

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

RQ

Applicant

AND

TS

Respondent

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

DECISION

Introduction

[1] Ms RQ has applied for a review of a decision of the Standards Committee to take no action in respect to a complaint made by Ms RQ against Ms TS.

Background

[2] Following the breakdown of her marriage, Ms RQ instructed Ms TS to assist her in resolving property matters arising from the matrimonial separation. Ms TS was at the time of receiving instructions a staff solicitor in the Law firm [Law Firm A].

[3] Ms RQ secured a grant of legal aid.

[4] A settlement conference was convened and attended by the parties and their respective counsel.

[5] At the conclusion of the conference, a global settlement figure was agreed. That was not the end of the matter however. Further issues arose. Ms RQ sought advice from another lawyer and engaged that lawyer to finalise her property matters.

Approximately five months after instructing that lawyer, a relationship property agreement was concluded.

The Complaint and the Standards Committee Decision

[6] Ms RQ filed a complaint with the New Zealand Law Society Complaints Service on the 12 August 2011. She made complaint that Ms TS had:

- Arrived late at the mediation.
- Failed to respond promptly to her enquiries.
- Provided inadequate legal advice on the implications of the settlement agreed at mediation.
- Failed to take into account the tax implications of the agreed settlement.
- Failed to ensure that she fully understood the scope and extent of the parties' assets and liabilities.

[7] The Standards Committee distilled the issues to be addressed as follows:

- Had there been delay in responding to correspondence and delay in having the matter finalised?
- Did Ms TS arrive late to the mediation?
- Had Ms TS properly prepared for the mediation conference?
- Were the fees charged excessive?

[8] In its decision delivered on 25 June 2012, the Committee determined pursuant to section 138 of the Lawyers and Conveyancers Act 2006 (the Act) to take no further action on the complaint. In reaching that decision, the Committee concluded that:

- Considering the process as a whole, the Committee could see no evidence of undue delay on the part of Ms TS, given that she was faced with a lack of cooperation from the other side.
- Whilst there was evidence that Ms TS had arrived late for the mediation conference, a slight delay in commencing the conference had not prejudiced Ms RQ's position.

- There was no evidence to satisfy the Committee that Ms RQ had not received appropriate legal advice prior to the mediation, or that she had failed to understand the mediation process.
- There was no evidence of overcharging.

Application for Review

[9] Ms RQ filed an application to review the Standards Committee decision on 31 July 2012. In a comprehensive submission filed in support of her application, she submits that:

- She had suffered considerable financial loss as a consequence of receiving poor advice from Ms TS.
- She had lost the benefit of an insurance policy as a consequence of Ms TS failing to understand the full extent of the assets which fell for division.
- Ms TS had failed to respond promptly to her enquiries.
- Ms TS had drafted a settlement offer and submitted that offer without her knowledge or permission.
- She had received inadequate representation.
- Ms TS had failed to properly advise her of the tax consequences of the settlement.
- Ms TS had failed to make sufficient enquiry into the extent of the parties assets and liabilities.
- Ms TS had failed to follow instructions.

[10] I have noted that the submission filed in support of the review application was comprehensive. It is pertinent to note, that the scope of this review is confined to addressing the issues considered by the Standards Committee. Whilst a Review Officer has a broad discretion to look at matters afresh, the scope of that discretion does not extend to considering fresh complaints raised on review which were not the subject of inquiry before the Standards Committee.

[11] In response, Ms TS submits that:

- She had explained the purpose of the settlement conference to Ms RQ prior to attending the conference.
- She was a few minutes late for the conference, but that had no influence or effect on the proceedings or the outcome.
- She had provided competent advice to Ms RQ.
- Ms RQ had requested numerous amendments to documents.
- The settlement agreed at the conference was consistent with Ms RQ's instructions.
- Her view was that tax and accounting issues would need to be addressed on settlement, a view she says that was shared by the mediator.
- The fee charged was reasonable. Time spent on the file considerably exceeded the legal aid grant.

Role of the LCRO on Review

[12] The role of the Legal Complaints Review Officer (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 judgement for that of the Standards Committee, without good reason.¹

The Hearing

[13] Both parties attended a hearing by teleconference on 16 June 2015.

Analysis

[14] Mrs RQ indicated at the commencement of the hearing that a number of matters raised in her initial complaint had, with the effluxion of time, become less important to her. She did not wish to pursue those matters on review. Included in that category were complaint that Ms TS had turned up late, complaint that fees charged were excessive, and complaint that Ms TS had been tardy in providing response. Whilst she considered that the costs she had incurred as a consequence of the Legal

¹ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [40]-[41].

Aid Agency levying a charge at the conclusion of the matter should be reimbursed by Ms TS (or her former firm), that argument was advanced primarily from the perspective that she had been inadequately represented, and not a criticism of the time that had been spent on the file.

[15] The main issue that Ms RQ sought to have addressed on review was complaint that she had been poorly represented by Ms TS and had suffered substantial financial loss as a direct consequence of Ms TS failing to adequately advance her interests.

[16] It is helpful to provide some additional background. Ms RQ instructed Ms TS to act on her property matters in June 2010. As is not uncommon with relationship property disputes, the parties were unable to agree on a division of the matrimonial assets and proceedings were filed in court.

[17] Whilst Ms RQ makes complaint that Ms TS was dilatory in responding to phone calls and requests for information, there is indication from the file, that Ms RQ's former husband was unreceptive to some of the proposals for settlement advanced.

[18] The Court appointed a mediator to convene a settlement conference. Ms RQ's dissatisfaction with the outcome of that conference is at the heart of her complaint. At the conclusion of the conference the parties and their counsel executed a document which recorded an agreement reached. That document, described as a mediation agreement, records that the parties have formalised their understandings in a further document described as a "Heads of Agreement". The heads of agreement document was not protected by privilege unless the parties agreed otherwise, and records that the terms of the agreement may be enforced by judicial proceedings.

[19] Ms RQ and Ms TS both confirmed that the arrangements detailed in the heads of agreement were to be further recorded in a section 21 property relationship agreement.

[20] Following the mediation conference, the parties were initially unable to reach agreement on the contents of the deed. By the time consensus had been reached, Ms RQ had relocated to another town. She took the agreement to another lawyer with intention of having the agreement certified however after perusing the agreement her new lawyer expressed concern about aspects of the settlement and proposed a number of alterations. Around five months later an agreement was finalised.

[21] Ms RQ argues that the agreement that was eventually concluded was unfair and significantly advantaged her former husband. In particular she complains that the

settlement failed to bring into the mix a residential unit owned by her husband prior to the marriage and to include the assets of a business that her husband had operated prior and subsequent to separation.

[22] Ms RQ does not make criticism of her second lawyer for failing to ensure that the final agreement comprehensively addressed all issues. She submits that her second lawyer's opportunity to secure traction on the two issues of importance to her was fettered by the fact that the matters agreed in the heads of agreement could not be varied without the intervention of the court.

[23] In short, she argues that Ms TS's failure to competently represent her at the mediation conference resulted in her being committed to accepting a settlement that was inequitable.

[24] It is not possible to discern from the submissions filed, the extent to which Ms RQ's second lawyer was constrained by the agreement reached at mediation. Whilst Ms RQ submits that his ability to change the agreement was confined to relatively minor matters, in her complaint to the Law Society she records that her lawyer proceeded to "write a new document changing almost every clause, which I signed and sent on".²

[25] If it was the case that Ms RQ's second lawyer had unrestricted opportunity to rewrite the agreement then argument that Ms TS can be held responsible for losses purportedly suffered is difficult to sustain.

[26] Whilst it is necessary to background the events that transpired subject to Ms RQ electing to change her lawyer, I do not consider that the outcome of this review should be materially influenced by the later events.

[27] The issue to be considered is whether Ms TS failed to provide Ms RQ with competent advice, and whether that failure, if established, was of such a degree that should attract a disciplinary sanction.

[28] Referencing that complaint to the relevant disciplinary provisions under the Act, and Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, the statutory provisions and conduct rules engaged by the complaint, are s 12(a) of the Act, and rule 3 of the Rules.

² Correspondence RQ to Complaints Service (7 December 2011).

[29] Section 12(a) of the Act provides that a lawyer's conduct is deemed to be unsatisfactory if the conduct is such that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

[30] Rule 3 provides that a lawyer, in the course of providing regulated services to a client, must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

[31] In addressing Ms RQ's argument that Ms TS's conduct fell short of the standard of competence and care that a member of the public is entitled to expect of a reasonably competent lawyer, it is important to carefully address the evidence on which Ms RQ relies, and equally important to consider whether it is appropriate and open to this Office on review, to appraise the fairness or otherwise of a property settlement concluded at a mediation conference, with the objective of arriving at conclusion as to whether the settlement reflected a fair outcome for the parties.

[32] In essence, Ms RQ is advancing argument that Ms TS was negligent in the advice she provided.

[33] It has been noted that the relationship between the tort of negligence and unsatisfactory conduct as defined in s 12(a) is close.³

[34] Those seeking compensation based on negligence should look to the general law for a remedy. Standards Committees and this office have many times stated that the complaints process is not to be considered an alternative to court proceedings and s 138(1)(f) of the Act provides that a Standards Committee:

... may, in its discretion, decide to take no action or, as the case may require, no further action, on any complaint if, in the opinion of the Standards Committee,-

there is in all the circumstances an adequate remedy.... that it would be reasonable for the person aggrieved to exercise.

[35] Whilst Ms RQ submits that she was poorly represented at the mediation conference, Ms TS rejects allegation that significant issues were overlooked. She submits that the two issues identified by Ms RQ of most concern, the value of the business and status of the residential unit, were addressed at the mediation conference, and notes that both matters were referenced in the memorandum she filed

³ *BR v CS LCRO 226/2013* at [14].

with the Court, recorded in her client's affidavit of assets and liabilities, and referenced in the draft agreement prepared after the mediation conference.

[36] It is Ms TS's submission that the global settlement figure recorded in the heads of agreement was agreed to by Ms RQ, and that the agreement was reached in the context of Ms RQ having a full understanding of how the issues of the business and unit had been addressed, and her giving clear indication that she wished to settle all property matters on the terms proposed.

[37] It is not the role of this Office to provide a forum for parties to re-litigate proceedings.

[38] If Ms RQ considers that Ms TS made errors that resulted in significant financial loss, her remedy is to pursue a claim in another forum. She indicated that her second lawyer had discussed with her possible remedies she could pursue.

[39] It is not appropriate to postulate as to what did or did not take place at a confidential mediation conference, and to endeavour to draw conclusions as to what the parties, particularly Ms RQ, understood were the consequences of the agreements reached. The aspects of the settlement on which Ms RQ contends she was poorly advised (business and residential unit) were recorded in Ms RQ's affidavit of assets and liabilities filed with the court, and identified in the memorandum prepared by Ms TS for the mediation conference. It would be unlikely that those assets, and their significance for any global settlement agreed, would have been overlooked or ignored at the mediation conference. Argument that Ms TS gave inadequate advice during the confidential mediation is premised solely on Ms RQ's view of events, and is argument that is at odds with Ms TS's view that Ms RQ fully understood the implications of the settlement agreed, and confirmed her acceptance of the settlement from an informed position which had given proper consideration to all of the parties' assets.

[40] The mediation was presided over by court-appointed mediator. The mediator would have discussed with the parties and their counsel the nature of the mediation process and would have emphasised that any decision made in respect to division of the parties assets and liabilities could only be reached with the agreement of both parties, and that any issues unable to be resolved could fall to be determined by the Court.

[41] The agreements reached at mediation were then recorded in a property agreement. The agreement was subsequently amended by Ms RQ's new lawyer, and finalised some five months after Ms RQ had elected to change her lawyer.

[42] That lengthy process provided abundant opportunity for Ms RQ to seek the intervention of the court if she considered that she was intractably bound by the agreement reached at the mediation conference, and was in that position as a consequence of being poorly advised by Ms TS.

[43] There is no evidence before me which could properly lead me to conclude that Ms RQ had not received adequate advice prior to the mediation, or that she failed, as a consequence of errors or omissions on Ms TS's part, to understand the mediation process and her role in it.

[44] I see no basis to disturb the Standards 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 23rd day of June 2015

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:

RQ as the Applicant
TS as the Respondent
GC as a related person
Standards Committee
The New Zealand Law Society