

LCRO 170/2014

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

SW

Applicant

AND

UH

Respondent

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

DECISION

Background

[1] Mr SW applies for a review of the decision of the Standards Committee to take no further action on his complaint against Ms UH.

[2] Ms UH was counsel for VM in proceedings that were before the Family Court. The subject of the proceedings was Ms VM's grandchildren. The children had been in Ms VM's care. The proceedings were initiated by the children's grandfather, who was seeking day-to-day care of the children. At the time the proceedings were filed, the children's grandfather was residing with Mr SW.

[3] The Court made timetabling directions. Ms UH prepared an affidavit to be filed in Court by her client, Ms VM.

[4] Attached to Ms VM's affidavit, was a letter written by one CR. Ms CR was an employee of a Runanga which provided family support services to members of the community.

[5] Ms CR's correspondence recorded that she worked for [Runanga] and had conducted fortnightly visits to Ms VM's home while Ms VM had the care of her grandsons. Ms CR stated that it had been reported to her that Mr SW had sexually abused two boys.

The Complaint and the Standards Committee Decision

[6] Mr SW filed a complaint with the Complaints Service on 11 April 2014. He made complaint that:

- (a) Ms CR's correspondence contained comments which were factually incorrect and defamatory of him.
- (b) Ms UH, as the lawyer responsible for drafting the affidavit, had breached the Lawyers Conduct and Client Care Rules, specifically Rule 13.8¹ which directs that a lawyer engaged in litigation must not attack a person's reputation without good cause in court or in documents filed in court proceedings.
- (c) Ms UH had breached rule 13.8.1,² which provides that a lawyer must not be a party to the filing of any document in court alleging fraud, dishonesty, undue influence, duress, or other reprehensible conduct, unless the lawyer has taken appropriate steps to ensure that reasonable grounds for making the allegation exist.

[7] Mr SW makes complaint that Ms UH allowed a document which contained comments severely damaging of his reputation to be put before the Court, without taking steps to check the veracity of the allegations made.

[8] The Committee delivered its decision on 18 June 2014. In reaching a determination to take no further action on the complaint, the Committee concluded that:

- (a) Ms UH had a duty to put all evidence to the Court.

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

² Above n 1.

- (b) The Runanga (through its employee Ms CR) was an appropriate agency to provide a report to the Court.
- (c) It would not be known to Ms UH as to whether the contents of the report were correct or incorrect, however she had an obligation to include the report with the affidavit, and could have been in breach of her obligations to the Court if she had failed to do so.
- (d) The strict confidentiality provisions which surround the operation of the Family Court protect the confidentiality of documents filed with the Court.

[9] In response to the complaint filed, Ms UH submitted that:

- (a) She had acted in accordance with her obligations to her client and her obligations as an officer of the Court.
- (b) The affidavit was filed on Ms VM's instructions.
- (c) Mr SW was not a party to the proceedings.

[10] The Standards Committee exercised its discretion pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 and took no further action on the complaint.

Application for Review

[11] Mr SW filed an application to review the Committee's decision on 16 July 2014.

[12] Mr SW submits that:

- (a) Ms UH had played a part in the preparation of Ms CR's letter.
- (b) Ms UH should have required Ms CR to seek independent advice before providing correspondence to the Court.
- (c) Ms UH had permitted a serious defamation to be promulgated.
- (d) Ms UH has not sought to withdraw the affidavit, or redact the offending statements from the affidavit.
- (e) He had been required to file an affidavit in the Family Court as a consequence of Ms UH failing to check the veracity of the affidavit filed.

- (f) He had no standing to defend his position in the Family Court.
- (g) The Committee's decision fell short of the professional standards required of a decision making body and was wrong.

[13] Mr SW included in his application for Review, three affidavits which had been filed in the proceedings, including an affidavit of Ms UH filed in support of her application to be removed as counsel on the record. Those affidavits were not before the Committee.

Review on the papers

[14] The parties agreed to the review being dealt with on the papers. This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all the information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

The role of the LCRO on review

[15] The role of the 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.

[16] 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.

Analysis

[17] As noted, Mr SW provided copies of affidavits which had been filed in the Family Court proceedings. Those affidavits were not provided with his initial complaint. Ms UH objected to the producing of those affidavits, on grounds that they were available to Mr SW at the time he laid the complaint against her.

[18] A significant issue is raised by the placing of those affidavits before this office.

³ *Deliu v Hong* [2012] NZHC 158 at [41].

[19] Family Court proceedings are confidential. No information relating to the proceedings can be released to any person who is not a party to the proceedings without the consent of the Court.

[20] I am unaware as to how these documents came into Mr SW's possession, but it is inappropriate for this office to receive documents that are privileged and confidential, without indication from the Court that it is appropriate to do so.

[21] In providing those documents to this office, Mr SW exposes a significant problem with his application.

[22] Mr SW is understandably aggrieved that his reputation has been attacked in documents put before the Family Court, but it is not the role of this office to determine issues of evidential dispute which are before the Court. That is the task of the Court. Mr SW endeavours to expose the calumny which he says has been done to his reputation by putting copies of proceedings which have been filed in the Court before this office, with expectation that an analysis of those documents will confirm that the allegations made against him were unfounded.

[23] It is not the role of this office to make findings on contested issues that have been put to the Court in affidavit evidence.

[24] If Mr SW rejects suggestion that he is asking this office to make evidential findings on matters that are dealt with within the shroud of confidentiality provided by the Family Court, he need do no more than refer to paragraphs 15 and 16 of his 15 July submissions to the LCRO, in which he specifically invites the LCRO to consider affidavits filed by three parties to the proceedings, and draw conclusion that the allegation reported by Ms CR was false.

[25] Mr SW advances argument that, as he is not a party to the proceedings, he is unable to respond to the matters raised in Ms CR's correspondence. He is critical of the fact that the Committee described him as a third party to the proceedings.

[26] It is correct that he is not a party to the proceedings, but it is not the case that he has had no opportunity to respond. He refers in his submissions to having filed an extensive affidavit in the Family Court, and to affidavits being filed by other parties to the proceedings which have supported his position.

[27] It would be expected that the issues raised in Ms CR's correspondence would be carefully considered by the Court in the course of the proceedings.

[28] Nor does Mr SW lack opportunity to seek remedy in other forums. He indicates that he is pursuing defamation proceedings against three parties.

[29] The proper focus of this inquiry is on an examination as to whether Ms UH breached her professional obligations, and the relevant conduct rules, by allowing her clients to attach to her affidavit a statement which Mr SW contends made improper and inaccurate statement about him.

[30] Mr SW advances argument that Ms UH should have made enquiry to satisfy herself that the information provided by Ms CR was accurate, before allowing it to be put before the Court.

[31] Four matters need to be considered: the statement made, the context in which the statement was made, Ms UH's obligations as counsel, and the purpose and reach of the conduct rules which Mr SW contends have been breached (Rules 13.8 and 13.8.1).

Statement and Context

[32] The Family Court has at its heart an obligation to protect and keep children safe. When there are proceedings before the Court which are focused on determining appropriate care arrangements for children (with particular consideration as to whether any of the care options proposed for the children may present a possibility of risk for the children), parties who have concerns that a particular environment may be unsafe have an obligation to put that information before the Court.

[33] It is for the Court to hear and sift the evidence and make decisions as to the validity of any adverse allegations made about a particular individual.

[34] Ms UH's client had had her grandchildren in her care. Ms CR was an employee of an organisation that provided support to the family. Ms CR in the course of that work had regular contact with the children over a twelve-month period. She visited the home on a fortnightly, and occasionally weekly, basis.

[35] In the face of Ms CR's regular contact with the children and her experience as a person employed with an organisation providing support to families, it would present as entirely unremarkable that she would be asked by Ms VM to provide a letter of support to the Court.

[36] Ms CR's correspondence does no more than report the situation as it is known to her. She records her observations of the children. She reports that two family members had disclosed to her that Mr SW had sexually abused children.

[37] Ms CR does not level accusation at Mr SW, she simply reports what she was told. Criticism would likely have been made of Ms CR if she had neglected to report the information that was conveyed to her by close family members.

Ms UH's Obligations

[38] Ms UH's obligation was to protect and advance her client's interests, subject to her overriding duty as an officer of the Court.

[39] Ms UH is accused of having permitted a serious defamation to be promulgated. She has not. She fulfilled her obligation to prepare an affidavit on her client's instructions. Parties who provide evidence to the Court in the form of a sworn affidavit are required to tell the truth, and on signing their affidavit, to attest to the fact that they have done so.

[40] There is no evidence to support suggestion that Ms UH was in the possession of information which would have put her on notice that the veracity of her client's affidavit, or the attachment to that affidavit, demanded careful scrutiny.

[41] The letter of which Mr SW complains addressed matters directly relevant to the Family Court proceedings which were confidential. The extent to which the content of the letter was accurate and relevant was a matter to be determined by the Court. Ms CR signed the letter and in those circumstances, Ms UH was not obliged to test the veracity of Ms CR's statement, a statement that did no more than report what had been told to her.

[42] I do not consider that Ms UH had an obligation as lawyer for Ms VM, to commence enquiry into matters raised in Ms CR's correspondence. It is quite untenable, and indeed steering a lawyer into dangerous territory, to suggest that a lawyer has an obligation to commence to conduct enquiry to check the veracity of statements made in their client's affidavit.

[43] It is the responsibility of a lawyer to exercise judgement, and if information given to a lawyer by their client presents as unconvincing, inconsistent with the facts of the case as known to the lawyer, or provocative and unnecessarily confrontational, it is

the lawyer's responsibility to alert their client to those concerns, and to caution against putting inflammatory material before the Court.

[44] But in circumstances where a person effectively acting in the role of a social worker engaged with a family, reports statements made by third parties which raise concerns as to whether children may be put at risk if placed in a particular environment and the lawyer's client wishes to have that information put before the Court, the lawyer could not reasonably be said to have breached their professional obligations by preparing an affidavit which included a statement from a party tasked with working with the family.

[45] Mr SW goes further and suggests that Ms UH had a hand in drafting Ms CR's letter. There is no evidence to support that suggestion, and the evidence advanced by Mr SW to substantiate the allegation (the correspondence of Ms CR's employer) does not support the construction that Mr SW places on it.

The Conduct Rules

[46] The scope of Rule 13.8 and 13.8.1 must be considered.

[47] Rule 13.8 refers specifically to a lawyer attacking a person's reputation, without good cause in Court or in documents filed with the Court. Clearly Ms UH cannot be accused of launching attack on Mr SW's reputation, nor is the Rule engaged by submission that her role in preparing an affidavit on her client's instructions constituted an attack by her on an individual's reputation.

[48] Mr SW is offended by the allegations that are reported to Ms CR, but a lawyer preparing a client's affidavit for the Court which contains a report from a party who has been providing support to and monitoring the children for a period of time, cannot be expected to filter her client's information. Ms UH's obligations as an officer of the Court could have been seriously compromised if, in proceedings involving the care and protection of children, she had intervened and made a decision to require Ms CR to delete from her statement information which may have had relevance for the children's safety. It is important to reiterate that the task of assessing the weight to be given to the evidence, falls to the Court.

[49] Nor does Ms UH's conduct constitute a breach of Rule 13.8.1. The only element of that rule that could be engaged by Mr SW's complaint would be allegation that Ms UH had been a party to filing a document that alleges reprehensible conduct. It is Ms UH's client that puts the information before the Court. Whilst the allegations

made against Mr SW were of the utmost seriousness for him, Ms UH was not acting irresponsibly in facilitating the preparation of the affidavit for her client.

[50] Rule 13.8.2 is more directly focused on the obligations of a lawyer to ensure that improper allegations are not made against persons who are not a party to the proceedings, unless reasonable steps are taken to ensure the accuracy of the allegations.

[51] That rule is qualified by the caveat that allegations should not be made unless they are necessary to the conduct of the litigation and reasonable steps are taken to check the accuracy of the allegations.

[52] In proceedings involving the protection of children, if allegation is made that a person who the children may come in contact with has a history of sexually abusing children, it would be important for that information to be made available to the Court.

[53] It is not uncommon for allegations of that nature to be put before the Family Court, and not infrequently the allegation may rest on information which is unproven, untested, and based on suspicions which lack, at the time the allegation is made, a firm, established, evidential foundation. This can result on occasions in innocent individuals having to bear the intolerable burden of labouring under false accusation, but the overarching need to ensure that children are protected demands that the allegation is properly investigated.

[54] The extent to which a lawyer can be expected to make inquiry into allegations made by a client, or as in this case, information reported by a person supporting the client, is limited. It is not the role of a family lawyer to assume the role of investigator. That task is left to the Court. Short of satisfying herself that her client understood the need to ensure that statements made in her affidavit were true and correct (and there is no evidence to suggest that Ms UH did otherwise) a lawyer can do little more in the absence of evidence to alert them to particular concerns as to the veracity of their client's information, than place reliance on their client and fulfil their obligation to have their client's position fully put to the Court.

[55] Mr SW submits that further information had been put before the Court which clearly refuted allegation that he had behaved in an improper manner. He argues that Ms UH should have withdrawn her client's affidavit, or arranged to have information redacted from the affidavit.

[56] In advancing that position, Mr SW confuses the role of counsel with the role of the Court. It was not Ms UH's evidence that was put before the Court, it was her clients. Ms UH could not withdraw an affidavit unless her client instructed her to do so, nor could she redact information from the affidavit. It was not her role to assess evidence, and determine whether allegations made were supported by the evidence.

Conclusion

[57] Complaint that Ms UH has breached her professional obligations is not established.

[58] I see no grounds which could persuade me to depart from the Committee's decision.

Decision

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

DATED this 5th day of February 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:

SW as the Applicant
UH as the Respondent
DT as a related person as per section 213 of the Act
The Standards Committee
The New Zealand Law Society
Secretary for Justice