

CONCERNING

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

AND

CONCERNING

a determination of the North Island Standards Committee

BETWEEN

GB

Applicant

AND

PW

Respondent

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

DECISION

Introduction

[1] Ms GB applied for a review of a decision by the North Island Standards Committee dated 25 May 2012 (the decision) in which the Committee determined Ms GB's conduct had been unsatisfactory pursuant to s 12(c) of the Lawyers and Conveyancers Act (the Act).

[2] Ms PW complained that Ms GB had failed to attend to her instructions competently or in a timely manner, had breached her obligation to maintain her client's confidence and trust, and had charged an excessively high fee.

[3] Ms PW's instructions related to an urgent protection order that she wanted to obtain to keep her former partner away from her home and family. Ms GB accepted there had been delays, but attributed the fault for them to a member of the court staff who she said had impeded her ability to progress her client's application.

[4] Ms PW was not satisfied with Ms GB's conduct, and complained to the New Zealand Law Society (NZLS).

Standards Committee

[5] The Standards Committee noted the delays in Ms GB taking steps to obtain the protection order, and her failure to lodge documents, both of which it found were

unacceptable, and in breach of Rules 3 and 10 of the Conduct and Client Care Rules (the Rules).¹ In circumstances where the orders were of no utility to Ms PW by the time Ms GB eventually completed her instructions, the Committee found her fees were not fair and reasonable, and she had breached Rule 9.²

[6] The Committee recorded a finding of unsatisfactory conduct in respect of Ms GB's breaches of the Rules, and made orders under s 156 of the Act. The Committee ordered Ms GB to cancel all of her fees, and refund \$2,300 to Ms PW, pay costs of \$750 and a fine of \$750 to the NZLS.

[7] Ms GB was dissatisfied with the decision and applied for a review.

Review Application

[8] Ms GB says that Ms PW approached her directly to seek advice on protecting herself and her family from her former partner, and that she advised Ms PW to apply for protection orders and to arrange for a trespass notice to be served on Ms PW's former partner. Although Ms GB maintains that she "consistently moved Ms PW's matter forward",³ she also says that Ms PW's current partner asked her to delay preparation of the protection order, and to account for her delay in filing the application in Court. She says that when she did "...the Registrar at the Family Court Counter would not "accept filing" until the Police had provided further information".⁴ Ms GB claims that the Registrar was wrong to require the further information, and that caused delays. On the basis that the Committee made the wrong decision based on her evidence, Ms GB applied for a review.

Role of the Legal Complaints Review Officer

[9] 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 judgment for that of the Standards Committee, without good reason.

Scope of Review

[10] 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

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

² Above n1.

³ Affidavit of Ms GB sworn 2 July 2012 at [22].

⁴ Above n 3 at [7].

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

[11] The parties attended a review hearing in Auckland on 27 November 2013, after which Ms GB was allowed time to file further information, which she eventually did.

[12] The information was not passed on to Ms PW because some of it was personal to Ms GB, much of it was simply a repetition of the information that had already been provided to the Committee and on review, and none of it adequately accounted for the delays in providing legal services to Ms PW.

Review issues

[13] Ms GB was a barrister sole at the time of the conduct complained about. She had accepted payment of \$2,300 in fees from Ms PW, with no instructing solicitor being involved, although that aspect of Ms GB's conduct was not considered by the Committee.

[14] There are therefore two issues on review:

- (i) whether there is any good reason to interfere with the Committee's findings of unsatisfactory conduct in respect of Ms GB; and
- (ii) whether it is appropriate to record a further finding of unsatisfactory conduct in respect of Ms GB taking instructions directly, without reference to an instructing solicitor, in breach of the Intervention Rule.⁵

The answers to those two questions are no and yes respectively.

Discussion

[15] The substance of Ms PW's complaint arose in May 2011, and she laid her complaint in the following August. The Committee records granting Ms GB a number of extensions to enable her to respond to the Committee's various attempts to contact her, culminating in the Committee's request for a copy of Ms GB's file to which she did not respond.

[16] The Committee concluded that Ms GB's failure to progress Ms PW's matter in a timely fashion, and not filing her protection order application in good time, constituted

⁵ Above n 1 at [14.4].

unsatisfactory conduct in that she had breached her obligations under Rules 3 and 10 which state:⁶

3 In providing regulated services to a client, a lawyer must act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

10 A lawyer must promote and maintain proper standards of professionalism in the lawyer's dealings.

[17] Ms GB's conduct was also considered to be unacceptable when measured against the standards of "competent, ethical and responsible practitioners",⁷ which is a reference to the test for unsatisfactory conduct by way of conduct unbecoming in s 12(b)(ii) of the Act.

[18] There is nothing unreasonable in any of the Committee's findings, all of which are supported by the evidence. Ms GB primarily excuses her conduct on the basis that that the delays were beyond her control. However, once she had an instruction to proceed, Ms GB could not use a member of court staff as an excuse for not knowing the relevant law.

[19] A protection order application is made under legislation and rules which clearly set out the documents that must be filed for the application to proceed.⁸ There was nothing complex about the application, and there is no excuse for Ms GB being so unfamiliar with the legislation and rules that she could be persuaded by a member of the court staff to delay filing her client's application on the basis that she claims.

[20] Bearing in mind her apparent lack of familiarity with commonplace legislation and rules, it was reasonable for the Committee to consider Ms GB lacked competence, had failed to take reasonable care, and had not promoted and maintained proper standards of professionalism in her dealings with Ms PW. The Committee's reference to the inappropriate delays is a soundly based.⁹ It was also open to the Committee to conclude that her conduct was unacceptable measured against the standards of competent, ethical and responsible practitioners.¹⁰ There is no reason to interfere with the Committee's findings of unsatisfactory conduct in respect of her breaches of Rules 3 and 10.

⁶ Above n 1 at [3 and 10].

⁷ Standards Committee determination dated 25 May 2012 at [7].

⁸ Domestic Violence Act 1995; Domestic Violence Rules 1996.

⁹ at [8] SC decision (25 May 2012).

¹⁰ *B v Medical Council* [2005] 3 ZLR 810 to Elias J at 811.

Fees

[21] Although Ms GB contended that her fees were reasonable, in the circumstances the Committee found they were not. The Committee took into account the fact that Ms GB's work on the protection orders was of no utility to Ms PW because Ms PW eventually gave up on Ms GB, and obtained protection orders without her help.

[22] Ms GB's evidence on review was that she had done her best to remain in touch with Ms PW, and keep her apprised with her progress.

[23] I have carefully considered the information provided on review, including the evidence of the parties at the review hearing, and the information provided after the review hearing. I am not persuaded by Ms GB's assertions that her conduct was of an acceptable standard in the circumstances. Given the urgent nature of protection order applications in general, it is not surprising that Ms PW took matters into her own hands after Ms GB delayed for weeks in providing her with services. I can find no reason to depart from the Committee's findings that Ms GB's conduct was unsatisfactory in respect of her breaches of Rules 3 and 10.

[24] I also consider it was unfair and unreasonable for Ms GB to bill Ms PW in the circumstances. It was particularly unreasonable for Ms GB to press Ms PW over fees once she became aware that it was her delays that had driven Ms PW to apply for protection orders herself. I can find no reason to depart from the Committee's findings that Ms GB's conduct was unsatisfactory in respect of her breach of Rule 9.

[25] The penalties the Committee imposed were logically linked to Ms GB's poor performance, as a result of which she was ordered to pay costs and a fine, cancel all her fees and refund Ms PW's payment of \$2,300. Those orders are reasonable, proportional and confirmed on review. The order for a refund highlights conduct issues arising from Ms GB's failure to comply with the Intervention Rule, when she accepted Ms PW's instructions, which the Committee did not consider.

Rule 14.4 –The Intervention Rule

[26] Ms GB's conduct highlights the consumer protection purpose of the Intervention Rule, and other rules that govern the conduct of lawyers in practice as barristers sole. The Intervention Rule is set out at Rule 14.4 which says:

... a barrister sole must not accept instructions to act for another person other than from person who holds a practising certificate as a barrister and solicitor.

[27] Ms GB was, at the relevant time, a barrister sole. She accepted instructions to act for Ms PW, directly from Ms PW. Ms GB's evidence is that no instructing solicitor

was involved, although she denies any impropriety in that regard, relying on what she describes as common practice amongst barristers she knows, who she says generally ignore the Intervention Rule.

[28] As Ms GB is a barrister sole, she is prohibited from holding money on behalf of another person.¹¹ Any fees paid to her in advance should have been paid into an instructing solicitor's trust account. However, Ms GB asked Ms PW for fees in advance, which she paid, and which Ms GB then deposited directly into her own account.

[29] If Ms GB had complied with the Intervention Rule, she would have had an instructing solicitor, and Ms PW's money could have been paid into a trust account until an invoice was issued with respect to the fees for work done by Ms GB. Ms PW could then have authorised payment or disputed the fee.

[30] As Ms PW was so disappointed with Ms GB's service, it is entirely possible she would not have directed Ms GB be paid, and could have disputed her fee. By paying Ms PW's money directly into her own account Ms GB deprived Ms PW of that opportunity.

[31] At the review hearing Ms GB said that she has now been declared bankrupt. Consequently, she says she now has no personal ability to refund the fees Ms PW paid to her. That situation would have been avoidable if Ms PW's money had been held to her direction by an instructing solicitor in his or her trust account.

[32] In the circumstances, it is necessary to consider how to address Ms GB's admitted breach of Rule 14.4.

Referral Back

[33] I have considered referring the Intervention Rule aspect raised by Ms PW's complaint back to the Standards Committee pursuant to s 209 of the Act. I have decided not to refer that breach back to the Committee for the following reasons.

[34] Ms GB presents very little in the way of risk to the public, because she is currently bankrupt, and cannot practise as a lawyer.

[35] The subject matter of the complaint is relatively old, having arisen in May 2011, three years before this review was completed.

[36] There is no complexity associated with the breach. It is a straightforward failure to comply with the Intervention Rule which Ms GB frankly admits.

¹¹ Above n1, Rule 14.2(e).

[37] In the circumstances, it would not be an efficient use of the Standards Committee's resources to refer the matter back, rather than conduct the review to its logical conclusion.

Breach of Rule 14.4

[38] Ms GB's breach of the Intervention Rule does not approach misconduct, but is clearly a breach of Rule 14, which is a practice rule made under the Act. Breaches of practice rules are regulated by section 12(c) of the Act which says:

In this Act **unsatisfactory conduct**, in relation to a lawyer...means—...

(c) conduct consisting of a contravention of...any...practice rules made under this Act that apply to the lawyer...(not being a contravention that amounts to misconduct under s 7)...

[39] In the circumstances, a further finding of unsatisfactory conduct is appropriate, and is recorded against Ms GB in respect of her breach of Rule 14.4, pursuant to s 12(c) of the Act.

Outcome

[40] The Standards Committee's decision is modified to record a further finding of unsatisfactory conduct for a breach of the Intervention Rule by Ms GB, and is otherwise confirmed.

Costs

[41] The LCRO has discretion to order costs under s 210 of the Act and the LCRO's Costs Guidelines.

[42] The Guideline provides for a costs order to be made against practitioners whose applications for review are unsuccessful. Ms GB has been unsuccessful in her review application.

[43] The purpose of costs orders made under the Act is to help defray the costs of administering the complaints and disciplinary machinery of the Act. This will be met by an order against Ms GB that she pay costs on review.

[44] The usual Guideline amount of \$1,200 is appropriate in all the circumstances, and an order is made against Ms GB in those terms.

Decision

Pursuant to s 211 of the Lawyers and Conveyancers Act 2006 the Committee's decision is:

- (a) modified to include a further finding of unsatisfactory conduct for breach of the Rule 14.4 pursuant to s 12(c) of the Act; and
- (b) otherwise confirmed;

Pursuant to s 210 of the Lawyers and Conveyancers Act 2006 Ms GB is ordered to pay costs of \$1,200 to NZLS.

DATED this 13th day of August 2014

Dorothy Thresher
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Ms GB as the Applicant
Ms PW as the Respondent
North Island Standards Committee
The New Zealand Law Society