

LCRO 184/2015

CONCERNING

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

AND

CONCERNING

a determination of [City] Standards Committee [X]

BETWEEN

WD

Applicant

AND

YR

Respondent

DECISION

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

Introduction

[1] Mr WD has applied for a review of the decision by [City] Standards Committee [X] to take no further action in respect of his complaints about Mr YR. Mr YR is a barrister.

Background

[2] In July 2013 Mr WD asked Mr YR to act in respect of matters arising out of disputes Mr WD and his wife were having with the landlord of their business premises. Mr KG of ABC Law was acting for Mr WD at that time, and agreed to remain as solicitor on the record.

[3] On 25 March 2014, after carrying out considerable legal work for Mr WD, Mr YR received an email from Mr WD saying “Hi [YR] I got this from the court Kind Regard [WD]”.

[4] Mr WD was referring to an email the Court had sent directly to him in the following terms:¹

Your email has been sent to me. I note the claim was filed by a solicitor, if you are now acting for yourself you need to file a notice of change of representation. At this stage the court has no idea at what stage the claim is at as the parties serve documents among themselves. A claim can go to trial as a defended matter or an undefended matter, until you can advise what has happened since it was filed I am unable to advise how you need to proceed to obtain a trial.

[5] Prior to this Mr YR had expressed some unhappiness to Mr WD about acting for him, because he considered Mr WD was pursuing the litigation for vindictive and malicious purposes.² Mr YR says that on Mr WD's instructions he had communicated agreement to the other party that the litigation would lapse, and had advised Mr WD of that at the time.³

[6] Mr YR knew about the email from the Court to Mr WD, and that Mr WD lacked funds to pursue the litigation. Combined with his previous expression of unhappiness about acting for Mr WD, Mr YR believed Mr WD was intending to act for himself.

[7] Acting on the belief that Mr WD had withdrawn his instructions, Mr YR sent an email to Mr KG advising him that Mr WD was going to represent himself, and that he intended to withdraw as counsel.⁴

[8] On 31 March 2014 Mr YR sent an email to Mr WD saying:

[WD]

My hard copy file is here. If you send me your street address I'll courier it to you. Below is a print out on proceedings by simplified trial that I think is your best chance of doing this expeditiously.

I will file a memorandum seeking to withdraw as counsel in the District Court. Best of luck.

Regards

[YR]

¹ Email BG to WD (18 March 2014).

² Mr YR advises that Mr WD's response to settlement offers from his previous lawyer that Mr YR considered should be accepted, was that Mr WD did not consider the offer caused his former lawyer enough discomfort and that he wanted him to "bleed from the eyes". Letter YR to Lawyers Complaints Service (24 November 2014).

³ Letter YR to Legal Complaints Service (LCRO) (24 November 2014).

⁴ YR email to CZ [ABC Law] (25 March 2014).

[9] Mr WD responded with a lengthy email in which he talked about the litigation and said:⁵

The reason why we are going to present ourselves in court is to save some money and we are confident we have enough physical documents to present in court ...

[10] Mr YR replied:⁶

Stop sending me emails. Your proceedings are on foot, you have no money to continue, and I got you a settlement offer you should have taken.

Goodbye [P]lease send me nothing more.

[11] Subsequently Mr WD again asked Mr YR for help and Mr YR drafted new proceedings for Mr WD. He did this pro bono, but eventually declined to help any further.

The complaints

[12] Mr WD's complaints were:⁷

(a) Mr YR had failed to complete the work for Mr and Mrs WD and terminated the retainer.

(b) He did not send them their file.

[13] Mr WD sought a refund of all fees paid.

[14] In response Mr YR submitted:

(a) Mr WD had terminated the retainer.

(b) He had fulfilled his instructions which were to stay the WD's bankruptcy and obtain a settlement offer from their former lawyers.

(c) He carried out further work on a pro bono basis, including drafting a statement of claim, because of Mr WD's financial situation.

(d) Mr WD "fired" him then changed his mind, but Mr YR refused to be re-engaged.⁸

⁵ Email WD to YR (31 March 2014) at [3].

⁶ Email YR to WD (31 March 2014).

⁷ Lawyers Complaints Service file "Telephone Note" (15 October 2014).

⁸ Above n 3.

The Standards Committee decision

[15] The Standards Committee determined to take no further action on Mr WD's complaints. It concluded that the correspondence on 31 March 2014 showed that the lawyer-client relationship had broken down:⁹

It was clear from the material provided by the parties that the retainer had been terminated on 31 March 2014, although how or why this occurred could not be determined. However following the termination Mr YR undertook to complete work for Mr and Mrs WD pro bono.

[16] The Committee observed that Mr YR could have "better explained" why Mr WD needed to instruct another solicitor after Mr KG withdrew and the basis on which he was continuing to work for him.¹⁰ It also noted that Mr YR's pro bono work was done without an instructing solicitor. This was identified as a "technical breach" of the Conduct and Client Care Rules¹¹ but the Committee exercised its discretion to take no further action on that issue.

[17] The Committee confirmed that Mr YR's file belonged to Mr and Mrs WD but Mr YR was only required to make it available to them not to send it to them, and he had fulfilled that obligation.¹²

[18] The Committee also observed that Mr WD had not complained about Mr YR's fees and had commented on his good service.

[19] The Committee's overall conclusion was that Mr WD had been satisfied with the work Mr YR had carried out and that he "was entitled to be paid for any work he had already completed regardless of who terminated the retainer and why".¹³

Review Application

[20] The grounds put forward by Mr WD in support of the submission that the Standards Committee's decision should be reversed are:

- (a) Committee failed to follow legal processes stipulated in the Act.
- (b) Committee failed to follow fundamental obligations.
- (c) Committee failed procedural fairness, and act as counsel on behalf of lawyers.

⁹ Standards Committee determination at [14].

¹⁰ At [15].

¹¹ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

¹² At [18]–[19].

¹³ At [24].

- (d) Committee failed procedural fairness and natural justice and perverted the course of natural justice.
- (e) Committee failed procedural of the Human Rights Act. And had based the decision on discrimination and racism.

[21] He then repeated, and added to, his complaints:

- (a) Lawyer failed to act competently.
- (b) Lawyer failed to act in a timely manner, in accordance with instructions.
- (c) Lawyer failed to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients.
- (d) Lawyer failed to discuss his objectives and how those objectives were to be achieved.
- (e) Lawyer failed to provide information about the services to be provided.
- (f) Lawyer failed to act with instructions, and with his advice.
- (g) Lawyer failed to communicate in a respectful manner.
- (h) Lawyer failed to protect and promote our interests.
- (i) Lawyer failed to provide information about the progress of the case.
- (j) Lawyer failed to provide necessary support to find another lawyer.
- (k) Lawyer failed to provide information as to how to pursue a complaint.
- (l) Lawyer failed to communicate effectively.

[22] Mr YR said he had nothing to add to the material submitted to the Standards Committee.¹⁴

Nature and scope of review

[23] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:¹⁵

¹⁴ YR email to LCRO (8 December 2016).

¹⁵ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

... 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.

[24] More recently, the High Court has described a review by this Office in the following way:¹⁶

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.

[25] 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.

Procedure on review

[26] Following an initial consideration of the application for review, the supporting material, and the Standards Committee file the Review Officer directed that the review should proceed by way of a hearing with both parties.

[27] On 13 November 2015 Mr WD provided a copy of a notification from the Disputes Tribunal that “both claims ... be enlarged pending LCRO outcome”.¹⁷ It was apparent from this letter that Disputes Tribunal proceedings relating to the same matter

¹⁶ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

¹⁷ Letter Disputes Tribunal to WD (12 October 2015).

had been filed. No information has been provided about these proceedings, and they have no relevance to complaints that Mr YR has breached professional standards.

[28] In February 2016 Mr WD asked for this review to be afforded priority.¹⁸

[29] Following a further consideration of the material in 2016, the Review Officer issued a minute which included the following paragraphs:¹⁹

[5] From a preliminary review of the material provided, it is difficult to establish how Mr and Mrs WD have been prejudiced by the conduct complained about. In addition, I have not identified anything in the material provided following a preliminary review, that would indicate the determination of the Standards Committee should be altered.

[6] There is no apparent reason why this application should be afforded priority and if Mr WD wishes the Disputes Tribunal proceedings to continue more quickly, it is suggested he give consideration to withdrawing the application for review.

[30] The application for review was not withdrawn and in October 2016 Mr WD provided a "Complete statement for LCRO hearing" which was forwarded to Mr YR.²⁰

[31] No further comment was received from Mr YR, and in November 2016 this Office requested consent from both parties for the review to be completed on the material to hand. Both parties provided their consent and the review was scheduled for completion on the papers.²¹

[32] On 27 February 2017 this Office received a document headed "Memorandum of Applicants withdrawing consent for the LCRO to hear matters between the parties on the papers." That document included the following paragraphs:

2. Information has come to light since the aforementioned consent was given by the applicants.

3. In view of the above the applicants respectfully withdraw their consent to having the LCRO hear matters between parties on the papers.

[33] Unfortunately this memorandum was not drawn to the attention of the Review Officer until June 2017. At that stage the Review Officer requested Mr Ali-Ali to advise:

1. The nature of the information.
2. Why it was not made available to the Standards Committee.

¹⁸ Email WD to LCRO (26 February 2016).

¹⁹ Minute 29 April 2016.

²⁰ In subsequent correspondence from Mr WD he advised he did not receive the Minute 29 April 2016.

²¹ Email WD to LCRO (18 November 2016) Email YR to LCRO (8 December 2016).

3. Why the information cannot be made available in written form to the Review Officer.

[34] In response, Mr WD advised that the new information related to a breach of the High Court Rules, and was before the Standards Committee.²²

[35] As the information Mr WD referred to was not “new information” and was on the Standards Committee file, it is therefore available for consideration on review. Mr WD was advised that his withdrawal of consent to the review being completed on the papers was not accepted, and the review has been completed on the papers on the basis of the initial consent provided by Mr WD.²³

Review

The Standards Committee procedure

[36] Mr WD has not addressed each of the allegations made about the Committee’s procedures. Under the heading “*How the Committee made the decisions*” he has made the following statements:²⁴

- (a) The “committee acted as counsel on behalf of lawyers.”²⁵
- (b) “... our complaint wasn’t related to pro bono, volunteered or free work at all.”²⁶
- (c) “The committee not in a position to act in [sic] behalf of lawyers. Rather judging on lawyers provided pro bono work or not. But must committee determine are lawyers had breach RCCC rules?”²⁷
- (d) “The committee had narrowed the decisions on the withdrawal. And ignored all other breaches of the rules.”²⁸
- (e) “I’ll start my statement with(P16) of Mr YR decision. This will prove ... decision ... was based on wrong foundation. Perhaps committee they are perverting the course of justice.”²⁹

²² Email WD to LCRO (12 June 2017).

²³ Email LCRO to WD (8 June 2017).

²⁴ Complete statement for LCRO hearing.

²⁵ At [1].

²⁶ At [1].

²⁷ At [1].

²⁸ At [1].

²⁹ At [1].

[37] All of Mr WD's comments, which are apparently in support of the allegations of procedural breaches by the Committee, are in a similar vein. There is nothing which provides any substance to the wide ranging allegations and accordingly there are no grounds to reverse or modify the Standards Committee decision for procedural reasons.

The scope of review

[38] The Standards Committee noted in its determination that "the precise nature of the complaint made by Mr and Mrs WD was hard to discern from the material provided by the parties".³⁰ The same is true of the application by Mr WD for review of the Standards Committee determination.

[39] From the information provided, the Committee identified two issues to be considered:

- (a) whether Mr YR failed to complete and then also improperly terminated the retainer; and
- (b) whether Mr YR failed to return Mr and Mrs WD's file to them despite requests to do so.

[40] The issues were distilled by the Committee from the email sent by Mr WD to the Lawyers Complaints Service on 13 August 2013 with which was forwarded an email sent to Mr YR and his instructing solicitor on the previous day. Both of those emails are set out below.³¹

From: [WD]
Sent: Wednesday, 13 August 2014 9:51 p.m.
To: Complaints
Subject: Fw: THIS IS A FORMAL REQUEST

Hi Dear,

the email below we send it to above lawyer about work not only not completed but our claim in the court has ended and that resulted to pay the bankruptcy judgment + cost
 we believe if we ask to present our self we have all right to do so.
 and we have to have our case still a live which it cost us over \$25,000
 and we did try every method so they can do it right again but no one willing to do so.
 and we never been informed about the law complaint process
 and today we been informed that we have no -----
 and even our file we need to collected by our self
 please we have all emails if they are required and this is just the short of the matter

³⁰ At [6].

³¹ Emails WD to Lawyers Complaints Service, YR and KG (12 and 13 August 2014).

and please let us know if we need to go to the next step to make a formal complaint!

Kind Regard

WD

-----Original Message-----

From: [WD]

To: [YR]; [KG]

Sent: Tuesday, August 12, 2014 4:31 PM

Subject: THIS IS A FORMAL REQUEST

Hi Both

With all due respect

Since April 2014, we have found that our claims have ended, since then we did our best to support and help to solve the problem without blaming anyone. We only wanted to bring our claim back on foot to start a new claim but that's not what's been happening here. On the 4th of AUG we received a email to be told to find a new lawyer to proceed with a new claim. that's what we doing now. Regardless of our time being wasted and our stress and our money spent, therefore we believe its very reasonable to ask for the following things and we expect the issue will be addressed or taken care of within 10 working days.

1-We would like all fees we paid, back in full. To our acc [Bank]
[.....account # included.....]

2-We would like our file to be sent to us at [No.] [X] Road, [Suburb].
As we mentioned before, really are expecting to resolve this all now.

Kind Regard

WD

Mrs WD

Date

12/08/2014

[41] I cannot find anything in the correspondence from Mr WD that raises any issue other than those identified by the Standards Committee.

[42] In his review application and subsequent submissions, Mr WD has raised numerous other matters that were not before the Committee. No new matters may be raised on review and for that reason many of the issues raised by Mr WD in his review application, and in his subsequent submissions, will not be addressed. If they are not referred to in this decision it does not mean they have not been noted.

[43] If Mr WD wishes to pursue allegations of negligence against Mr YR that is best pursued through the courts. I am aware there are proceedings before the Disputes Tribunal which may be related to these allegations and that is also an appropriate forum before which such allegations should be addressed.

The termination of the retainer

[44] The email chain which led Mr YR to form the view that Mr WD was intending to act for himself has been set out above in paragraphs [4] and [8]–[9]. Mr YR assumed that, as Mr WD had been in direct contact with the Court, he had taken control of the proceedings for himself. That was a reasonable assumption to make.

[45] It would seem that Mr WD interpreted Mr YR's request on 31 March for Mr WD to stop sending him emails that Mr YR was himself terminating the retainer.³² However, that followed an email from Mr YR in which he advised Mr WD that he could uplift his file and that he (Mr YR) would file a memorandum seeking to withdraw as counsel.³³ That, in turn, had followed an exchange between Mr YR and Mr WD where Mr YR says he indicated to Mr WD he did not want to continue to act for him in relation to a dispute that seemed to be motivated by malice.

[46] The circumstances leading to the termination of the retainer are confused and blurred by the fact that Mr YR did carry out further work albeit on a pro bono basis. However, looking at the facts objectively, Mr YR's inference that Mr WD had terminated his instructions, is understandable, for the following reasons:

- (a) Mr WD had been in direct contact with the Court, and the Court's email suggested that the court staff understood Mr WD was going to act for himself.
- (b) Mr WD's email of 31 March explained he was going to act for himself to save money.
- (c) He was asking Mr YR to send his file to him.

The file

[47] There is nothing to support the allegation that Mr YR was either refusing, or being obstructive in delivering Mr WD's file to him. There are several emails provided in which Mr YR refers to arrangements for delivering Mr WD's file to him. For example "[WD], my hard copy file is here. If you send me your street address I will courier it to you."³⁴

[48] It is not clear why Mr WD did not receive his file, but it is clear Mr YR was endeavouring to make arrangements to deliver the file to him.

³² Email YR to WD (31 March 2014).

³³ At 9.49 am.

³⁴ Email YR to WD (31 March 2014).

Competence/fees

[49] Mr YR's competence and fees were not issues before the Standards Committee. However, Mr WD has now raised these issues on review and they are matters which should be addressed.

[50] In the correspondence from Mr WD in which he sought to withdraw his consent to this review being completed on the papers, he referred to breaches of the High Court Rules.³⁵ In his application for review Mr WD alludes to proceedings lapsing "because they did not follow the time limit for the District Court Rules this make the claim lapped [sic]".³⁶ In his response to the complaint Mr YR advised that the proceedings had terminated by agreement after he had taken instructions from Mr and Mrs WD.

[51] In other correspondence Mr WD expressed satisfaction with the work carried out by Mr YR and expressly confirmed he would pay any outstanding fees:³⁷

... in most of our emails to you, we did mention your good work, even last year we sent an email to the Law Society and I did call them by phone expressing our satisfaction with your work and yourself. ... we will absolutely pay you all your work and we more than value that work you have done, regardless of the hiccups.

[52] Mr WD's expressed willingness to pay Mr YR's fees is somewhat contradicted by the outcome sought by Mr and Mrs WD in their complaint and by Mr WD in this application for review in which he seeks repayment of all fees paid.

[53] In this regard, I do no more than to note that Mr WD previously expressed gratitude to Mr YR for the work done by him and confirmed he had no issue with Mr YR's fees. These issues, now raised on review, cannot be sustained by reason of Mr WD's own words.

The need for an instructing solicitor

[54] There is one final matter that was referred to by the Standards Committee, which should be confirmed on review. When it became clear that Mr WD needed assistance to continue with his proceedings, but was in no position to pay further fees, Mr YR carried out further work for Mr and Mrs WD without charge. At that stage, Mr KG had withdrawn as instructing solicitor. The Standards Committee correctly observed that it was necessary in these circumstances, for Mr YR to have an

³⁵ Email WD to LCRO (12 June 2017).

³⁶ WD supporting documentation with application for review at [9].

³⁷ Email WD to YR (13 August 2014).

instructing solicitor. Mr YR did however correctly insist that if he was to continue to be involved, then Mr and Mrs WD need to instruct a solicitor and pay the filing fee to him or her. It is not clear what eventuated but it does seem this communication resulted in the complaints by Mr and Mrs WD.

[55] The Standards Committee exercised its discretion to take no further action on this issue and I agree that was a valid exercise by the Committee of its discretion.

Summary

[56] Having considered all of the material on the Standards Committee file, and the further material provided on review, I have reached the same conclusions as the Standards Committee namely that no further action on Mr WD's complaints is either appropriate or necessary.

Decision

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

DATED this 6th day of July 2017

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 WD as the Applicant
 Mr YR as the Respondent
 [City] Standards Committee [X]
 New Zealand Law Society