

CONCERNING

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

AND

CONCERNING

a determination of the [City] Standards Committee

BETWEEN

TP

Applicant

AND

RO

Respondent

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

DECISION

Introduction

[1] Mrs TP has applied for a review of a decision dated 22 June 2012 by the [City] Standards Committee to take no further action in respect of her complaint against Mr RO, who is now deceased.

[2] Mrs TP's complaint arose in the context of a dispute in the High Court between Mrs TP, her former husband Mr VN, and their son and his wife. Mr RO acted for Mr VN who is said to be functionally blind.

[3] The parties to the High Court litigation attended a mediation which resulted in settlement of the High Court claims, and required Mr and Mrs VN to make payments from funds that were being held by two different law firms in [City], [law firm], and [law firm]. The funds were to be paid out at the direction of Mr and Mrs VN as trustees of the VN Family Trust. Funds would move between the parties to the High Court proceedings as set out in the Settlement Agreement, which included a provision that presentation of the Settlement Agreement to each of the two law firms that held money was sufficient instruction for each firm to make the payments agreed under the settlement.

[4] Mrs TP instructed Ms UM to act for her, and on 13 February 2012 Ms UM emailed Mr RO confirming that the High Court proceeding had settled, and authorising Mr RO to pay out funds to the plaintiffs, Mrs TP's son and daughter-in-law. Ms UM also authorised [law firm] to pay money out from the funds that they were holding.

[5] Mr RO sent a copy of Ms UM's email, with an email he sent on behalf of Mr VN to [law firm]. When Mr RO sent copies of the emails to his client, Mr VN, he also copied them to Mr and Mrs GH, his daughter-in-law's parents, and a person called [CF] (the non-parties). Mr RO also sent copies of that email to Ms UM, and when Mrs TP discovered that the email correspondence had been copied to the non-parties, she registered her concerns with Ms UM, who wrote to Mr RO protesting on Mrs TP's behalf. Mrs TP's concern was that the mediation and settlement were confidential, because all the parties had signed an agreement to that effect, and that Mr RO had breached the confidentiality provisions by copying in the non-parties.

[6] Mr RO responded saying that although the mediation agreement contained a confidentiality provision, that related to the process of mediation, not the outcome recorded in the Settlement Agreement, which he said contained no confidentiality provisions. Mr RO also mentioned his client's functional blindness, and reliance on others to read his emails, resulting in his general instruction to send emails to non-parties. Mr RO said the attachment to his emails made it clear that the contents were confidential to the sender and recipient, and urged "a degree of sensitivity and realism" from Mrs TP, with whom his client appears to have had unfinished legal business.

[7] Mrs TP was not satisfied with Mr RO's responses, and made a complaint to the New Zealand Law Society (NZLS).

Standards Committee

[8] Mrs TP's complaint to NZLS attached the two emails between Ms UM and Mr RO, and said that Mr RO had offended her and breached the confidentiality of the mediation by copying the email to the non-parties.

[9] Mr RO's response to NZLS referred to the response he had previously sent to Ms UM, including his reliance on Mr VN's instructions, and his functional blindness.

[10] In its determination, the Standards Committee set out the factual background including reference to the agreement reached at the mediation, and considered the complaint on the basis of whether the Settlement Agreement was confidential, and if it was, whether that prevented Mr RO from copying his email to the non-parties.

[11] The Committee recorded its reasoning, including its assumption that the mediation process itself would be confidential, but that the Settlement Agreement contained no provision limiting publication of it. The Committee formed the view that Mr RO had no contractual obligation of confidentiality arising from the mediation agreement or the settlement agreement, and determined that aspect of the complaint on that basis.

[12] It also considered whether Mr RO' disclosure of the email to the non-parties was justified and reasonable because of Mr VN's instructions and his functional blindness.

[13] The Committee's view was that copying the email to non-parties was justified and reasonable in the circumstances.

[14] On that basis the Committee decided to take no further action on the complaint pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act).

[15] Mrs TP was dissatisfied with that outcome, and applied for a review.

Review Application

[16] Mrs TP's application for review challenged Mr RO' reliance on his client's blindness as a justification for sending the email to the non-parties, saying Mr VN has a programme on his computer that reads his emails to him, so he does not need to rely on people to do that for him. Mrs TP said Mr RO had breached her right to privacy under the Privacy Act, and seeks a number of remedies including compensation for stress and financial loss, and asks that certain business be removed from Mr RO' office.

[17] In response to Mrs TP's review application, Mr RO relied on his submissions to the Committee.

Role of the LCRO

[18] The role of the 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

[19] 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.

Events before the review hearing

[20] A review hearing was scheduled to occur on 17 October 2014 in [City], because Mrs TP wished to be heard on her application. After the review hearing was set down in September 2014, Mr RO' office advised this Office that Mr RO had passed away on 13 August 2014.

[21] Mrs TP was advised of Mr RO passing, and on 10 October 2014 this Office wrote to her saying that, in preparing for the hearing, the LCRO had formed the preliminary views that:

- (a) In the context of the professional conduct alleged, only Mr RO could have been held accountable for any breach of the obligations he may have owed to Mrs TP, who was not his client.
- (b) It therefore appeared likely that the decision on review would have no professional disciplinary consequences for the late Mr RO.
- (c) Although the LCRO may make a decision based on reasons that were different to those of the Standards Committee, the outcome, overall, was likely to be the same, namely that further action on the complaint was unnecessary and inappropriate pursuant to s 138(2) of the Act.

[22] As Mrs TP did not attend, and did not apply to withdraw her review application, the review proceeded in the parties' absence pursuant to s 206(2) of the Act.

Review Issue

[23] Mrs TP's complaint to NZLS did not refer to the Privacy Act, so that issue, which she raised for the first time in her review application, will receive no further attention on review.

[24] The Standards Committee and LCRO review processes focus on professional discipline, which was not clearly the focus of the Standards Committee's decision.

[25] The situation is somewhat different on review, because of Mr RO' demise.

Section 138(2) of the Act

[26] Section 138(2) of the Act says:

138 Decision to take no action on complaint

...

(2) Despite anything in subsection (1), a Standards Committee may, in its discretion, decide not to take any further action on a complaint if, in the course of the investigation of the complaint, it appears to the Standards Committee that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate.

Section 211(1)(b) of the Act

[27] On review, s 211(1)(b) of the Act gives the LCRO the power to exercise any of the powers that could have been exercised by the Standards Committee in the proceeding in which the decision was made or the power was exercised or could have been exercised.

Post-Mortem Review

[28] In the circumstances, and for the reasons discussed below, the review issue is whether, in all the circumstances of this review, I should exercise the discretion in s 138(2) and decide not to take any further action on Mrs TP's complaint because, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate.

Discussion

[29] Mrs TP's complaint to the Standards Committee raised the question of whether Mr RO had breached the limited duties he owed to her as a third party. Primarily, Mr RO' duty was to his client Mr VN. He did, however, owe Mrs TP limited duties as a third party represented by her own lawyer, including those that are regulated by Chapter 12 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[30] Rule 12 says:

A lawyer must, when acting in a professional capacity, conduct dealings with others... with integrity, respect, and courtesy.

[31] The professional disciplinary issue Mrs TP's complaint raised was whether Mr RO had breached the limited professional duties he owed to Mrs TP. The

Committee considered his contractual duties, but there is no evidence of it having analysed the complaint in the context of his professional duties to her, including those that arise under Rule 12.

[32] It is marginally relevant that there is no evidence that Mr RO was a signatory to the mediation agreement or the settlement agreement. It is therefore unlikely that he was bound by any contractual duties. More significant in the context of this review, is that the Committee did not consider the professional conduct issue raised by Mrs TP's complaint. In that respect, the Committee's approach was flawed.

[33] Even when complying with strict instructions from a client, a lawyer must act in accordance with his or her duties to a third party, including those contained in Rule 12. The interplay between the application of the rules varies from case to case.

[34] The starting point is that Mr RO owed Mrs TP a professional obligation to treat her with integrity, respect and courtesy. That duty extended to his treatment of information that came into his hands that may have been confidential to the parties to the mediation, which included Mrs TP.

[35] Mrs TP may be correct when she says that Mr VN's functional blindness was not sufficient reason or justification for passing the settlement agreement on to the non-parties. The Committee did not consider it in those terms. It is possible that Mr RO's conduct fell short of the relevant standards. However, as he is deceased, it is not possible for him to respond to a professional conduct issue framed in that manner, and as the obligation under consideration is one that was personal to Mr RO, there is no one else who can adequately respond on his behalf.

[36] One alternative for disposing of a review application is to refer it back to the Committee with a direction to the Committee under s 209 to reconsider the complaint in the context of Mr RO's professional conduct, as discussed above. However, no practical purpose could be served by a referral back to the Committee.

[37] Having regard to all the circumstances of the case, for the reasons discussed above, I am satisfied that any further action is unnecessary and inappropriate in respect of Mrs TP's complaint, pursuant to s 138(2) of the Act.

Costs

[38] The LCRO has the discretion to order costs pursuant to s 210 of the Act, and the LCRO's Costs Orders Guidelines.

[39] As mentioned above, Mrs TP was advised in advance of the review hearing that Mr RO had passed away, and that it was open to her to withdraw her application for review. Mrs TP did not withdraw her review application, nor did she attend the review hearing so the review application was determined in the parties' absence, pursuant to s 206(2) of the Act.

[40] I have considered whether it is appropriate to order Mrs TP to pay costs on review, because of the cost of unnecessarily convening the hearing in [City].

[41] The purpose of costs orders made under the Act is to defray the costs of administering the complaints and disciplinary mechanisms of the Act, which otherwise fall on all lawyers.

[42] The starting point is that Mrs TP was entitled to apply for a review. There is a clear focus on consumer protection within the broader purposes of the Act, and on open access to the complaints and disciplinary processes of the Act for members of the public such as Mrs TP.

[43] It is also relevant when considering costs that the Committee did not focus its attention on the disciplinary issue Mrs TP had raised, namely whether Mr RO had met his professional obligations to her as a third party, and in particular, his obligations in Rule 12.

[44] I do not consider that the broader consumer protection purposes of the Act would be met by ordering Mrs TP to pay costs on this review, particularly because, if Mr RO had been alive it is possible this complaint may have been referred back to the Committee with a direction to the Committee under s 209 to reconsider the complaint in the context of his professional conduct, as discussed above.

[45] On balance, no costs order is made against Mrs TP.

[46] As this review has resulted in no adverse disciplinary outcome for the now deceased Mr RO, no costs order is made against him.

[47] No costs orders are made on review.

Decision

Pursuant to s 211(1)(b) and s 138(2) of the Lawyers and Conveyancers Act 2006 no further action will be taken on Mrs TP's complaint because it appears to the LCRO on review that, having regard to all the circumstances of the case, any further action is inappropriate.

DATED this 7th day of November 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:

Mrs TP as the Applicant
Mr RO as the Respondent
Mr XJ as a related person
The [City] Standards Committee
The New Zealand Law Society