

**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**

**FE**

Applicant

**AND**

**SH**

Respondent

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

**Introduction**

[1] Mr FE has applied for a review of the finding of unsatisfactory conduct against him (and the consequent orders) by the Standards Committee following a complaint by Mr SH about the conduct of Mr FE, Mr LX and Mr QM, all of whom are partners in the [Town] branch of [Law Firm A].

[2] The Standards Committee determined that Mr FE and Mr LX had breached rules 3.3 and 3.5 of the Conduct and Client Care Rules<sup>1</sup> (failure to provide client information) and also rules 9.8 - 9.10 (conditional fee agreements), fined each lawyer \$1,000 and ordered each of them to pay costs of \$600.

[3] The grounds advanced by Mr FE (supported by an affidavit from Mr LX) that the adverse finding should be reversed, are that Mr LX was the lead partner acting for Mr SH, and Mr FE relied on Mr LX to ensure compliance with the Rules.

**Background**

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<sup>1</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[4] Mr SH and his family moved to New Zealand in 2007 and on advice, instructed [Law Firm A] to act on his behalf. In his letter of complaint<sup>2</sup> Mr SH advised that Mr LX “seemed to be the primary point of contact”.

[5] The firm acted as Mr SH's legal advisers on all matters including:

- forming several companies;
- forming a family trust;
- buying and selling several properties;
- employment matters.

[6] Mr SH says these attendances had taken place “over the last 5 years”.<sup>3</sup> He says that he decided in April 2013 to sever his relationship with the firm because he realised the service he received from the firm had been deficient and the fees charged excessive.

[7] In his letter of complaint he referred to two specific matters being the “contingency fee arrangements” and the “sale of [Lodge]”.

[8] He identified the solicitors connected with each complaint as being:

- Mr LX in respect of both matters.
- Mr QM in respect of the [Lodge] complaint.
- Mr FE in respect of the contingency fee complaint.

[9] As this application for review has been brought by Mr FE, the review relates only to the contingency fee complaint.

### **The contingency fee complaint**

[10] Mr SH became embroiled in a “fairly complicated” commercial dispute which culminated in an arbitration in [Overseas City] where Mr FE and Mr LX represented Mr SH's interests.<sup>4</sup>

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<sup>2</sup> Letter SH to LCS (4 September 2013).

<sup>3</sup> Above n 2.

<sup>4</sup> I refer to Mr SH's interests, as the dispute involved entities associated with Mr SH rather than himself in his personal capacity, and the bills of costs were addressed to those entities, and in some instances to Mr SH personally at his direction. It is accepted that Mr SH speaks for, and represents those interests, but when I refer to “Mr SH” in this decision, it includes those interests where appropriate.

[11] It is common ground that there was some form of contingency fee agreement between [Law Firm A] and Mr SH but the detail of that arrangement is in dispute.

[12] Mr SH's complaint is that [Law Firm A] did not provide him with either the relevant client information as required by rules 3.4 and 3.5 of the Conduct and Client Care Rules, or details of the fee agreement as required by rules 9.8, 9.9 and 9.10.

[13] With his complaint Mr SH included three bills of costs aggregating over \$112,000, noting they constituted only some of the bills in dispute.

[14] The Standards Committee determined that the issue was one of liability for each of the three invoices and declined to determine that issue. It did however find that Mr LX and Mr FE had breached rules 3.3, 3.5, 9.8, 9.9 and 9.10 and determined that these breaches resulted in a finding of unsatisfactory conduct against the lawyers and imposed the penalties recorded in paragraph [2].

### **Review**

[15] As this review has been sought by Mr FE only, the Standards Committee determinations in respect of the complaints against Messrs QM and LX are not part of this review.

[16] A review hearing took place in [Town] on 28 October, attended by Mr FE, and Mr CC appeared on behalf of Mr SH. Mr SH himself was overseas.

[17] Subsequent to filing the review application, Mr FE filed an affidavit by Mr LX. Mr CC objected to this on the grounds that further evidence is not generally allowed to be introduced in conjunction with a review, as the review must be based on the material provided to the Standards Committee.<sup>5</sup>

[18] Mr CC submitted that if the affidavit from Mr LX were to be accepted, then he should be able to provide further information which had been produced to the court in relation to the proceedings issued by [Law Firm A] for recovery of its fees. The introduction of this material was uncontentious, as Mr FE himself referred to the documents Mr CC wished to introduce, and they have proved helpful in this review.

[19] Mr SH has been represented by Mr CC throughout this review, and through Mr CC expressed some disappointment that the Committee had not ruled on the question as to what the terms of the fee agreement were. That was the correct, and only, approach for the Committee to take, as the question of liability for fees is one to be determined by the court.

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<sup>5</sup> LCRO Guidelines for Parties to Review at [17].

[20] In response to Mr FE's review application Mr CC said:<sup>6</sup>

Although the Standards Committee did not see fit to impose a substantial fine, and did not see fit to make any order in respect of compensation, it is submitted on Mr SH's behalf that the failure of [Law Firm A] to comply with the Client Care Rules was serious, and 'the whole point' of the rules in respect of contingency fees is to ensure that the difficulties such as [have] arisen in this case, should in fact not be able to arise.

[21] A Standards Committee may order a lawyer to pay compensation to "any person [who] has suffered loss by reason of any act or omission of a practitioner..."<sup>7</sup>

[22] The loss must therefore have been suffered by **reason of the act or omission** of the lawyer. I cannot see what loss Mr SH would have suffered by reason of the breach by Mr FE and consequently dismiss any suggestion that should be the case.

### **Rules 3.4 and 3.5**

[23] Rules 3.4 and 3.5 require a lawyer to provide a client with information in writing on the principal aspects of client service which includes the basis on which fees would be charged, and the other information as set out in the Rules.

[24] In his response to the complaint on behalf of all three lawyers, Mr LX disputed they had failed to comply with the Rules. He advised that the firm's terms of engagement, which included the information required by the Rules, was provided to Mr SH on 3 November 2010. Those terms recorded that it was Mr LX who would have the day-to-day responsibility for overseeing the matter and described the work to be done as being "advice regarding structuring of new business, and other related advice".

[25] Critically, the information with regard to fees was recorded in the following way: "preliminary fee estimate: to be discussed".

[26] The Committee did not refer to rule 3.6 in its determination, but this rule is equally, if not more, relevant to the issue, as it requires a lawyer to update any information in the Client Information letter, if the information provided becomes inaccurate in a material aspect. The Committee did indirectly refer to rule 3.6, in that it recorded it was satisfied that the failure by Mr LX and Mr FE to "ensure ongoing compliance with" the rule, amounted to unsatisfactory conduct.

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<sup>6</sup> Letter CC to LCRO (25 July 2014).

<sup>7</sup> Lawyers and Conveyancers Act 2006, s 156(1)(d).

### **Rules 9.8 - 9.10**

[27] It is undisputed that these rules were not complied with, and the Standards Committee noted the acknowledgement by Mr LX and Mr FE that “they were not aware of the specific rules and the obligation that rested on them”.<sup>8</sup>

[28] I commented to Mr FE at the review hearing, that this acknowledgement was somewhat disturbing, as all lawyers have an obligation to ensure that he or she is aware of his or her duties under the Conduct and Client Care Rules and the Lawyers and Conveyancers Act, both of which have now been in force since 2008. In any event, conditional fee arrangements are not new to the legal environment, and regardless of the requirements set out in the Rules, it would be expected that good practice management would have dictated that any special arrangement for the payment of fees would be recorded in writing, if not for any reason other than to avoid the very situation in which the firm now finds itself.

### **Mr FE’s submissions**

[29] Mr FE’s grounds for review, relate to the findings of breaches of all rules referred to. He says:

At all material times LX was the lead partner in the client relationship with SH. I commenced practice with [Law Firm A] on 25 October 2011. The terms of engagement with SH dated 3 November 2010 predated this and consequently I cannot have any responsibility for those terms of engagement. My role was limited only to preparing for and attending mediation. Although I took part in discussion regarding the disputed conditional fee arrangement, the responsibility for concluding the agreement was LX’s. This is consistent with the submission made on behalf of SH (at page 11 of the letter from [Law Firm B] dated 10 January 2014) that ‘As Mr SH sees it, the fault in the matter lies principally with Mr LX: he being the person primarily involved from [Law Firm A] and being the person with whom the Conditional Fee Agreement was made. In that circumstance, we are instructed that Mr SH does not ask that the Standards Committee makes any finding of “unsatisfactory conduct” against any other partner or employee of [Law Firm A].

[30] As noted in paragraph [3] above, this submission was supported by Mr LX in his affidavit filed in support of the review application. Mr FE submitted that “the Standards Committee has failed to draw any distinction between the role I played and the role of Mr LX. In making the same finding, and imposing the same penalty on Mr LX and me, there has been a failure by the Committee to acknowledge in any way that my role was the provision of litigation experience, support and advice in relation to the mediation”.<sup>9</sup>

[31] Mr FE also made the point, that if there is no recognition of degrees of responsibility, it would mean that every lawyer who has anything to do with a file stands

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<sup>8</sup> Standards Committee determination (10 June 2014) at 5.

<sup>9</sup> Submissions of FE (17 July 2015) at [11].

equally exposed to an adverse finding and an equal penalty when the Rules are not complied with. This submission is clearly relevant where, as happens in firms of all sizes, several lawyers provide legal services to a client on the same matter.

[32] With regard to the conditional fee agreement, Mr FE advised that all discussions with regards to fees were conducted by Mr LX, and he considered that Mr SH would have thought it odd if he had corresponded or communicated in any way with Mr SH to record the fee agreement.

[33] In response, Mr CC says that the fee agreement was made after Mr FE joined the firm and all lawyers involved on Mr SH's behalf had an equal obligation to ensure compliance with the Rules and the Act. He also pointed out at the review hearing that Mr FE contributed in some detail to the discussion about the terms of the fee agreement. Mr FE accepted that was the case.

[34] Mr CC also referred to diary notes made by Mr LX produced in the proceedings issued by [Law Firm A] for recovery of its fees. He pointed out that some of the detail recorded in those diary notes had been contributed by Mr FE.

[35] This issue raises an important matter of principle – namely, is it a defence to an alleged breach of the Conduct and Client Care Rules (particularly the Rules as it is difficult to contemplate this proposition being a defence to an alleged breach of the Act) where a lawyer has a legitimate expectation that another lawyer has attended to matters required to be attended to by the Rules? There are two preliminary responses to this:

- The Rules apply to all lawyers and do not allow for this possibility.
- It is not enough for a lawyer to “sit back” and assume that another lawyer will attend to compliance issues. There is a responsibility to check, follow up, or otherwise confirm there has been compliance with the Rules.

[36] However, there may be some room for the argument promoted by Mr FE with regard to compliance with the rules in question, where for example, the lawyer under scrutiny played a minor part in a matter, had no direct or personal relationship with the client, and the client had a point of contact through another lawyer, often regarded as a senior “lead” lawyer.

[37] Overall, each case must be considered on its facts. Mr FE cannot escape all responsibility for compliance with the Rules on the grounds that Mr LX was solely responsible. Mr FE was a partner in the firm and clearly played a significant role,

extending to travelling to [Overseas City], to be part of the arbitration. The finding of unsatisfactory conduct must stand.

[38] However, degrees of responsibility are accepted as being relevant to the penalties imposed. All of Mr FE's submissions have some relevance in this regard and it is reasonable to accept that where one lawyer is the lead lawyer and the point of contact with a client, then it is that lawyer who carries the most exposure to penalties. In the present instance, the Standards Committee imposed a fine of \$1,000 on each of Mr FE and Mr LX, and ordered each of them to pay costs of \$600.

[39] In recognition of the submissions and the principle promoted by Mr FE, the fine imposed on him should be reduced to reflect his lesser involvement with the client. The maximum fine that may be imposed by a Standards Committee or this Office is \$15,000.<sup>10</sup> In most cases where a nominal fine is to be imposed to support an adverse finding, the amount imposed is in the region of \$500.<sup>11</sup> In the circumstances, the fine imposed by the Standards Committee is reduced to \$500.

[40] The principles relating to costs is that costs are awarded according to the finding, and are not to be regarded as part of the balancing required to reflect an appropriate penalty. Accordingly, the award of costs in the sum of \$600 stands.

### **Decision**

[41] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee is modified by reducing the fine imposed on Mr FE pursuant to s 156(1)(i) of the Lawyers and Conveyancers Act 2006 to \$500.

[42] In all other respects the determination of the Standards Committee is confirmed.

### **Comment**

[43] This decision admits a principle of differing penalties where there has been a breach of the Conduct and Client Care Rules, in circumstances where it was reasonable for a lawyer to rely on another lawyer to ensure compliance. I particularly note this decision is not intended to support a submission for differing consequences where there has been a breach of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008.

[44] In each firm a trust account supervisor is appointed as the person responsible to oversee the operation of the firm's trust account, and compliance with the

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<sup>10</sup> Lawyers and Conveyancers Act 2006, s 156(1)(i).

<sup>11</sup> See for example *GJ v TW* LCRO 205/2011.

Regulations. However, all partners in a partnership and directors of an incorporated law firm must play their part, and carry the same responsibilities to ensure compliance with the Trust Account Regulations. This obligation is specifically recorded in reg 16(5) of the Regulations. This decision is not intended to be applied or followed in those circumstances.

**DATED** this 16<sup>th</sup> day of November 2015

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**O W J Vaughan**  
**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 FE as the Applicant  
Mr SH as the Respondent  
Mr CC as the Representative for the Respondent  
Mr LX as a Related Person under s 213  
Standards Committee  
The New Zealand Law Society