

LCRO 197/2016

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

BETWEEN

BC

Applicant

AND

RN

Respondent

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

DECISION

Introduction

[1] Ms BC has applied for a review of a decision by the [Area] Standards Committee which determined her complaint about Mr RN's conduct, service and fees on the basis that further action was not necessary or appropriate pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act).

Background

[2] Ms BC instructed Mr RN to act for her in November 2014, in finalising and settling relationship property, some years after she had separated from her husband. Mr RN instructed Ms T as counsel for Ms BC, on a reverse brief.

[3] Ms T negotiated the terms of the relationship property settlement, and that was documented with input from Mr BC's lawyer and from Mr RN, particularly in relation to the conveyancing aspects of settlement of the transaction.

[4] Ms BC says she had secured an offer of finance from [Bank] in June 2014, which formed the basis of her negotiations through Ms T. Those instructions included Ms BC retaining her interest in the family home, and paying a sum of money to her former husband. Ms BC was to use funds borrowed from [Bank], with the lending secured against the family home, to pay her former husband. It is not clear when or if Ms BC explained the details of the [Bank]'s offer of finance to Mr RN.

[5] Mr and Ms BC owned the family home, subject to a mortgage, jointly with one of their two daughters, Ms M. Ms M lived overseas. She was to retain her interest in the property. Mr RN was concerned about the potential for a Family Protection Act claim by the other daughter, whose interests were not protected by the interests registered jointly on the title.

[6] [Bank] was not satisfied that Ms BC or her daughter could manage the loan repayments. Ms BC says that the arrangements she made with [Bank] in June relied on her new partner, Mr C, to also be liable for the debt to [Bank]. His interest in the family home would also warrant recognition by registration as an owner, alongside Ms BC and Ms M, either jointly or as tenants in common. The [Bank]'s mortgage would also affect his interests.

[7] It appears that either Ms BC did not disclose all of the relevant background to Mr RN, or that Mr RN misapprehended Ms BC's instructions. It is evident from his correspondence at the time that Mr RN did not appreciate that Ms BC was in another relationship, that Mr C was her current partner (rather than Ms M's), or that he was to be a borrower from [Bank], with an ownership interest registered against the title to the property.

[8] When he became aware on 19 October 2015 that Mr C was Ms BC's partner, Mr RN explained that in addition to Ms M needing to obtain her own independent legal advice, Mr C would also have to be independently advised. Recognising the conflicts between the interests of the three individuals borrowing from [Bank], which could not be reconciled without each of them receiving independent legal advice, appears to have been the cause of some consternation on Ms BC's part.

[9] The position as between Mr C and Ms BC was further complicated by the fact that they had signed a contracting out agreement in 2013, which was in direct conflict with the concept of joint ownership of the property, and which was not disclosed to Mr RN until 10 November 2015.

[10] In circumstances where he did not have full information from Ms BC, Mr RN spent time attempting to resolve the difficulties arising from the existing factual matrix, so that the terms agreed between Ms and Mr BC, settlement of which was already late, could be given effect to.

[11] It appears that Ms BC had a very different view of where her best interests lay, and terminated Mr RN's retainer on 14 November 2015.¹

[12] On 17 November 2015 Mr RN issued a note of his fee of \$5,470 for all his attendances since November 2014, and provided his time records at Ms BC's request, on 18 November 2015. Mr RN explained his fees were calculated on the basis of the \$380 hourly rate set out in the letter of engagement he had sent to Ms BC at the start of the retainer, rather than the \$400 hourly rate shown on the time record.

Complaint

[13] Ms BC's complaint is dated 25 March 2016. In it she is critical of Mr RN in a number of respects, including that he did not provide her with information or advice, did not act competently, in a timely way or in accordance with her instructions and talked down to her. She says he did not check her personal situation, about which he made unwarranted assumptions. Ms BC says Mr RN did not produce any tangible output, and did nothing to assist her in settling the division of her relationship property.

[14] Ms BC believes Mr RN's ultimate fee of \$5,470 was more than she had agreed to pay him, and considers he should waive it.

[15] Mr RN denied any professional wrongdoing, and maintains his fee is fair and reasonable.

Standards Committee decision

[16] The Committee considered the various aspects of Ms BC's complaint and decided in respect of each element that further action was not necessary or appropriate.

[17] Ms BC disagreed with the Committee's decision and applied to this Office for a review.

¹ Email from Mrs BC to Mr RN (14 November 2015).

Application for review

[18] Ms BC's application for review proceeds on the basis that the Committee did not give sufficient consideration to her version of events. She relies on the fact that her new lawyer concluded matters within a fortnight of her terminating Mr RN's retainer as the basis for saying he did a poor job. Ms BC maintains Mr RN lacked competence, misunderstood her instructions, caused delays by insisting her daughter come to New Zealand, and was discourteous to her based on his tone of voice and "short arrogant comments". She contends that he should have achieved a final result.

Review Hearing

[19] Both parties attended a review hearing in Auckland on 18 May 2017. This Office was assisted by the appointment of an interpreter, Ms Z, to assist Ms BC. Mr C also attended as Ms BC's support person.

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:²

... 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:³

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

² *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

³ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

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

Analysis

[23] In her application for review, Ms BC said Mr RN was unnecessarily active between 12 August and 3 September 2015, communicating with others involved in the settlement, including Ms T and [Bank], for no reason. Ms BC believes that all the documents for the separation agreement were ready and only waiting to be signed.

[24] Ms BC oversimplifies the position.

[25] Mr RN was responsible for assisting in drafting the separation agreement, and for implementing it. He had no choice but to resolve the situation over ownership of the property, arising from Ms M's existing registered interest, and, when details later emerged, Mr C's proposed interest. Given the conflict between the interests of the three people involved, Mr RN could not act for anybody other than Ms BC.

[26] While he did not finalise the transaction, Mr RN progressed matters to a point where Ms BC's new lawyer was able to finalise it with little difficulty, presumably on the basis that Ms M and Mr C had received independent legal advice and were satisfied that their individual interests were adequately protected, before the new lawyer gave effect to the transaction.

[27] Joint registration between the three does not resolve the risk Mr RN foresaw in relation to the BCs' other daughter, but as Ms BC says, that is a matter between family members. Mr RN had a professional responsibility to highlight that as a risk, and suggested how that could be managed, perhaps through registration. There was nothing improper in him having raised the possibility of a claim by the other daughter as an issue.

[28] The same applies to Mr RN having suggested to Ms BC that she amend her will. It is far from clear that Ms BC understands the ramifications of registration as joint owners as opposed to registration as tenants in common in equal or unequal shares, during her life or after.

[29] Plainly, Mr RN does.

[30] Registration of Mr C's joint ownership interest appears to have been inconsistent with the terms of the contracting out agreement between him and Ms BC. Mr RN was right to be concerned that Ms BC's interests should be protected, or at least properly understood by her, and that all parties received independent advice before she compromised her interests on registration.

[31] It appears that, while the morality of her situation in terms of her obligations to family members appeared simple enough to her, Ms BC did not understand the complexity of her existing legal position, or the position she would be in after settlement had been effected, and she was committed to debt and joint ownership.

[32] Although Ms BC says that Mr RN made unwarranted assumptions about her personal position, and did not do his due diligence, her comments fail to acknowledge that she knew the full background, for example that she and Mr C had entered into a contracting out agreement that would be affected by settlement of the transaction she had instructed Mr RN to complete, but she did not share that information with him. The situation would have been far simpler, and delays in settlement may well have been avoided, if she had disclosed the existence of the contracting out agreement to Mr RN at the start of his engagement, rather than after the date for settlement had passed.

[33] It is difficult to see how Ms BC could have failed to understand the significance of that agreement, signed in April 2013, given the advice she would have received when she signed it, and the discussions she says she had with the bank in June 2014. The impasse reached because of the requirement for all three of the borrowers to obtain independent advice was not of Mr RN's making; nor were the consequent delays in effecting settlement.

[34] I do not accept Ms BC's assertion that Mr RN insisted her daughter come to New Zealand for two weeks, or a month, as she has variously stated, or that he did not suggest any other alternatives. Focused as he was on acting in what he understood to be Ms BC's best interests, the easiest and quickest way to resolve any issues arising from the three-way ownership of the property would have been to get all three of them in a room with their own lawyer, reach an agreement, document that, and have it

signed. That would have been a sensible approach, given the significance of the new arrangements, and that the settlement date under the relationship property agreement had already passed by the time Ms BC disclosed the contracting out agreement to Mr RN.

[35] There is no substance to the allegation that Mr RN simply wanted to take advantage of her to make monetary gains.

[36] In all the circumstances, there is no reason to take any further action in relation to the allegations Ms BC makes about Mr RN's conduct or the services he provided.

Fees

[37] Ms BC says Mr RN charged too much. She says she finds it difficult to understand why Mr RN had to make a number of phone calls to the bank, and then charge her for those. These were the phone calls made by Mr RN after he received loan documentation from the bank, at a time when he did not appreciate that Ms BC was in a relationship with Mr C, that Mr C was to be a party to borrowing from the [Bank], and was not aware that there was an existing contracting out agreement between them which reserved the family home as Ms BC's separate property.

[38] It is one thing for Ms BC to attempt to limit the terms of Mr RN's retainer, saying the matter was not complicated and he spent too much time trying to resolve non-issues. It is quite another for Mr RN not to fulfil his professional responsibilities, which is essentially what Ms BC requires of him when she contends he should have taken shortcuts.

[39] Mr RN set out his hourly rates in his letter of engagement dated 25 November 2015, which indicated his fees would be based on time and effort spent, outcome achieved and the value of the transaction.

[40] I have considered all of the available material, including Mr RN's timesheets, and the parties' comments at the review hearing. The fees Mr RN charged to Ms BC were fair and reasonable for the services he provided, having regard to Ms BC's interests and his own, and having regard to the relevant factors set out in rule 9.1.⁴

[41] Those factors include the time and labour expended, the importance of the matter to the client and the results achieved, and the value of the transaction. Mr RN

⁴ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

did not add a premium to reflect the complexity of the matter, but, given the late disclosure of the contracting out agreement, in my view, he could have done so.

[42] There is no reason to take any further action in relation to Ms BC's complaint about Mr RN's fees. His fee is fair and reasonable.

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 May 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:

Ms BC as the Applicant
Mr RN as the Respondent
Mr K as a related party
[Area] Standards Committee
The New Zealand Law Society