

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

TG

Applicant

AND

MR and MRS OQ

Respondents

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

DECISION

Introduction

[1] Mr TG has applied for a review of a decision by the Standards Committee dated 3 July 2012 in which the Committee made unsatisfactory conduct findings against him under s 12 of the Lawyers and Conveyancers Act 2006 (the Act). The Committee also imposed orders under s 156(1) including an order that he pay \$25,000 in compensation to each of Mr and Mrs OQ (the OQs), on the basis that they were his clients, and that around \$50,625 of their money had been paid out of his trust account without their authority.

Background Summary

[2] In July 2009 over \$100,000 was paid out of Mr TG's trust account from funds held to the credit of "Estate XX" to Mr AB for his fees in acting on a criminal appeal for Mr XX posthumously.

[3] According to their evidence, Mr and Mrs OQ had no legal status in relation to "Estate XX". They were not present when the money was paid into Mr TG's trust

account, and it was not their money that was paid into Mr TG's trust account. They were also not involved when the money was paid out of Mr TG's trust account.

[4] Mr TG says he did not act for Mr or Mrs OQ. That position is supported by what I have seen of his trust account records. Those records include a printout provided by the OQs of a trust account record for Mr TG's client "Estate XX" dated 21 June 2010. That document records payments totalling \$103,625 having been made to Mr TG's trust account on 23 June 2009 by YY Holdings.

[5] Mr TG's full trust account records were not considered by the Committee, and have not been considered in the course of this review. NZLS inspectorate provided some information to the Committee on 28 October 2011 which I have read. That information provides some background, but there is no evidence in it of anything that is material to determining the OQs' complaint. That is consistent with this decision having been made in relation to a complaint made by the OQs, who are a third party for the purposes of the Act, and the rules and regulations made under it that regulate lawyers' conduct.

Complaint

[6] At the heart of their complaint is the OQs' argument that they have the right to claim an interest in \$50,625 of the money that was paid out of Mr TG's trust account. That claim cannot be determined within the complaints and disciplinary framework of the Act, the focus of which is on whether Mr TG's conduct in relation to the OQs has fallen below proper professional standards.

Committee's Decision

[7] Unfortunately, the Committee accepted the OQs' argument that their money was paid out of Mr TG's trust account. To get to that point, the Committee had to find there was a relationship between them as lawyer and clients. Those two premises permeate the entire decision, and were the basis on which the Committee made compensatory orders under s 156(1)(d) in favour of the OQs. Given the lack of a proper evidential basis for those premises, on review it is appropriate to reverse the decision pursuant to s 211(1)(a) of the Act.

[8] Reversal of the decision means there is no determination of unsatisfactory conduct made under s 152(2)(b) of the Act and no statutory basis for orders to be made under s 156(1). Those orders, which include the order that Mr TG pay a total of \$50,000 in compensation to the OQs, fall away.

[9] This review is determined on the basis, indicated as a preliminary view at the review hearing on 17 October 2014, that further action on the OQs' complaint is not necessary or appropriate.

Regulatory Framework

[10] Lawyers owe professional obligations according to a strict hierarchy: first as officers of the Court; second to their client or clients. Any obligations a lawyer may owe beyond that are largely summed up in Chapter 12 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the rules). Rule 12.2 does not apply, but rr 12 and 12.1 warrant consideration. They say:

- 12 A lawyer must, when acting in a professional capacity, conduct dealings with others, including self-represented persons, with integrity, respect, and courtesy.
- 12.1 When a lawyer knows that a person is self-represented, the lawyer should normally inform that person of the right to take legal advice.

[11] The nub of the OQs' complaint is that money was paid out of Mr TG's trust account without their authority. He failed to account to them for their money, they have not seen the invoice rendered for the fees paid with their money, they dispute the reasonableness of the fees paid with their money, they did not approve payment of Mr AB's invoice, and they seek a full refund from Mr TG. They raised their concerns with Mr TG and were unable to obtain an explanation that satisfied them, or a refund, so they laid a complaint to the New Zealand Law Society (NZLS) apparently in an attempt to obtain over \$50,000 from him.

Standards Committee

[12] Mr TG responded at length to the Committee essentially saying the OQs were not his clients, and the money was not theirs. Mr TG made a number of comments about the way in which he administered his firm's trust account, including that he was not directly involved when his staff paid Mr AB's bill with the money from his trust account on 1 July 2009.

[13] The Committee's view was that the money in Mr TG's trust account belonged to the OQs, and that they were Mr TG's Firm's clients. On the basis of those two premises, the Committee concluded that Mr TG had failed to meet the obligations and duties that flowed from his professional relationship with the OQs, had contravened

money handling provisions of the Act, the Lawyers and Conveyancers Act (Trust Account) Regulations 2008, (the regulations) and the rules.

[14] The Committee noted the absence of evidence from the people directly involved in paying the money out of, or in to, Mr TG's trust account. There is no evidence of the Committee giving any consideration to the absence of evidence from the trustees or executors of the XX Trust, none of whom were the OQs.

[15] Nonetheless, the Committee was critical of Mr TG's trust accounting practices, made adverse findings about those, and consequential orders, based on the OQs' being Mr TG's clients, and over \$50,000 of the money that was paid to Mr AB being theirs.

[16] Mr TG was dissatisfied with the Committee's decision, and applied for a review.

Review application

[17] Mr TG's review application invites the Legal Complaints Review Officer (LCRO) to set aside the Standards Committee's decision and dismiss the complaint against him. The grounds on which Mr TG relies include a breach of the principles of natural justice by the Committee in failing to disclose, and then relying on, information from NZLS inspectorate (referred to in [5] above as background material) that was not disclosed to him.

[18] Mr TG says the Committee misdirected itself by forming the view that it was necessary for it to establish that the payment was made in accordance with Mr and Mrs OQ's direction. Mr TG says that was not an issue that required determination by the Committee because Mr and Mrs OQ did not pay the money to Mr TG, they were not his clients, they had given no direction as to the payment of the money out of Mr TG's Trust Account, and they had no authority to give instructions in relation to the appeal or the payment of the money out of Mr TG's Trust Account.

[19] Mr TG says the Committee had no, or insufficient, evidence for a number of its findings, and that it made a number of incorrect findings, and orders beyond its jurisdiction.

Review Hearings

[20] A review hearing was conducted in [City] on 17 April 2014. Mrs OQ attended that hearing with Mrs CD as a support person. Mr TG also attended, and was represented by counsel, Mr NI.

A second review hearing occurred on 11 December 2014 to hear evidence from Mr TG's colleague, Mr LL. That hearing was attended by Mr and Mrs OQ, represented by counsel, Mr SU; and Mr TG, represented by counsel, Mr NI and Ms IH.

Role of the LCRO

[21] 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 judgment for that of the Standards Committee, without good reason.¹

Scope of Review

[22] 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.

Review issues

[23] The fundamental issue on review is whether there is good reason to depart from the Committee's determination. The deficiencies in the evidential basis for the finding that the OQs were Mr TG's clients, and that the money paid into his trust account was theirs, provide good reason to reverse the Committee's determination.

[24] As the complaint by the OQs is essentially a complaint by a third party, the question on review is whether Mr TG met his somewhat limited obligations to them. As the evidence does not support a finding that Mr TG breached any obligation to the OQs, this review is determined on the basis that further action is not necessary or appropriate.

Discussion

Errors of Fact

[25] The Committee proceeded on the basis of the two material errors of fact referred to above, that:

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

- (a) Mr and Mrs OQ were Mr TG's clients, when they have produced no persuasive evidence that supports that finding, and the trust account records provided by Mr TG do not support a finding that they were his firm's clients.
- (b) Mr and Mrs OQ paid money into Mr TG's trust account, when by their own admission, and on the evidence provided by Mr TG, they did not.

[26] The whole of the Committee's decision is premised on those two incorrect findings. The evidence supports the conclusion that the OQs were third parties for the purposes of the Act and rules.

Obligations to third parties

[27] Lawyers' obligations to third parties are dealt with in Chapter 12 of the rules. For r 12 to apply, the conduct under consideration would have to be conduct by Mr TG when he was acting in a professional capacity. For rule 12.1 to apply, Mr TG would have to know that the OQs were not represented before he could inform them of their right to take legal advice.

[28] The OQs say that all their dealings were with Mr LL, and that although they saw Mr TG on a very few occasions, they had almost no direct contact with him.

[29] Mr TG and the OQs agree that he personally had no professional dealings with them at all, although they appear to have met once at the Court of Appeal when the XX appeal was to be heard. Mr TG says he was aware of the appeal because Mr LL had told him it was proceeding, and attended the Court of Appeal as an interested observer. There is no evidence of Mr TG having any professional dealings with the OQs on that occasion.

[30] The OQs' position relies on payment of their money into Mr TG's trust account constituting a professional dealing that gives rise to professional obligations to them. That argument fails on the basis that Mr TG's trust account records show it was YY's money, not the OQs, that was paid into Mr TG's trust account. The OQs acknowledge the money was paid in by a cheque issued by YY, and that they have no interest in that entity. Any dispute between the OQs and YY cannot be resolved within the complaints and disciplinary framework of the Act.

[31] I have carefully considered all of the evidence available in the course of this review. I have been unable to identify any satisfactory evidence that could support a finding that Mr TG acted in a professional capacity in relation to the OQs, or that when

he did encounter them his conduct towards them was in any way deficient. There are, therefore, no grounds upon which his conduct towards the OQs as third parties could be said to be unsatisfactory. Further enquiry is not necessary or appropriate.

Supervision of Practice

[32] I have considered whether the OQs' complaint, and Mr TG's reply, provide grounds for inquiry into whether Mr TG ensured his practice was competently supervised, as rule 11.3 requires and conclude that that inquiry is not one that can be initiated on review.

Costs

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

[34] Mr TG has been successful on review, the unsatisfactory conduct findings have been reversed, and there is no statutory basis for any orders under s 156(1). In all the circumstances there is no good reason to order Mr TG to contribute to the costs of the review.

Outcome

[1] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision and orders of the Standards Committee are reversed.

[2] Pursuant to ss 211(1)(b) and 138(2) of the Lawyers and Conveyancers Act 2006, further action on the OQs' complaint is not necessary or appropriate.

DATED this 24th day of September 2015

D 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:

Mr TG as the Applicant
 Ms IH as the Representative for the Applicant
 Mr and Mrs OQ as the Respondents

Mr SU as the Representative for the Respondents
Mr PP as a related person as per section 213 of the Act
The Standards Committee
The New Zealand Law Society
NZLS Inspectorate