

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

TB

Applicant

AND

KP

Respondent

DECISION

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

Introduction

[1] Mr TB has applied for a review of a decision by the [City] Standards Committee to take no further action in respect of his complaint concerning the conduct of Mr KP.

[2] His complaint related to:

- (a) What he, a principal of [Law Firm], regarded as a disrespectful and discourteous letter a Mr FC, then a legal assistant with KP Lawyers, had sent to his firm.
- (b) Whether there was justification for the lodgement of a caveat against dealings with certain land.

Background

[3] Briefly expressed, the background was that:

- (a) On 31 March 2016 CT, a senior associate with [Law Firm], wrote to KP Lawyers disputing the justification for the lodgement of a caveat claiming a cestui que trust interest against her client's land. Ms CT's letter advised that if assurance was not received that KP Lawyers' client would remove the caveat, her instructions were to take steps for its removal.
- (b) Mr FC, a legal assistant recently engaged by Mr KP's firm, sent a reply in terms contending that Ms CT's letter had asserted "unsubstantiated threats".¹ The letter went on to refer to various provisions of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 so as to suggest breaches of those by Ms CT. The letter ended with a suggestion that Ms CT should "seek independent legal advice regarding legal professional ethics".

[4] Mr TB's initial reaction to this letter was to ring Mr KP in his capacity as a principal of KP Lawyers. On being told that Mr KP was with clients, he left a message for Mr KP to ring him urgently about the matter. Mr KP had not returned his call, so Mr TB immediately wrote to him.

[5] Mr TB's 1 April 2016 letter to Mr KP read:

This is a personal note from me to you.

I was distressed and embarrassed to receive the attached fax from your office this morning. I do not know if you are aware of its contents. If you are and stand by the contents, then we have an issue between us. If you are not aware it left your office, then you need to take some of your employee's advice regarding supervision of what happens in your office.

If you do not stand by the contents, may I suggest you withdraw the letter and we can start again and have a more considered and courteous letter from you.

I tried to call you this morning but you have not returned my call and if I do not have a response from you by return then we will deal with this matter by what we regard as proper without further reference to you.

[6] There had been no reply to this letter when on 4 April 2016 Mr TB prepared the complaint to the New Zealand Law Society Complaints Service.

The Complaint

[7] The complaint to the New Zealand Law Society Complaints Service (NZLS) was received on 7 April 2016. The substance of the complaint was that:

¹ Letter FC to CT (1 April 2016).

- (a) The 1 April 2016 letter signed and sent by Mr FC, instead of reserving the client's position while more time was sought to investigate, were that necessary, took the form of an improper attack on Ms CT.
- (b) The letter reflected the kinds of professional shortcomings of which Ms CT had been accused.
- (c) The letter raised questions of competency and supervision.

Standards Committee decision

[8] The Committee distilled the issues to be considered as:

- (a) Whether Mr KP breached rule 11.3 by failing to competently supervise and manage the conduct of Mr FC which may have resulted in Mr FC failing to act competently and consistent with the duty to take reasonable care by registering a caveat without first being satisfied that a caveatable interest existed.
- (b) Whether Mr KP breached rule 10.1 by failing to treat Mr TB with respect and courtesy by failing to return his telephone calls and by failing to respond to his inquiries.

[9] The Committee then gave only very brief attention to the letter that was at the forefront of Mr TB's complaint.

[10] The Standards Committee delivered its decision on 23 June 2016.

[11] The Committee determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) that no further action on the complaint was necessary or appropriate.

[12] In reaching the rule 11.3 decision the Committee:

- (a) Noted that the question of whether the caveat could be sustained was before the High Court.
- (b) Found that Mr FC had acted appropriately as there was a legitimate client interest in lodging a caveat pending further investigation of sustainability issues.
- (c) Found that by lodging the caveat Mr FC was promoting and protecting his client's best interests.

[13] In reaching the rule 10.1 decision the Committee:

- (a) Found that there was no evidence to suggest that Mr KP had failed to respond to Mr TB's telephone calls or other inquiries.
- (b) Noted that whilst the letter dated 1 April 2016 was "assertive, it was not discourteous or intended to be offensive".²

Application for review

[14] Mr TB filed an application for review on 28 July 2016. He sought reconsideration of his complaint in terms that:

- (a) The High Court had since held that the caveat must lapse.³
- (b) The Committee had failed adequately to address his complaint about the nature of the 1 April 2016 KP Lawyers' letter.

[15] His submission:

- (a) Reiterates his original complaint about the tone of that letter.
- (b) Points to a failure by the Committee to consider that against the rule 10.1 obligation to treat other lawyers with respect and courtesy.
- (c) Contends that there was no evidence that any steps had been taken to see whether a caveat had actually been justified.
- (d) Asserts that it ought to be self-evident to a lawyer that (as was the case with the KP Lawyers' client here) the status of discretionary beneficiary under a trust did not create a caveatable interest in any trust property so that the caveat was lodged in breach of rule 2.3.

Response for Mr KP

[16] Mr KP was invited to comment on the review application. Mr GB responded on behalf of Mr KP and Mr FC. He submitted:⁴

- (a) In response to Mr TB's submission on review that the 1 April 2016 letter was not an adequate response and improperly attacked the principals of

² Standards Committee decision at [13].

³ Footnote removed.

⁴ Email GB to Legal Complaints Review Officer (16 August 2016).

[Law Firm], that “The principals of [Law Firm] were not attacked, the acts and omissions of the responsible actors were the focus, not the actors themselves”.⁵

- (b) The letter was “ghost written by MY who now lives and works in [Overseas] and is a capable litigator as well as a conveyancer”.
- (c) The Committee had correctly dealt with the matter of the letter.
- (d) The caveatable interest claim was based on a verbal promise between the parents of the caveator in the course of her parents settling relationship property differences, rather than on her status as a discretionary beneficiary under a trust.
- (e) The caveat fell down for lack of a written, and so enforceable, agreement.

Information not before Standards Committee

[17] A consideration of the file led me to conclude that I could only properly conduct this review with the benefit of more information. For example, the assertion that the subject letter was “ghost written” by MY required further explanation.

[18] Using the powers I have under ss 204(c)(i) and (d) of the Act I asked Mr KP (through his counsel Mr GB) to answer a series of questions concerning:

- (a) The circumstances of the original caveat lodgement.
- (b) How exactly the subject letter had come to be written and sent.
- (c) Who had been involved, and in what way, in that process.

[19] The 10 March 2017 answers provided by Mr GB brought to light as regards the lodgement of the caveat that:

- (a) MY was an Australian qualified lawyer admitted in Australia on [Date].
- (b) He was an employee of KP Lawyers from [Date] until April 2016.
- (c) When the caveat was lodged, he held the requisite Land Information New Zealand Landonline licence to do that and had done so after discussion with Mr KP by whom he was supervised.⁶

⁵ At [1.1].

- (d) The caveat was lodged before Mr FC became an employee of KP Lawyers and he had no involvement in that process.

[20] As to Ms CT's letter, Mr GB advised that:

- (a) Mr KP was the original recipient of that letter.
- (b) Mr MY (then due to leave the firm's employment in a couple of days or so) was out of the office using up accrued leave.
- (c) Mr KP contacted Mr MY and made request of him to draft a reply to Ms CT's letter and he complied "in strict accordance" with instructions from Mr KP.
- (d) Mr MY saw his work as a preliminary draft only, so anticipated further drafts, but the letter was dispatched after Mr KP had a "limited discussion" with Mr FC and a "broad terms" discussion with Mr MY.
- (e) Mr KP had instructed Mr FC to cut and paste the MY draft onto KP Lawyers letterhead and then send it out.

[21] As to Mr FC, Mr GB advised that:

- (a) He commenced employment with KP Lawyers on [Date] (not long before Ms CT wrote her letter).
- (b) He had completed his professionals in 2015 and he obtained his practising certificate in [Month] 2016.
- (c) He had no experience of legal practice before joining KP Lawyers and his first duties as, a "legal assistant" were to provide administrative support to the firm's practising lawyers.
- (d) The expectation was that he would "learn as he went".

Review on the papers

[22] The parties have 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

⁶ Mr MY did not receive "Practising on Own Account" approval from the NZLS until 16 September 2016.

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.

[23] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submissions from either party. On the basis of the information available I have concluded that the review can be adequately determined in the absence of the parties.

Nature and scope of review

[24] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:⁷

... 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.

[25] More recently, the High Court has described a review by this Office in the following way:⁸

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.

⁷ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]- [41].

⁸ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[26] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

- (a) Consider all of the available material afresh, including the Committee's decision; and
- (b) Provide an independent opinion based on those materials.

Analysis

Preliminary

[27] Mr TB is correct when he says that the Committee's decision did not deal with the letter sent out by Mr FC as a primary element of his complaint. The focus was on the caveat.

[28] Considering the whole matter afresh and in light of what is now known I will:

- (a) Deal with the caveat issue.
- (b) The 1 April 2016 letter.
- (c) Address who was responsible for the 1 April 2016 correspondence.

The caveat

[29] I start with the High Court judgment on the application made to sustain the caveat.

[30] On [Date], Associate Judge A:⁹

- (a) Held that the caveator's rights as beneficiary under the trust did not give her a caveatable interest.¹⁰
- (b) Acknowledged that the "main basis" of the caveatable interest claim was reliance by the caveator on an oral promise by her father to her mother to preserve the property for her.¹¹

⁹ Above n 3.

¹⁰ At [20].

¹¹ At [24].

- (c) Recognised that promise as unenforceable for lack of compliance with s 21F of the Property (Relationships) Act and because equity does not require completion of a gift.¹²
- (d) Noted the wider difficulty of the absence of writing in the context of claims relating to land.¹³
- (e) Dismissed the application to sustain the caveat, so that it lapsed.¹⁴

[31] I note that:

- (a) There is no criticism by the Associate Judge of the fact that efforts were made to sustain the caveat. He does not suggest that there had been any improper use of Court process.
- (b) His judgment is illustrative of a case that was argued on several fronts in relation to an unusual set of circumstances.

[32] On the evidence available, I find that the claim of a breach of rule 2.3 for which Mr KP is in some way accountable is not made out. The claim falls at the first hurdle for lack of evidence that caveat lodgement was not justified at the time.

[33] This can be a difficult area. A practitioner who fails to lodge a caveat may, depending of course on circumstances, face accountability for that. It is not a practitioner's responsibility to, as it were, try the case at that point.

[34] That the High Court subsequently let the caveat lapse does not go to the first hurdle issue. Mere failure to sustain the caveat does not show an absence of due consideration in the context of what led to the decision to lodge it.

[35] That being the case, issue as to whether there was adequate employee supervision is not engaged.

[36] The Committee's findings in respect to the complaint concerning the lodgement of the caveat are confirmed.

Content and tone of the 1 April 2016 letter

[37] The 1 April 2016 letter signed and sent by Mr FC:

¹² At [27] and [30].

¹³ At [31].

¹⁴ At [33]-[34].

- (a) Claimed that Ms CT's letter had asserted "unsubstantiated threats".
- (b) Referred to various provisions of the Lawyers: Conduct and Client Care Rules 2008 so as to suggest breaches of those by the letter's author.
- (c) Included without clear justification a claim that in acting for the caveator Ms CT had a conflict of interest.

[38] In my view, the letter was inappropriate and unprofessional. Its suggestion that Ms CT "seek independent legal advice regarding legal professional ethics" exhibited a patronising tone.

[39] Its content and tone reflect a misplaced at the most basic level understanding of the rules to which it aggressively refers. In plain language it was quite "over the top" and an overstated response to Ms CT's unexceptional letter.

[40] Mr GB referred me to *Law Society of Upper Canada v Kay* where it was said:¹⁵

The committee does not condemn all strongly-worded or ill-received communications. Truthful statements professionally communicated are not misconduct even if they are hurtful to the subject of the statements. Overwrought opinion, misplaced hyperbole, or a desire to intimidate, sully or defame have no place in communications from lawyers, whether directed to colleagues or to members of the public. The line between candour and slander is sometimes fine; a lawyer is better advised to err on the side of courtesy. Lawyers have a positive obligation to be courteous to each other and deal in good faith, their communications with each other must maintain the proper tone of a communication from a member of the Law Society, and whatever other stresses face lawyers in daily life or in practice cannot be allowed to interfere with these positive and important obligations.

[41] I agree with the approach taken in that decision.

[42] I find that the letter:

- (a) In overall content and tone manifested unacceptable "overwrought opinion" and "misplaced hyperbole" of the kinds spoken of in *Kay*.
- (b) Failed to "maintain the proper tone of a communication" that is to be expected of a practitioner.

[43] I agree with *Kay* that correspondence of that kind have no place in communications dispatched by lawyers or their employees.

[44] What is concerning, is the lack of oversight from Mr KP.

¹⁵ *Law Society of Upper Canada v Kay* 2006 ONLSHP 0031 at 19.

[45] He allowed correspondence which was inappropriate in both tone and content to issue from his office, in the name of an inexperienced staff solicitor who had only just commenced work with Mr KP, a staff solicitor who had no experience of working in a law practice.

[46] It could not be expected of Mr FC that he would at this early stage of his career have been the person in Mr KP's office that should have been responsible for responding to argument as to the validity of a caveat being lodged. Nor was he in a position to tender advice to Ms CT concerning her professional obligations.

[47] Mr FC was being put in a difficult position. It was not his correspondence but he was held out to be responsible for it.

[48] Mr KP as Mr FC's supervising partner, should never have allowed Mr FC to be compromised in this fashion. It reflected a failure on Mr KP's part to provide proper supervision.

[49] This constitutes a breach of rule 11.3, which requires that a lawyer, in practice on his or her own account must ensure that the conduct of employees is at all times competently supervised and managed.

[50] In my view, Mr KP's failure to provide appropriate supervision and his preparedness to allow correspondence of this nature to issue from his office under the name of an inexperienced lawyer was conduct that lawyers of good standing would consider as being unacceptable. As such, the conduct constitutes unsatisfactory conduct as defined in s 12(b) of the Act.

[51] This was not competent supervision.

[52] I accordingly conclude that the letter:

- (a) Breached the positive obligation to be respectful and courteous to each other that practitioners and their employees owe.¹⁶
- (b) Breached Mr KP's obligation to provide competent supervision.¹⁷
- (c) Evidenced unprofessional conduct pursuant to s 12(b)(ii) of the Act.

Responsibility/Accountability for the 1 April 2016 letter

¹⁶ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 10.1.

¹⁷ Rule 11.3.

[53] What is set out at [19] to [21] above establishes that Mr KP is personally responsible for the 1 April 2016 letter, of which I have found the complaint is justifiably made.

[54] The grounds on which I make that finding are:

- (a) Upon receipt of Ms CT's letter, Mr KP had Mr MY compose a draft response in terms of his directly conveyed instructions.
- (b) He determined that what Mr MY only saw as a first draft should be the letter to be sent.
- (c) He then personally directed the newly arrived Mr FC to cut and paste the draft onto KP Lawyers letterhead and sign and send it.

[55] It was to all intents and purposes Mr KP's letter.

[56] In my view, Mr KP's correspondence, and it was correspondence for which he properly bore responsibility, breached the conduct rules described, and provides a basis for an unsatisfactory conduct finding.

Failure by Mr KP to respond to Mr TB's personal note

[57] This issue can be disposed of very briefly. By writing his personal note to Mr KP on a Friday and only waiting until the ensuing Monday before preparing and subsequently dispatching his complaint, Mr TB acted with uncalled for haste.

[58] That personal note was of a kind that would lead any careful and competent practitioner to thoroughly investigate the underlying matters before responding.

[59] Given what is known of the background circumstances that could well have taken some time after which a measured in all respects response would have been in order.

[60] By his own precipitate action Mr TB jumped the gun. The matter was translated into a complaint before Mr KP had been afforded a reasonable period of time to reply.

[61] No disrespect or discourtesy on the part of Mr KP is demonstrated here.

[62] The Committee's findings in respect to the complaint concerning the personal note are confirmed.

Conclusion

[63] With the benefit of significantly more and relevant evidence than was before the Committee, and as foreshadowed, I find Mr KP's conduct was unsatisfactory on account of the sending of the 1 April 2016 letter, but otherwise confirm the decision of the Standards Committee.

Decision

[64] The decision of the Standards Committee is reversed in part:

- (a) Pursuant to s 152(2)(b) of the Lawyers and Conveyancers Act 2006, Mr KP's conduct constitutes unsatisfactory conduct in terms of ss 12(b) and 12(c) of the Lawyers and Conveyancers Act 2006.
- (b) The unsatisfactory conduct finding arises in respect to the 1 April 2016 correspondence, and Mr KP's responsibility for that.
- (c) The Committee's decision on the caveat and failure to respond issues are confirmed.

[65] Having made an unsatisfactory conduct finding, I must consider the appropriate penalty. By s 211(1)(b) of the Act, I am able to make any orders that could have been made by a Standards Committee.

[66] I consider that a finding of unsatisfactory conduct, together with an order for censure is sufficient to reflect the lack of competent supervision by Mr KP and the breach of an obligation to treat another lawyer with respect and courtesy.

Costs

[67] Where a finding has been made against a practitioner it is appropriate that a costs order in respect of the expenses of conducting a review be made. In making this costs order I take into account the Costs Orders Guidelines published by this Office. The practitioner will be ordered to pay costs in the sum of \$900.00.

Orders

1. Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Standards Committee is reversed in part.

2. By reason of a breach of rules 10.1 and 11.3 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 and pursuant to ss 12(b) and 12(c) of the Lawyers and Conveyancers Act 2006, Mr KP's conduct constitutes unsatisfactory conduct.
3. Pursuant to s 156(1)(b) of the Lawyers and Conveyancers Act 2006, Mr KP is censured.
4. Pursuant to s 210(1) of the Lawyers and Conveyancers Act 2006, Mr KP is ordered to pay the sum of \$900.00 to the New Zealand Law Society by way of costs, such sum to be paid within one month of the date of this decision.

DATED this 21st day of April 2017

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:

Mr TB as the Applicant
Mr KP as the Respondent
Mr GB as counsel for Mr KP
[City] Standards Committee
New Zealand Law Society