

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of the Standards Committee of the New Zealand Law Society

**BETWEEN**

**SW**

Applicant

**AND**

**RD**

Respondent

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

**DECISION**

**Introduction**

[1] Mr SW applied for a review of a decision by the Standards Committee in which a finding was made that he had not maintained his independence in litigation, in breach of rule 13.5 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the rules). A finding of unsatisfactory conduct was recorded pursuant to s 152(2)(b) of the Lawyers and Conveyancers Act 2006 (the Act) in relation to conduct in breach of a practice rule, within the definition set out in s 12(c) of the Act. Mr SW was ordered to pay costs of \$500 to the New Zealand Law Society (NZLS) and reprimanded.

**Background**

[2] Mr SW acted for Ms CH in proceedings before the Family Court. Mr RD was the other party.

[3] Included in a range of complaints by Mr RD was his objection to Mr SW having included himself as a protected person in an application that he put before the Family Court on behalf of Ms CH by signing a consent dated 7 December 2010 addressed to the Presiding Judge which said:

I hereby consent to the making of a protection order in the matter of *CH v RD* (application for protection order) naming me as a protected person under any protection order under the Domestic Violence Act 1995 against the respondent RD.

(the consent)

[4] Mr SW explains that he had encountered difficulties with Mr RD, who had endeavoured to drive a wedge between him and his client. He says he included himself in the application for protection orders in the hope that protection orders would put a stop to behaviour towards him by Mr RD that he considered unacceptable. Although no protection orders were made, Mr RD was affronted by Mr SW including himself in the application, and arranged for his lawyer to lay a complaint on his behalf with NZLS.

### **Standards Committee**

[5] The Committee framed the issues of complaint as inappropriate conduct and conflict. It noted Mr RD's evidence of what he considered to be inappropriate personal and social contact between Mr SW and Ms CH.

[6] The Committee considered the complaint and other information collected in the complaint process on the basis of whether it was appropriate for Mr SW to continue to act after nominating himself as a protected person. The Committee considered whether Mr SW may have breached r 13.5, which imposes an obligation on a lawyer to maintain his independence in litigation at all times; or r 13.7, which imposes obligations relating to evidence a lawyer may give in a court proceeding.

[7] The Committee formed the view that there was the potential for conflict to arise as a result of Mr SW having added himself as a protected person to the application, "without advising his client that it would be appropriate for the client to instruct another lawyer". On that basis the Committee considered Mr SW had breached his obligations under rule 13.5 to maintain his independence, and that his conduct was unsatisfactory when measured against the standards of "competent, ethical and responsible practitioners",<sup>1</sup> and fell within the definition under s 12(c) of the Act. He was reprimanded, and ordered to pay \$500 costs to NZLS.

[8] Mr SW objects to the decision, and applied for a review.

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<sup>1</sup> *B v Medical Council* [2005] 3 NZLR 810 (HC) at 811.

### **Review Application**

[9] In his application for review Mr SW says the decision is in error because it was based on a series of misplaced beliefs by the Committee including that he lived next door to Mr RD, which was not true, that there was potential for conflict of interest in respect of the application for protection orders, that Ms CH should have instructed another lawyer, and the finding that his conduct was unsatisfactory. He asks that the decision be reversed.

[10] Both parties provided further correspondence relating to the continuing dispute between Ms CH and Mr RD, and made further submissions in relation to various professional conduct rules, and costs on review.

### **Review Hearing**

[11] Mr SW attended a review hearing in Auckland on 13 May 2015 in person, Mr RD attended by telephone link from overseas.

### **Role of the LCRO**

[12] The role of the Legal Complaints Review Officer (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 judgement for that of the Standards Committee, without good reason.<sup>2</sup>

### **Scope of Review**

[13] 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**

[14] Lawyers owe obligations according to a strict hierarchy: first as an officer of the Court, second to his or her client. Obligations to third parties, as Mr RD is in this case, fall to be considered against that background.

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<sup>2</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209.

[15] Much of Mr RD's complaint is not appropriate for determination within the complaints and disciplinary framework of the Act because Mr SW is not Mr RD's lawyer, and Mr SW owes Mr RD very limited professional obligations. However, the concerns expressed about an apparent loss of independence by Mr SW in relation to the application for protection orders relate to Mr SW's obligations as an officer of the Court, and to his client, and are of concern in the sense of professional standards.

[16] The Committee addressed Mr RD's complaints in the context of conflict of interest between Mr SW and his client. The approach on review is to focus on Mr SW's obligations of independence as those relate to his position as an officer of the Court.

[17] The issue on review is whether there is good reason to interfere with the Committee's decision. On review, the Committee's determination that Mr SW's conduct was unsatisfactory according to the definition in s 12(c) is confirmed, for additional reasons.

#### **Further Information**

[18] After the review hearing Mr SW was given the opportunity to tender submissions on the professional propriety of him having signed the consent given the requirement that a close personal relationship must exist before orders can be made. Mr SW provided submissions dated 12 June 2015 which have been carefully considered in the course of this review.

#### *Mr SW's submissions*

[19] Mr SW accepts that by signing the consent to be a protected person he purported to be in a close personal relationship with his client. However, he says at no stage has he been in a close personal relationship with her, and he was never in danger of giving evidence in relation to the grounds advanced for the protection order.

[20] Mr SW agrees that evidence of conduct towards him was not necessary to Ms CH's application for protection orders to protect her and her son. However, he says signing the consent did not prejudice either party to the application for protection orders, and he maintains that he acted in Ms CH's best interests.

[21] Mr SW says he did not appreciate he would not qualify for protection under the protection orders, and overlooked the requirement that to be protected he must be in a "close personal relationship" with Ms CH as the applicant for orders. He says he "quite simply got that wrong", and signed the consent by oversight, rather than with intention to mislead the Family Court, in the context of an urgent application.

[22] Mr SW describes his oversight as “regrettable and fairly minor” and says he did not breach rules relating to maintenance of independence, or the exercise of proper professional judgement, nor were his interests in conflict with Ms CH’s.

[23] Mr SW says not every mistake in litigation amounts to unsatisfactory conduct, and he does not consider his conduct falls within any of the definitions of unsatisfactory conduct under s 12 of the Act.

[24] Mr SW considers that inquiry into the propriety of his conduct in signing a consent to be a protected person is ultra vires the powers of this Office, procedurally unfair and contrary to the principles of natural justice. Those concerns are met by the comments of the High Court in *Deliu v Hong*<sup>3</sup> regarding the scope of review, and the role of this Office on review, and by the opportunity Mr SW has had in the course of this review to respond to specific concerns raised by this Office at the review hearing and in submissions.

### **Analysis**

[25] Mr SW accepts that he signed the consent. By filing the consent as part of Ms CH’s application, Mr SW sought a direction that any protection order made for Ms CH’s benefit also apply for his own, pursuant to s 16(2) of the Domestic Violence Act 1995 (DVA). Section 16 provides for a person other than the applicant to be protected by the Court making a direction that the order also apply for the benefit of a particular person with whom the applicant has a domestic relationship.

[26] Although he is an experienced family practitioner, Mr SW says he did not make the connection between the definition of “domestic relationship” in the DVA, which relies on the existence of a close personal relationship between him and Ms CH, and his assertion that for professional purposes he has, or had, no such relationship with Ms CH. Although, logically, Mr SW cannot have it both ways, it is not for this Office to determine which version of his evidence is the truth. The difficulty, in a professional standards sense, is that Mr SW called his own conduct into question.

[27] Whether the proximity of the relationship for the purposes of the Family Court is sufficient is a question for that Court. Section 4(4) of the DVA gives some direction to the Family Court on the matters to which it may have regard in determining whether a person has a close personal relationship with another person. Whether a close personal relationship exists in fact, can only be determined on the basis of evidence.

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<sup>3</sup> Above n 2.

Evidence as to the proximity of the personal relationship can best be given by the applicant and the person claiming the close personal relationship alleged to provide grounds for the legal basis on which a court can make a direction under s 16 DVA.

[28] There is no evidence of an intimate relationship between Mr SW and his client such as to put him at professional risk under r 5.7, but by signing the consent, Mr SW claimed to have a close personal relationship with his client which shifts the court's focus from Ms CH's situation to his own.

[29] Mr SW says that at the time he signed the consent, his concern was to be protected against further threats being made by Mr RD. He says protection was purely for his own benefit; signing the consent was peripheral to the overall thrust of his client's application, and his oversight was a "lapse from his usual standard of practice".<sup>4</sup> In a disciplinary sense, his motivation in signing the consent is of concern.

[30] By signing the consent, Mr SW unnecessarily involved himself personally in his client's proceeding. The professional propriety of his conduct in that respect is questionable given that he brought his own independence in the proceeding into question, and submitted consideration of his personal circumstances to the Court's jurisdiction in his client's proceeding. The emphasis is less on whether there was, or may have been, any conflict between his interests or Ms CH, and more on the simple question of whether he could be said to be acting purely in Ms CH's best interests.

[31] Rules that require lawyers to maintain their independence for the sole benefit of their client include rr 5.2, 5.3 and 13, 13.5 and 13.5.1 to 13.5.4, which say:

- 5.2 The professional judgement of a lawyer must at all times be exercised within the bounds of the law and the professional obligations of the lawyer solely for the benefit of the client.
- 5.3 A lawyer must at all times exercise independent professional judgement on a client's behalf. A lawyer must give objective advice to the client based on the lawyer's understanding of the law.
- ...
- 13 The overriding duty of a lawyer acting in litigation is to the court concerned. Subject to this, the lawyer has a duty to act in the best interests of his or her client without regard for the personal interests of the lawyer.
- ...
- 13.5 A lawyer engaged in litigation for a client must maintain his or her independence at all times.

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<sup>4</sup> Submissions by SW, 12 June 2015, at [17].

- 13.5.1 A lawyer must not act in a proceeding if the lawyer may be required to give evidence of a contentious nature (whether in person or by affidavit) in the matter.
- 13.5.2 If, after a lawyer has commenced acting in a proceeding, it becomes apparent that the lawyer or a member of the lawyer's practice is to give evidence of a contentious nature, the lawyer must immediately inform the court and, unless the court directs otherwise, cease acting.
- 13.5.3 A lawyer must not act in a proceeding if the conduct or advice of the lawyer...is in issue in the matter before the court. This rule does not apply where the lawyer is acting for himself or herself, or for the member of the practice whose actions are in issue.
- 13.5.4 A lawyer must not make submissions or express views to a court on any material evidence or material issue in a case in terms that convey or appear to convey the lawyer's personal opinion on the merits of that evidence or issue.

[32] Other than r 13.5, the Committee did not consider those rules in relation to Mr SW having signed the consent, drafting Ms CH's affidavit, and application for protection orders, or progressing that application through the Family Court. The Standards Committee viewed the situation as one of conflict with Ms CH's interests, which is a different approach.

[33] Mr SW's evidence on review is that he included evidence of Mr RD's conduct towards him in Ms CH's affidavit when he drafted that. Choices about which evidence is included in an affidavit, and which is left out, are matters of professional judgement for a lawyer on the basis of their client's instructions. Not all available information can or should be included in evidence. It is part of the lawyer's role to sift information before it becomes evidence. Evidential calls must always be made "within the bounds of the law and the professional obligations of the lawyer solely for the benefit of the client". According to his own evidence, Mr SW was pursuing his own ends through Ms CH's application. His conduct in doing so supports a finding that he contravened r 5.2.

[34] Mr SW exercised his professional judgement on Ms CH's behalf, but also in his own interests. His advice to her was not objective to the extent that he progressed her application on the basis of his advice to her that the protection orders could extend to him. That advice was incorrect if, as he now says, he was not in a close personal relationship with Ms CH. Also of concern, his conduct was inconsistent with his advice being objective, and his judgement being exercised independently and professionally on Ms CH's behalf. The evidence supports a finding that Mr SW contravened r 5.3.

[35] Mr SW's overriding duty in Ms CH's litigation was to the Family Court. There is no reason to believe the court was misled, largely because Ms CH's application

appears to have been resolved on the basis of undertakings. However, by signing the consent Mr SW held himself out as being in a close personal relationship with Ms CH to further his own interests in being protected from further threats by Mr RD. Commingling his interests with Ms CH's was inconsistent with r 13. It diminished the appearance of independence, and was inconsistent with r 13.5.

[36] By signing the consent, Mr SW put himself at professional risk. His status as a person who could be protected by the orders could have been challenged under cross-examination if the application for protection orders had been contested. He may have been called upon to give evidence of a contentious nature about his own conduct in the matter, thereby contravening r 13.5.1 and 13.5.3.

[37] If the matter had not been resolved by undertakings, Mr SW had put himself at risk of having to inform the Court of his position in relation to the consent he had signed, and of having to cease acting. If he had continued to act, Mr SW was at risk of having to make submissions or express views to the Court on material evidence or a material issue in the case in terms that may have conveyed or appeared to convey his personal opinion on the merits of the evidence in relation to Mr RD's behaviour, which was the central issue in the application for protection orders. Mr SW's evidence suggests he did not turn his mind to those risks.

[38] It is difficult to see how Mr SW could be said to have been acting purely in Ms CH's best interests, if a hearing had eventuated. That appears to have been the underlying concern in the Committee's process, and in its conclusion that Mr SW's professional judgement on this occasion was poor.

[39] By signing the consent, Mr SW contravened rr 5.2, 5.3, 13, 13.5, 13.5.1 and 13.5.3. Those contraventions fall within the definition of unsatisfactory conduct in s 12(c) of the Act which says that unsatisfactory conduct in relation to a lawyer means:

- (c) conduct consisting of a contravention of... practice rules made under this Act that apply to the lawyer...

[40] Pursuant to s 211(1)(b) of the Act, this review is determined on the same basis as the Committee's decision, that there has been unsatisfactory conduct on the part of Mr SW pursuant to s 152(2)(b)(i) and s 12(c).

**Consequential orders – section 156**

[41] If a determination is made under s 152(2)(b) orders may be made under s 156. A range of orders are available for different purposes, including punishment, restorative and remedial orders and reparation. On the basis of its determination, the Committee ordered Mr SW to pay costs of \$500 and reprimanded him.

[42] Given the findings of this review, I have considered whether to modify those orders, on the basis that the functions of penalty orders in a professional context include punishing the practitioner concerned, deterring other practitioners and reflecting the public's and the profession's condemnation or opprobrium of a practitioner's conduct.<sup>5</sup>

[43] The identification of a wider range of concerns than those identified by the Committee warrants consideration of whether more substantial penalties should be imposed.

[44] The purpose of a reprimand is to mark conduct out as unacceptable, and to deter other practitioners in a similar situation to Mr SW from failing to pay due regard to their professional obligations.

[45] Applications for protection orders are routine matters in the Family Court jurisdiction. It is not uncommon for a party to seek to antagonise an opposing party's lawyer. The situation Mr SW found himself in is not an unusual one, but his reaction to it is one that should generally be discouraged. The Committee's order that Mr SW be reprimanded is therefore confirmed.

[46] It is also appropriate to order Mr SW to pay a fine pursuant to s 156(1)(i) as a punishment. By his conduct he placed compliance with his professional obligations to Ms CH at risk, but of greater significance for the purpose of this review, Mr SW failed in his obligations to the Court. A fine fulfils the three particular functions of punishment, deterrence and reflecting condemnation. In all the circumstances, a fine of \$1,000 is appropriate.

[47] The Committee's order that Mr SW pay costs of \$500 to NZLS is also confirmed.

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<sup>5</sup> *Wislang v Medical Council of New Zealand* [2002] NZAR 573 (CA) at [21].

**Costs on review**

[48] The LCRO has a broad discretion to order costs pursuant to s 210 of the Act, and the LCRO's Costs Orders Guidelines.

[49] Mr SW's application for review has been unsuccessful, and it is appropriate that he contribute to the costs of this review, which are otherwise defrayed across all New Zealand lawyers. A review hearing was convened to consider Mr SW's application for review. The Guidelines say the standard fee for a hearing in person is \$1,200. It is appropriate that Mr SW pay that amount pursuant to s 210 of the Act.

**Orders**

[50] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the Committee's decision is modified to the extent recorded in this decision.

[51] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the Committee's orders that Mr SW be reprimanded and pay \$500 of costs to NZLS pursuant to s 156(1)(b) and (n) are modified to the extent that the costs are to be paid within 28 days of the date of this decision, and otherwise confirmed.

[52] Pursuant to ss 211(1)(b), 156(1)(i) and (3) of the Lawyers and Conveyancers Act 2006 Mr SW is ordered to pay a fine of \$1,000 to NZLS within 28 days of the date of this decision.

[53] Pursuant to s 210 of the Lawyers and Conveyancers Act 2006 Mr SW is ordered to pay costs on review of \$1,200 to NZLS within 28 days of the date of this decision.

**DATED** this 24<sup>th</sup> day of September 2015

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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:

Mr SW as the Applicant  
Mr RD as the Respondent  
Standards Committee  
New Zealand Law Society