

LCRO 15/2014

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

HJ

Applicant

AND

TK

Respondent

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

DECISION

Introduction

[1] Ms HJ has applied for a review of the determination by [Area] Standards Committee to take no further action in respect of her complaints about Mr TK.

Background

[2] Ms HJ is the sole director and shareholder of [Company A] and a trustee of the HJ Family Trust (the trust).

[3] The company and the trust were placed into receivership by [Bank A] on 8 September 2011.

[4] Mr TK acted for [Bank A].

Ms HJ's complaints

[5] Ms HJ complained to the New Zealand Law Society Lawyers Complaints Service on 31 May 2013. Her complaints were as follows:

- (a) Mr TK ordered the liquidation of the HJ Family Trust and [Company A] without looking at loan documents and any reason for default.
- (b) She had not received any notice of default prior to the demand.
- (c) The lack of confirmation (signatures) in regard to the swaps agreement meant there was no contract for the loan.
- (d) The correct confirmation had her loans maturing on 31 May 2010, which meant she would have been on the 90-day bill rate at 5.4 per cent instead of rates fluctuating between 9 per cent to 15 per cent which "crippled the company and the trust".
- (e) There was an abuse of section 289(2) of the Companies Act 1993.
- (f) "The overall conduct of the professionals involved in this case [debt in dispute]."

[6] Ms HJ sought compensation "up to the maximum amount".

The Standards Committee determination

[7] The essence of the Standards Committee determination is recorded in the following manner:

[24] The Committee noted the background to the matter and the Company's and the Trust's financial arrangements and considered all aspects of Ms HJ's complaint. The Committee noted that Ms HJ's complaint really seemed to be directed at the actions of [Bank A]. That is not a matter for the Committee to look into – the Committee's role is to assess a lawyer's conduct and not the conduct of a lawyer's client.

[25] ... Mr TK did not act for Ms HJ and his duties to her were relatively limited. Mr HJ in fact had her own lawyer who had advised her on the matter and indeed had acknowledged [Bank A]'s right to act as it did.

[8] The Committee determined pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 to take no further action in respect of Ms HJ's complaints on the basis that further action was both unnecessary and inappropriate.

Ms HJ's application for review

[9] Included here are brief portions of Ms HJ's application for review to provide the tenor of the grounds advanced by her:

- (a) Her lawyer "had acknowledged the demands but questioned [Bank A]'s actions".
- (b) "There [were] no letters of default prior to the demands which is a requirement of the Property Law Act 2007."
- (c) "When I asked questions from ... [Bank A]'s bank manager in January 2011 about the loans there were no straight up answers."
- (d) "The loan variation shows the facility expiring 31 May 2010. Property Law Act 2007 sections 85(3)(c) and 85(5)(b) apply here. This was ignored by [Bank A] and would have been foreseeable that neglecting to execute this deed would [cause] considerable harm."
- (e) Mr TK has a duty to follow the Lawyers and Conveyancers Act 2006 and rules 2, 2.1, 2.2, 2.3 and 2.4 of the Lawyers' Conduct and Client Care Rules.¹

[10] In a subsequent letter Ms HJ disputed that Mr TK was acting for [Bank A]. She said:²

He was in fact acting for [Company A] and the Trust as the legal fees were paid from [Company A] for the sum of \$70,000 which means his duty of care was to [Company A] and the Trust.

[11] Ms HJ requested that "the itemised copies of the legal fees TK charged [be] looked into".

[12] Ms HJ requested to be heard in person in support of her application.

Review

[13] The review progressed by way of an applicant-only hearing in [City] on 21 July 2017 attended by Ms HJ. Mr TK was not required to attend and did not exercise his right to do so

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

² Letter from HJ to Legal Complaints Review Officer (26 March 2014).

[14] The hearing was conducted by Mr Vaughan acting as a delegate duly appointed by the Legal Complaints Review Officer (LCRO) pursuant to clause 6 of schedule 3 of the Lawyers and Conveyancers Act 2006. The LCRO has delegated Mr Vaughan to report to me and the final determination of this review as set out in this decision is made following a full consideration of all matters by me after receipt of Mr Vaughan's report and discussion.

Nature and scope of review

[15] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:³

... 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.

[16] More recently, the High Court has described a review by this Office in the following way:⁴

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.

Analysis

[17] Ms HJ questions [Bank A]'s actions. Mr TK is not vicariously liable for the conduct of his client and Ms HJ referred to the fact she had pursued her complaint against the bank through the Banking Ombudsman. That was the correct action to take.

³ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

⁴ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[18] Ms HJ also challenges the validity of the appointment of the receivers. That challenge needed to be pursued through the Court. This Office has no jurisdiction to consider those allegations.

[19] Ms HJ asserts that Mr TK acted for [Company A] and the HJ Family Trust on the grounds that those entities were liable for Mr TK's fees. That liability arose by virtue of the terms of the securities held by [Bank A] and any challenge to the validity of that documentation or liability for the fees must be pursued elsewhere. This Office has no jurisdiction to consider that issue.

[20] As Mr TK acted for [Bank A], his duty was to [Bank A]. The Lawyers' Conduct and Client Care Rules referred to by Ms HJ have no application.

[21] Although Ms HJ refers to Mr TK's fees in the complaint, there was no direct complaint about the quantum of the fees. No new complaint can be considered on review and Ms HJ's request for copies of Mr TK's invoices will need to be pursued through alternative channels.

[22] The evidence shows that no statutory demand pursuant to s 289 of the Companies Act 1993 was served on the company. The company was not placed into liquidation. Ms HJ's allegations that Mr TK had acted contrary to the Lawyers' Conduct and Client Care Rules in this regard have no foundation.

[23] Ms HJ advised that she had participated in proceedings instigated by the Commerce Commissioner with regard to the bank swap agreements, but that has no relevance to this review.

[24] Nothing more needs to be added to reach a conclusion that there is no basis for Ms HJ's complaints.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

DATED this 30TH day of August 2017

D Thresher
Legal Complaints Review Officer

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

Ms HJ as the Applicant
Mr TK as the Respondent
Mr W as a related person
[Area] Standards Committee
New Zealand Law Society