decision by the Standards Committee in which the Committee concluded that further action on his complaint about Mr RG's conduct was not necessary or appropriate pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act).

Background

[2] Mr RG acted for Company A Limited (Company A). Company A's director, Mr PH, and others from the company provided instructions to Mr RG.

[3] Mr CM and a colleague were appointed as liquidators for Company B Limited (Company B) in 8 December 2008. It was part of their role to recover money for Company B's creditors, including by recovering amounts they believed should be recovered from Company A.

[4] The central controversy in this complaint arises from Mr RG's conduct in relation to disclosure of a particular invoice, about which Mr CM made a complaint to the New Zealand Law Society (NZLS).

Standards Committee

[5] Mr CM's complaint is that Mr RG knowingly misled the Court in the "Respondent's Event Chronology" (the chronology) which he finalised shortly before the High Court hearing, and provided to Mr CM's lawyers and the Court. The chronology describes Company A's invoice number 893428 to Company B dated 14 March 2008 for \$666.92 (the invoice) as being for "interest during the period", as does Company A's printout. The narration to the invoice itself, however, says it is for "Bad Debts – Collection Costs".

[6] Mr CM says his concern is that Mr RG may have allowed Mr PH to give evidence that the invoice related to interest, knowing that evidence was false.

[7] Mr CM says that the fact that the invoice was "actually issued for bad debts collection" became "a pivotal evidential point" in the matter, referring for support to the High Court's judgment.¹ He argues that the discrepancy between the wording of the invoice and the chronology support the inference that Mr RG knew, before Mr PH gave evidence, that he would say the invoice was for interest when on the face of it, it was not.

[8] Mr CM says Mr RG ignored a request to produce the invoice made by his lawyers on 19 July 2010 pursuant to the High Court Rules. Mr CM says Mr RG had the invoice in his possession but did not produce it until requested by the High Court to do so at the hearing on 28 July 2010. Mr CM also says that the inconsistencies between the printout, the invoice and the chronology support his contention that Mr RG did not meet his professional obligations to the Court.

[9] The Committee considered the complaint and parties' correspondence in the context of the rules dealing with misleading and deceptive conduct in Court² and misleading and deceptive conduct in relation to a lawyer's practice.³ It noted Mr RG had an obligation to protect his client's privilege in the matter, and that it had requested a copy of the invoice from him, but he had not provided a copy to the Committee.⁴

[10] The Committee noted the High Court's judgment in favour of the liquidators, the complaint that Mr RG had "knowingly misled the court" in relation to the different descriptions in the chronology and the invoice, and Mr CM's assertion that the invoice

¹ *CM v Company A* [2011] XXX (HC) at [39].

² Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 13.1.

³ Rule 11.1.

⁴ It appears Mr RG did not retain a copy of the invoice he had provided to the Court. Ms UR provided a copy of the invoice in the course of this review.

was a “significant piece of evidence in the matter”. It also observed that Company A’s suspicions about Company B’s financial circumstances were said to be a “crucial evidential point in the litigation”.

[11] The Committee recorded that it did not have a copy of the invoice that Mr RG had provided to the High Court. It considered the sequence of events, referred to documents produced by the parties in the High Court proceeding, and affidavits sworn by Mr PH in anticipation of an appeal. The Committee noted that Company A’s position was that that invoice genuinely related to interest (i.e. the printout and chronology represent correct position), and that Mr RG’s conduct was consistent with maintaining that position.

[12] The Committee did not consider that the evidence before it “clearly proved actual prior knowledge on the part of Mr RG that the invoice was not for interest”⁵, and was satisfied that Mr RG, acting on his client’s instructions before and after the High Court hearing, believed the payment was for interest. In the Committee’s view “there may have been some inconsistencies and even possible errors in the matter”, but it did not consider that Mr RG’s conduct was unsatisfactory under the Act. The Committee did not consider Mr RG had “actively misled the court in breach of the rule 13.1”.⁶ In all the circumstances, the Committee decided to take no further action in the matter pursuant to s 138(2) of the Act.

[13] Mr CM was dissatisfied with the decision and applied for a review.

Review application

[14] In his review application Mr CM alleged that the Committee’s finding that Mr RG was unable to produce a copy of the invoice because he did not possess one was a reviewable error.

[15] At the heart of Mr CM’s review application, however, is his contention that Mr RG had a copy of the invoice, and should have produced that for inspection in response to the request under the High Court Rule. He says Mr RG should have accurately recorded the narration in the invoice in his chronology, and by not doing so he has contravened his absolute duty of honesty to the court.

Role of LCRO on review

⁵ Standards Committee determination (9 May 2012) at [21].

⁶ At [22].

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

Scope of review

[17] The LCRO has broad powers to conduct 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. The statutory power of review is much broader than an appeal, and gives the LCRO discretion as to the approach to be taken on any particular review and the extent of the investigations necessary to conduct that review.

Review hearing

[18] The parties attended a review hearing in Hamilton on 7 July 2015, with Mr CM being represented by Ms UR.

Review issues

[19] There is nothing to Mr CM's concern that Mr RG did not produce a copy of the invoice in the course of the complaints process. It is evident from the High Court transcript that a copy of the invoice was before the High Court, because Ms UR produced it into evidence after cross examining Mr PH in relation to its contents. The invoice itself was not material to the complaints process because there is no dispute over its existence or what it says. The dispute is whether it is a correct record. That is not a matter for this Office to determine.

[20] Enough information, including what the narration to the invoice said, was available to the Committee for it to conclude its inquiry into the professional standards issues raised. The question to be considered on review is whether there is good reason to interfere with the Committee's decision. For the reasons discussed in greater detail below, the answer to that question is no.

Discussion

[21] Mr RG's conduct with respect to the invoice occurred in the context of litigation between Mr CM as liquidator for Company B, and Company A as recipient of the payment. It is evident from the High Court's judgment that the invoice became relevant

to the question before the High Court, namely whether Company A could retain payments it had received from Company B, or whether Company A would have to refund those payments to Company B's liquidators. It appears from Ms UR's comments and the timing of Mr CM's request under High Court Rule 8.23 that neither of them had fully appreciated the potential significance of the payment or the need to examine the invoice until the proceeding was quite advanced. It was that belated appreciation that gave rise to the request under rule 8.23.

[22] Rule 8.23 relates to inspection of documents referred to in pleadings. Broadly speaking the rule is one in a series that constrain a party from seeking to rely on an undisclosed document in a proceeding, while preserving other parties' access to evidence subject to the rules of evidence. Sub-rule (3) for example allows claims to privilege. Any claim to privilege can be subject to challenge. Challenges are determined under the Evidence Act by the judge in the proceeding and involve consideration of a range of factors driven overall by fairness. Arguments about disclosure and privilege in High Court proceedings cannot be resolved by a standards committee, or by this Office on review.

[23] The focus of this review is on Mr RG's conduct, which has been assessed against the requirements of rules 13, 13.1 and 13.10 which say:

- 13 The overriding duty of a lawyer acting in litigation is to the court concerned. Subject to this, the lawyer has a duty to act in the best interests of his or her client without regard for the personal interests of the lawyer.
- 13.1 A lawyer has an absolute duty of honesty to the court and must not mislead or deceive the court.
- 13.10 A lawyer must not produce evidence knowing it to be false.

[24] Mr RG and Ms UR say there was no formal discovery process in the liquidators' proceeding, so I have not considered rule 13.9 or the High Court Rules as they relate to discovery. It is relevant to note, however, that the obligation on a lawyer is generally to ensure that their client understand his or her discovery obligations. The professional obligations imposed on counsel when dealing with discovery can put pressure on the relationship between lawyer and client, because of the lawyer's overriding duty to the court.

[25] Rule 13 refers to the strict hierarchy of the duties owed by counsel in litigation. Duties to the court override duties to clients. Mr CM's complaint is necessarily coloured by the fact that Mr RG was representing the opposing party in litigation. It was not Mr RG's job to assist Mr CM's case; doing so would have put him at risk of

criticism by Company A. Company A was in the position of having to prove a negative, to succeed in retaining the payment the liquidators sought to claw back. Mr CM can only guess at the advice Company A received and its reasons for the decisions it made in the course of the litigation.

[26] There is no evidence of the Court expressing any concern about Mr RG's conduct. However, if there had been a conflict between Mr RG's duties to Company A and to the Court, he would have had to resolve that in favour of the court.

[27] The Committee correctly observed that Mr RG was not in a position where he knew Company A's evidence was false. Mr PH accepted in his evidence in the proceeding what the invoice records on its face. What he apparently does not accept is that the invoice is a correct record.

[28] The focus of Mr CM's complaint, however, is that Mr RG misled the Court, and should be punished. Given that arguments over the meaning courts should attribute to evidence are the everyday staple of courts, it is useful to review conduct by other lawyers alleged to have breached the standards now encapsulated in rule 13.1 to decide whether the conduct alleged fell below a proper professional standard.

[29] Concerns of the type expressed by Mr CM in his complaint have been addressed by this Office with reference to comparable overseas jurisdictions in a number of cases. One comment by the New South Wales Court of Appeal in *Re Gruzman* is particularly pertinent. The issue before the Court of Appeal related to the professional conduct of a barrister in litigation. The Court made general comments which included that:⁷

Frankness should be one of the main attributes of a barrister. It is his duty to not keep back from the court any information which ought to be before it, and he must in no way mislead the court by stating facts that are untrue, or mislead the judge as to the true facts, or knowingly permit a client to attempt to deceive the court. How far a barrister may go on behalf of his client is a question too difficult to be capable of abstract definition, but when concrete cases arise one can see for oneself whether what he has done is fair nor not.

LCRO 179/2011 and LCRO 180/2011

[30] In LCRO 179/2011 and LCRO 180/2011 the LCRO said of the complainant's view that the opposing lawyer had misled the Court:

[24] The disciplinary process has no part to play in Court proceedings. Judgments are made by the presiding Judge as to the strength of the evidence before the Court and he or she will assess that evidence against the Rules of Evidence

⁷ *Re Gruzman* (1968) 70 SR (NSW) 316 at 323.

applicable to the proceedings before it. Rights of appeal exist for those parties who consider that the Court has made an error in its assessment of the evidence or made an error of law. In addition, where evidence can be adduced that statements made, or evidence before the Court, was not correct, then various remedies enable the new evidence to be put before the Court. If, in that process, it is shown that a lawyer has breached the Conduct and Client Care Rules, then without question, it is properly the role of the disciplinary process to act accordingly.

[31] The LCRO also observed that

[32] This application for review has similarities to the review application which was the subject of judicial review in *Siemer v LCRO & Collins*. In that case, Mr Siemer had lodged a complaint with the New Zealand Law Society Complaints Service about the conduct of Dr Collins QC about Dr Collins' role in proceedings brought against Mr Siemer. In its determination, the Standards Committee made the following comments:

It is not part of our role in the complaints jurisdiction to enter into a detailed examination of a case like this, for the purpose of identifying possible errors or misjudgements by a law officer in the position of Dr Collins QC. Unless there was some compelling evidence of bad faith, including such matters as the deliberate falsification of evidence or the pursuit of the application for improper motives, we do not consider it appropriate for us to re-litigate matters which have already passed the scrutiny of the Courts.

LCRO 224/2010 and LCRO 262/2011

[32] In LCRO 224/2010 and LCRO 262/2011 the LCRO considered the position of practitioner as officers of the court in relation to a breach of rule 13.1 saying:

[20] In order to make a disciplinary finding under this Rule, there needs to be more than an honest error or oversight. A finding that a lawyer has 'misled' or 'deceived' the Court requires an element of knowledge or intention on the part of the lawyer to mislead or deceive the Court, or some evidence of a reckless disregard as to the accuracy of information conveyed to the Court. This may come in the form of a wilful blindness to matters that challenge the accuracy of the information, but materially there needs to be an element of moral lapse in the lawyer's actions.

LCRO 48/2010

[33] In LCRO 48/2010 the LCRO accepted that the practitioner's conduct "should be examinable in a disciplinary context, and independently of any other avenue open to the Applicant to challenge the Practitioner's submissions". The risk would otherwise be that "any complaint that a practitioner had misled the court could be answered by reference to the opportunity to challenge submissions that arise in the course of the proceeding before the Court and thereby relieve a practitioner from being subjected to disciplinary examination in regard to the complaint". On that basis the LCRO examined the practitioner's conduct, finding that the lawyer's submissions were not well supported by her client's evidence, and conveyed an inaccurate impression to the Court. The LCRO's decision records:

[33] The proper administration of justice requires Courts to be able to rely on what a lawyer says and does. To deliberately deceive the court is a major disciplinary matter. This is reflected in the obligation of “absolute honesty” to the Court as set out in Rule 13 of the Lawyers: Rules of Conduct and Client Care. The Applicant contended that the Practitioner intentionally deceived the Court, and is in breach of Rule 13.1 of the Rules of Conduct and Client Care.

[34] The Practitioner denied any intention to mislead the Court, taking the view that the Applicant was legally represented and was at liberty to present such evidence to the Court as she considered appropriate to contest the Practitioner’s submissions, or correct anything that she considered to be erroneous.

[34] Despite the practitioner’s denials, the LCRO concluded that she had intentionally put submissions to the Court that did not accurately reflect what she knew of the state of affairs at the time, and created a misleading impression. All of the relevant information had been in the practitioner’s possession when she prepared her submissions. Her submissions did not actually mislead or deceive the Court, however, because they were immaterial to the decision the Court was charged with making.

[35] The LCRO said it was immaterial that the lawyer had not intended the Court to be deceived by her submissions, and that she had “relied on the true state of affairs coming to light by means of witness evidence”. Neither detracted “from a finding that the lawyer had intentionally placed before the Court information known to the lawyer to be incorrect”. The LCRO confirmed the Standards Committee’s finding that the lawyer had attempted to mislead the Court, and that case law establishes that the duty of honesty extends to impressions that may be conveyed to the Court through a lawyer’s submissions.

[36] Having concluded that the practitioner intentionally placed before the Court information that was erroneous and known to be erroneous, the LCRO concluded there was a proper basis for a finding, and that there has been breach of the duty of honesty to the Court in this case. Findings of unsatisfactory conduct were available under s 12(a) or (b) of the Act on the basis that the lawyer’s conduct fell short of the standard of diligence and competence that a member of the public is entitled to expect of a reasonably competent lawyer, or would be regarded by lawyers of good standing as being unacceptable.

Analysis

[37] The decisions referred to above reference lawyers’ obligations to be fair. Lawyers are discouraged from acting in bad faith; deliberately falsifying evidence; acting on improper motives; knowingly, intentionally or recklessly disregarding the accuracy of information and moral lapse.

[38] Bearing those considerations in mind when examining all of the information available on review does not give rise to any reason to interfere with the Committee's decision.

[39] Company A had disclosed the existence of the invoice and its related payment in the schedule attached to its letter to the liquidators dated 3 August 2009, well before Mr RG was instructed. That was both fair and proper. Neither Mr RG nor Company A then did anything to conceal the existence of the invoice after he was instructed. It was open to the liquidators to request a copy of the invoice from Company A if it had considered it relevant from August 2009 onwards if it did not have one. Nonetheless, nine days before the hearing, and having sworn two affidavits, apparently without reference to the invoice, Mr CM noted its absence and a request was made.

[40] There is no reason to believe that Company A or Mr RG had given any consideration to whether the liquidator had a copy of the invoice until it received the request on 19 July. There is no reason why they should have, because in the usual course Company B would have had to have received a copy of the invoice to have paid it, which according to Company A's records it plainly had.

[41] Mr RG says he received the request under rule 8.23, and promptly passed that on to Company A. Mr RG says he is certain he did not have the invoice when he prepared the affidavit Mr PH swore on 16 April 2010, but that he received the invoice at some point between 19 and 28 July 2010. He believes Company A first provided him with a copy in response to Mr CM's request.

[42] Mr RG says he does not recall having looked at the invoice when he drafted the chronology. It does not appear from the documents available to have been a significant part of the liquidators' case until then. Arguably Mr RG could have been quicker to respond to the request under rule 8.23, but according to the Court transcript, the invoice was in Ms UR's hands before she came to cross examine Mr PH.

[43] According to Mr RG's evidence, it is possible that he did not receive the invoice until the day of the hearing. He says he acted in accordance with his client's instructions. Mr RG says that from Company A's perspective the invoice was a "minor consideration in the case as a whole",⁸ although once he received the request under the High Court Rule he must be taken to have recognised that it may have been of some significance to the liquidator. Either the request was overlooked by Company A, it was slow in responding, or Mr RG was given the invoice and instructed to "take it to

⁸ Letter RG to NZLS (26 March 2012).

the wire” once it became apparent that the liquidators did not have a copy of the invoice. If the last of those is correct, Mr RG’s conduct could be said to have fallen foul of proper standards. However, there is insufficient evidence to make that finding because that aspect of the circumstances is protected by the privilege that exists between Mr RG and Company A as lawyer and client. It is not appropriate to take that enquiry any further in the course of a review brought by Mr CM as the opposing party in the litigation, in the absence of any concern being raised by the Court or Company A.

[44] Mr RG’s client apparently did not seek to rely on its own invoice, Mr RG produced that, and Mr PH was subjected to cross examination on it in the course of the High Court hearing. There is no evidence of any taint of bad faith, deliberate falsification of evidence, or improper motive on Mr RG’s part, and no reliable evidence of moral lapse. The chronology he produced is administrative rather than evidential. The evidence is that he probably did not reference a copy of the invoice when he prepared that, but relied on his client’s summary printouts. The chronology is consistent with the printout. The evidence does not support a finding that Mr RG intended to mislead the Court, or was reckless about the accuracy of the information presented. No obvious reason can be discerned from the information available on review that suggested it was unsafe for him to rely on the accuracy of the information his client had provided.

[45] Mr PH’s proposed case to the Court of Appeal relied on a ground that the invoice was a charge for interest, not, as recorded, for “bad debts – collection costs”. The affidavit Mr PH swore in support of his appeal refers to the invoice and enquiries he says he made after the 28 July 2010 hearing. He says his enquiries revealed that the charge was incorrectly coded in Company A’s computer system by a staff member who could not be identified; that the amount corresponded to an amount of interest that would be calculated on the sum outstanding at the time based on Company A’s standard formula. He said that Company A had not, in fact, referred Company B to its debt collectors. There is no obvious way Mr RG could have known about Company A’s internal machinations, given Company A could not identify the staff member responsible for coding the data after the importance of making any such enquiry became apparent.

[46] By that stage, Mr PH would have had a more sophisticated appreciation of the significance of the narration to the invoice, and its relevance to the Judge in determining the High Court proceeding. Hindsight and reflection do not mean Mr PH’s evidence is of no value. Mr PH deposes to his understanding that “some time during the period 16 April 2010 to 19 July 2010 a copy of the said invoice was located by

Company A". Mr PH describes Company A as a substantial organisation, and says he personally is "not aware of the contents of all invoices issued by Company A". He says that he had only given the invoice a cursory examination without making "any inquiry as to the correctness of the code/notation on the invoice".

[47] Mr CM is critical of the evidence contained in Mr PH's affidavits, saying it is self-serving. However, Mr PH's evidence must be given some weight in the course of this review. Its weight is increased by it being made under oath, not undermined by not having been prepared specifically for the purposes of this review, and not affected by Company A choosing, for its own reasons, not to proceed with its appeal against the High Court decision.

[48] An objective view of all of the evidence available on review results in conclusion that it is highly unlikely that Mr RG was in league with Mr PH in a deliberate attempt to mislead the Court or contravened rules 13, 13.1 or 13.10. There is no good reason to depart from the Committee's decision.

[49] In all the circumstances, the Standards Committee's decision that further action on Mr CM's complaint is unnecessary and inappropriate 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 7th day of September 2015

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 CM as the Applicant
Mr RG as the Respondent
Ms UR as the Applicant's Representative
Mr AG as a Related Person
Standards Committee
The Secretary for Justice
New Zealand Law Society