

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of the [Area] Standards Committee [X]

**BETWEEN**

**RN**

Applicant

**AND**

**WB**

Respondent

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

**DECISION**

**Introduction**

[1] Ms RN has applied for a review of a decision in which the Standards Committee concluded no professional standards issues arose, and further action on Ms RN's complaint about Ms WB's conduct and fees was not necessary or appropriate.

**Background**

[2] Ms RN separated from her husband in March 2008, and in January 2009 instructed Ms WB to act for her. Ms RN was facing two issues: a potential claim against her and her former husband for a debt to a family trust (the trust) that may or may not have relinquished all of its interests in the family home to Ms RN and her husband while they were married; and the identification and division of property between Ms RN and her husband.

[3] Ms WB assisted Ms DL. Both barristers were instructed by Mr ZX. There was some overlap between the work done by the two barristers, with Ms DL generally supervising Ms WB's work.

[4] Although she was not entirely certain what had happened at the time the transaction occurred, Ms RN contended that the trustees had relinquished the whole of the trust's interests in the family home to Ms RN and her husband. Ms RN's husband took the position that the trust had retained an interest in the family home, which would effectively reduce the share available to the two of them.

[5] Negotiations did not result in settlement. Ms RN applied for orders dissolving the marriage, then commenced proceedings in the Family Court seeking orders pursuant to the Property (Relationships) Act 1976 (PRA). Ms RN alleged bad behaviour in the course of the relationship on her husband's part. Her husband denied aspects of that. There were also issues around contributions, and whether the presumption of equal division was rebutted.

[6] As anticipated, the trust commenced a proceeding in the High Court against Ms RN and her husband seeking to recover the value of the trust's interest in the family home. The two sets of proceedings were joined together in the High Court, with Ms DL taking the lead, and Ms WB providing support.

[7] Further negotiations and a judicial settlement conference (JSC) that Ms WB did not attend, did not result in settlement.

[8] Ms RN changed lawyers shortly after the JSC, then made a complaint to the New Zealand Law Society Lawyers Complaints Service about both barristers.

## **Complaint**

[9] Ms RN's complaint was lengthy and detailed, focusing primarily on Ms DL's part in the retainer. Ms WB had issued invoices for work she had done on the file. Ms RN's service complaint can be summarised as allegations that the barristers did not advise her well or manage her expectations adequately. As a result she ended up dissatisfied with the position she found herself in and her inability to resolve it. Ms RN considers that if she had been better advised she would have made different decisions, could have adopted a different strategy, got a better result sooner, and been charged lower fees.

[10] The dominant themes begin with a complaint about the timing of Ms RN's application for dissolution, move through Ms RN's experience of the negotiation and court processes, and focus on a claim she pursued under s 13 of the PRA. Ms RN asserts that no such claim could be sustained on the facts, and relies on a second opinion she later obtained that supports that view. Ms RN refers to a concession by Ms

DL at the JSC that was not consistent with her understanding of the advice she had received from her barristers on the s 13 claim.

[11] Ms RN is unable to understand how the Judge's view on litigation risk could be so different from the understanding she had from her barristers. Ms RN believes neither of her barristers acted in her best interests, did not act in a timely manner and failed to keep her apprised of the work they were doing on her matter. Ms RN wants a reduction and refund on her fees, and compensation for costs she had incurred in pursuing her complaint.

*Ms WB's reply*

[12] Ms WB and Ms DL replied jointly. They say they acted for Ms RN initially on instructions from Mr ZX and then on instructions from Mr TE. In both cases Ms DL sent a letter of engagement to the instructing solicitor, and a copy of the letter to Mr ZX went to Ms RN's father who had been the first point of contact with Ms DL. From May 2009 communications were directly between the barristers and Ms RN, although Mr RN also remained involved on his daughter's behalf.

[13] Ms WB says she acted in a timely, competent way throughout the retainer, and the fees rendered, which totalled \$45,032.47 for both barristers, were reasonable in the circumstances and consistent with the estimates Ms DL gave for them both. Ms WB provided a copy of the written advice she and Ms DL had provided in response to Mr RN's queries, and other documents, correspondence and file notes. Ms WB says Ms RN had not paid \$11,726.20 of her fees.

*Ms RN's reply*

[14] Ms RN provided a lengthy and detailed response disagreeing with much of what the barristers had said, and repeating and expanding on her complaint.

*Ms WB's response*

[15] Ms WB explained that she had become involved in Ms RN's file in December 2009 when she attended a meeting between Ms DL, Ms RN and her father. At the time she was employed by a firm, and became a barrister sole shortly afterward, in February 2010. Ms WB says all the work she did was under Ms DL's supervision, and confirms she was present while preparations were under way for the JSC but she did not attend it. Ms WB confirms her view that her fees were fair and reasonable, while acknowledging that the GST should be deducted from the invoices. She later added

that any advice she had given had been at Ms DL's direction, and with her express approval.

#### *Standards Committee decision*

[16] The Committee considered all of the materials and determined the complaint on the basis that Ms WB had not provided Ms RN with legal advice, had charged fees that were fair and reasonable, and that no professional standards issues arose that warranted further action.

#### **Review application**

[17] Ms RN's grounds for review relate to unfairness in the Committee process. She does not believe the Committee considered all of the materials she provided or all the areas of complaint. She objects to the Committee having allowed Ms WB more time to reply without allowing her the opportunity to respond. Ms RN says the Committee incorrectly found Ms WB did not provide her with legal advice, and highlights evidence of advice provided by Ms WB.

#### **Review on the papers**

[18] 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 allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[19] 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 submission 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**

[20] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:<sup>1</sup>

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<sup>1</sup> *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.

[21] More recently, the High Court has described a review by this Office in the following way:<sup>2</sup>

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.

[22] 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 relevant materials afresh, including the Committee’s decision; and
- (b) Provide an independent opinion based on those materials.

## **Discussion**

### *Committee process*

[23] Ms RN complains that the Committee extended the timeframe for Ms WB’s response without affording her the same latitude. Her concern is based primarily on not having the opportunity to respond to what she describes as new claims by Ms WB. Lawyers may give evidence about the part played by a client, but to say that claims are made against clients in the disciplinary process misconstrues the disciplinary process.

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<sup>2</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

The disciplinary process relates to whether a lawyer's professional conduct, in this case Ms WB's, has met minimum standards.

[24] As to timing, Committees delegate to Legal Standards Officers and exercise discretion over the process followed for each complaint. An extension of time to enable the practitioner to respond was well within the reasonable exercise of discretion. Ms RN's concerns about the Committee not taking her interests into account lack a proper basis.

[25] There is nothing in the material available on review that suggests the Committee did not consider all of the material provided. Committees are not expected to address the minutiae of complaints. The focus is on whether standards have been met.

[26] I agree with the LCRO to whom Ms RN's concerns were referred at the time.<sup>3</sup> There was no procedural unfairness arising from the Committee process.

[27] Furthermore, Ms RN has had the opportunity to add to her already lengthy and detailed complaint and submissions in the course of the review process. I have considered all of those materials, as well as the information that was before the Committee, and the Committee's decision. This decision focuses on the key areas of complaint.

#### *Section 13 advice*

[28] Ms RN objects to the part Ms WB played in a claim made pursuant to s 13 of the PRA. There is no argument about who was the senior and who was the junior. Ms DL was the senior, and Ms WB the junior. That is not to say Ms WB would not be responsible for any advice she did give.

[29] The s 13 claim was made as part of an overall strategy aimed at placing pressure on Ms RN's husband, and undermining his credibility, and was based on evidence Ms RN said she had, but did not provide until shortly before the JSC. An analysis of that evidence resulted in an assessment that evidential support for the claim was weak, and the advice changed accordingly. Ms DL acknowledged that the s 13 claim was not the strongest argument. As Ms WB was involved in the analysis of the evidence Ms RN had provided, it is assumed she shared that view, so any advice she may have given would have been consistent with Ms DL's.

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<sup>3</sup> Letter from LCRO to the Complaints Service (2 April 2013).

[30] The commentaries suggest that a claim in terms of Ms RN's instructions could at least have been argued on the basis of conduct on her husband's part as reported by her, supporting a claim by Ms RN for an increased share.<sup>4</sup> It is not clear why Ms RN is so adamant that no such claim could be made or sustained other than with reference to her view of the evidence, which her barristers objectively assessed as not strong, or what she had been told by her husband's lawyer, which is not a reliable basis for concern.

[31] The key point, from the perspective of professional standards, is that on Ms RN's instructions there was some basis for the s 13 argument. It was her barristers' role to put forward the strongest case they could for Ms RN, even if parts of that case were weaker than others. If Ms RN could not produce adequate evidence to support her claim, there was little Ms WB could do about that.

[32] In the circumstances no professional standards issues arise for Ms WB in relation to the s 13 issue.

#### *Fees*

[33] The fee complaint included a concern about GST which is beyond the jurisdiction of the Committee and this Office to determine. From a professional standards perspective, when Ms RN identified there may be an issue around charging GST, the barristers checked, and acted in accordance with their understanding of the information they found. No professional standards issue arises.

[34] The Committee considered the fee complaint without appointing a costs assessor, and decided further action was not necessary because the fees were fair and reasonable.

[35] Ms RN's objection to the amount of the costs is mostly based in part on her belief that the s 13 claims was unsustainable so all the time Ms WB put into preparing her affidavit with a focus on the s 13 argument was a wasted exercise. Ms RN also believes an estimate Ms DL provided was exceeded and not revised.

[36] The s 13 claim has been addressed above. There is no basis for a reduction in fees arising from that.

[37] As to the provision of an estimate, estimates are one factor among several to consider. The estimate Ms RN was given indicated \$30,000 to \$50,000 for the whole

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<sup>4</sup> *Fisher on Matrimonial and Relationship Property* (loose-leaf end, LexisNexis) at chapter 12.

retainer. The barristers charged her a total of \$45,032.47 including disbursements and GST.

[38] There is nothing in the materials that indicates the fee component of the invoices was unfair or unreasonable having regard to either party's interests and when the reasonable fee factors are considered. There is no good reason to form a different view to that formed by the Committee, and no basis on which to conclude further action is necessary or appropriate.

[39] Ms WB's fees, including those Ms RN has already paid, are confirmed as fair and reasonable.

### **Summary**

[40] Although not every aspect of Ms RN's fulsome complaint and review application is referred to in this decision, all aspects have been considered on review. While Ms RN's concerns are acknowledged, after due consideration my opinion is that there is no reason to take a different view to the Committee on any of the matters Ms RN canvasses in her complaint or on review. There is nothing in the materials that indicates further action is necessary or appropriate. The decision is therefore confirmed.

### **Decision**

Pursuant to s 211 of the Lawyers and Conveyancers Act 2006 the Committee's decision is confirmed.

**DATED** this 7<sup>th</sup> day of August 2017

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**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:

Ms RN as the Applicant  
Ms WB as the Respondent  
[Area] Standards Committee [X]  
New Zealand Law Society