

LCRO 199/2011
LCRO 29/2012

CONCERNING

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

AND

CONCERNING

a determination of the Auckland Standards Committee 4

BETWEEN

LE
Applicant

AND

VV and VU
Respondents

DECISION

Introduction

[1] LE seeks a review of two Standards Committee determinations concerning VV and VU, partners in the firm of ADX. Given the commonality of the issues I have dealt with both determinations in this review decision. The outcome of the review is that the determination of the Standards Committee is confirmed.

Background

[2] ADX had acted for LE on a number of matters including relationship property matters. In March 2011 he instructed ADY to continue to act for him and on 14 March 2011 that firm sent to ADX an authority to uplift all of LE's deeds and files. LE states that these were required urgently by him to enable him to address an issue that had arisen with regard to the relationship property agreement.

[3] Following several telephone calls to ADX by LE, and in particular a telephone conversation with VU on 23 March 2011, the firm responded to ADY to advise that it was holding two original files and copies of three files originally from ADY. The letter sent under VV's name advised that these files and LE's deeds would be provided once

an outstanding bill of \$271.69 was paid, and that until the bill was paid, ADX claimed a lien over these files.

[4] LE advised ADX that the outstanding account was not payable by him as he had been declared bankrupt in December 2008. He also made a request pursuant to the Privacy Act for the files and deeds. ADX responded to that request by advising that copies of the requested files and deeds would be provided on payment of photocopying charges.

[5] Before that response was sent, LE had lodged his complaint with the Complaints Service of the New Zealand Law Society. He alleged breaches of a number of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 and the Privacy Act.

The Standards Committee determination

[6] Having considered all of the material before it, the Standards Committee determined to take no further action on the complaints. It recorded that it did not consider that either VV or VU had breached any of the Conduct and Client Care Rules, and also recorded that it considered that there was an alternative remedy for LE to pursue in respect of the alleged breach of the Privacy Act. In general, the Standards Committee did not consider that there was any evidence of any shortcomings or failure of professional standards, and accordingly resolved to take no further action in respect of the complaints pursuant to section 138(2) and 138(1)(f) of the Lawyers and Conveyancers Act 2006.

Review

[7] LE alleges breaches of the following Conduct and Client Care Rules:

- 4.4.1
- 11.1
- 10.1
- 2.3

[8] He does not consider that the Standards Committee addressed the issues raised by him in any depth and this did not in his view promote and maintain public confidence

in the legal profession which is one of the core purposes of the Lawyers and Conveyancers Act.¹

Rule 4.4.1

[9] This Rule provides as follows:

“Subject to any statutory provisions to the contrary, upon changing lawyers a client has the right either in person or through the new lawyer to uplift all documents, records, funds, or property held on the clients’ behalf. The former lawyer must act upon any written request to uplift documents without undue delay subject only to any lien that the former lawyer may claim.”

[10] At the review hearing VV advised that ADX would usually action an authority to uplift within 1-2 weeks. Some files are kept off site. He also advised that authorities to uplift were processed at that time by VT who was the person LE apparently spoke to when he telephoned. It was VT who had signed the letter dated 23 March on behalf of VV.

[11] VV also advised that it would not have been evident to VT that the files which the firm’s records show they continued to hold were copies only. In addition, it is apparent that the firm had not written off the outstanding balance owed by LE following his bankruptcy.

[12] Whilst that was an obvious step that should have been taken, the failure to do so could only be described as administrative inefficiency, and certainly not an issue that should involve the complaints process.

[13] It is understandable that VT did not appreciate that bankruptcy meant that the outstanding bill should be cleared and it was she that sent the reply letter to ADY on 23 March.

[14] Rule 4.4.1 refers to deeds and files being sent “without undue delay” following receipt of an authority to uplift. It does not require that the authority be complied with “without delay”.

[15] “Undue” means “unjustifiable” or “excessive”. The circumstances relating to each situation must be taken into account, but it would be fair to say that a response time of 1-2 weeks in usual circumstances could not be considered to constitute “undue delay”.

¹ Section 3 Lawyers and Conveyancers Act 2006.

[16] LE advises that the matter was urgent and that he had communicated that by telephone to VT. He says that he telephoned her on several occasions after the authority was sent and advised her of this.

[17] There was no indication in the letter from ADY with the request that this was the case, and the first that VV became aware of the urgency was from the telephone call of 23 March. This call was made to VT and it seems that she communicated the urgency to the partners at that time.

[18] The only evidence available to me that LE advised VT of the urgency of the matter previously, is the evidence from LE himself. There is nothing in writing either from ADY or LE. If there were some pressing need for the files and documents, it is surprising that LF of ADY had not advised of that when sending the authority to uplift. Upon being advised of the urgency, the firm responded on the same day.

[19] In disciplinary proceedings, matters must be proved “on the balance of probabilities” and given that the only evidence is verbal evidence from LE, this is not sufficient to enable me to conclude that the firm was aware of any urgency prior to 23 March. It follows therefore that there is no evidence on which there could be a finding of a breach of rule of 4.4.1 based on the fact that ADX was aware prior to that date of the urgency of the matter.

[20] I therefore find that there has been no breach of the obligation to provide the deeds and files “without undue delay”.

Rule 11.1

[21] Rule 11.1 provides as follows:

“A lawyer must not engage in conduct that is misleading or deceptive or likely to mislead or deceive anyone on any aspect of the lawyer’s practice.”

[22] LE alleges that VV has engaged in misleading and deceptive conduct by asserting a lien over the files and deeds. LE’s allegation is founded on the letter dated 23 March 2011 in which a lien was claimed over the deeds and files.

[23] LE submits that it is incumbent on a law firm to make sure that its statements are correct and can be relied on. Lawyers can and do make errors, some with greater consequences than others. LE has not explained what the consequences of VV’s error has been other than that the deeds and files were not forwarded as fast as he would have liked.

[24] In the circumstances the error that VT made in VV's name is understandable. The error was pointed out by LE and his complaint followed on 25 March. In his response to the Complaint's Service, VV acknowledged that the outstanding fee was not payable and that no lien attached to the deeds and files.

[25] Intent to mislead or deceive is not necessary for there to be a breach of Rule 11.1, nor is it necessary that someone is actually misled or deceived by the lawyer's statement or action. Those are matters which go to penalty. However, there must be something more than a mere error to warrant a finding that there has been a breach of the Rule.

[26] In circumstances where there has been an error by a lawyer which could on the face of it be misleading or deceptive, a Standards Committee is enabled to exercise a discretion as to whether or not there should be an adverse finding against the lawyer.² This is one of those situations where it seems to me that a genuine error was made by VT and signed out in VV's name. Before the error could be acknowledged, LE had complained to the Law Society. VV readily acknowledged the error in his first response to the Law Society. These are not circumstances which should result in adverse finding against a lawyer and I concur with the determination made by the Standards Committee in this regard.

[27] LE also alleges that VV misled and/or deceived him when responding to ADY on 23 March. This is because the two ADX files referred to in that letter were copies only, whilst the originals of the files and deeds had been sent by ADX to the Official Assignee in bankruptcy. Again I accept VV's submission that it would not have been apparent to VT when she responded to ADY that the files held by them were copies only, although it should be possible to note this in any file recording system.

[28] LE alleges that VV had an ulterior motive of extracting more fees from LE when he replied in this manner to ADY. The amount outstanding was \$271.69. It is not credible that a lawyer would go to these lengths to obtain payments of such a small amount. VV has advised that the content of the letter was incorrect by reason of an error and I accept that explanation.

[29] There is no other evidence to support LE's contention and the amount in question is insufficient to lend weight to that. In summary therefore, this is not an error which should lead to an adverse disciplinary finding and I agree that the proper course of

² Section 138(2) Lawyers and Conveyancers Act 2006.

action is to exercise the discretion available to the Standards Committee pursuant to section 138(2) of the Act that further action in respect of the matter is inappropriate.

Rules 10.1 and 2.3

[30] These Rules provide as follows:

Rule 10.1 A lawyer must treat other lawyers with respect and a courtesy.

Rule 2.3 A lawyer must use legal processes only for proper purposes. A lawyer must not use, or knowingly assist in using, the law or legal processes for the purpose of causing unnecessary embarrassment, distress, or inconvenience to another person's reputation, interests, or occupation.

[31] LE complains that VV has breached these Rules by speculating that LF had promoted the complaint by reason of the fact that VV and a colleague had previously lodged a complaint against LF in respect of which a finding of unsatisfactory conduct had been made. Whilst VV may harbour these thoughts, they add nothing to the substance of his response to the complaint.

[32] However, a lawyer cannot be discourteous or unprofessional for recording facts. I assume the reference to the complaint about LF and its outcome to be correct, as the statement has not been challenged. More importantly, LF has not taken any steps himself in respect of this matter. Section 138(1)(d) provides that a Standards Committee may in its discretion determine to take no action if the person alleged to be aggrieved does not desire that action to be taken. In addition to the reasons provided by the Standards Committee this is a relevant reason for no further action to be taken in this regard.

The Privacy Act

[33] LE alleged that VV failed to comply with the provisions of the Privacy Act. There is a mechanism within that Act to be followed for failure to comply with a request made in terms of the Act, and that is the appropriate course to take in this regard.

VU

[34] The only connection with this matter that VU has is that LE believes it was VU he spoke to on 23 March when he was told that a reply letter was on its way to ADY. VU does not recall any such conversation. Even if the content of the letter were such that it constituted unsatisfactory conduct in itself, there is inadequate evidence to support an adverse finding against VU.

[35] In any event, I have found that the content of the letter was not such as to result in a finding of unsatisfactory conduct, and consequently I concur with the determination of the Standards Committee in respect of the complaint against VU.

Decision

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

DATED this 6th day of June 2012

O W J Vaughan
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:

LE as the Applicant
VV as the Respondent
VU as the Respondent
The Auckland Standards Committee 4
The New Zealand Law Society