LCRO 200/2016

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	**ZR** Applicant
AND	**FG** Respondent

DECISION

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

Introduction

[1] Mr ZR has applied for a review of a decision by the [Area] Standards Committee which decided to take no further action in respect of his complaint about Mr FG's conduct of matters on his instructions. Mr ZR seeks compensation.

Background

[2] Mr FG acted for XYZ Trust (the trust), on instructions from Mr ZR, in a contractual dispute arising from ABC Limited having built a house for the trust. In his complaint, Mr ZR describes the building process as a "disaster" saying, by the end of it, the builder owed the trust $270,000. As the builder believed the trust owed him $96,000, at that early stage the parties were $174,000 apart.

[3] Mr FG was instructed after the builder had commenced summary judgment proceedings in the District Court. Mr FG offered Mr ZR two choices: accept the jurisdiction of the District Court or protest that jurisdiction and attempt to resolve the dispute according to the contractual mechanisms of mediation and arbitration.

[4] Mr FG favoured mediation, and Mr ZR instructed Mr FG to propose that. Mr FG did so by serving notice on the builder's lawyer, who had indicated he was authorised to accept service on behalf of the builder. The parties did not engage in mediation and, although settlement offers were exchanged, the parties did not reach agreement. The parties attended arbitration, as a result of which the arbitrator allowed the builder's counter claim and awarded interest and costs, including indemnity costs, against the trust. Mr ZR says the whole exercise has left the trust at least $638,350.93 worse off.

Complaint

[5] In his complaint Mr ZR objected to what he saw as a string of failures on Mr FG's part starting early on and continuing throughout the retainer. Among the range of concerns expressed by Mr ZR is the assertion that Mr FG did not bring more pressure to bear on the builder at the start to persuade him to engage in the mediation process.

[6] Mr ZR says that as the matter progressed, although Mr FG told him the matter should settle and that the result was "too hard to predict", he did not provide him with any realistic advice on the prospects of success or the likely costs if the trust's claims failed. Mr FG says he did not understand what the worst possible outcome might be, and he saw the final "catastrophic" figure only when it was too late and the arbitrator had given the award.

[7] Mr ZR believes he would have taken an entirely different approach in settlement negotiations if Mr FG had quantified the worst case scenario by putting an accurate number on the possible costs and losses to the trust.

[8] Mr FG denied any professional wrongdoing, saying he advised and guided as best he could, but Mr ZR said he was in pursuit of a point of principle and told Mr FG he was aware of the risks.

[9] The Committee considered Mr ZR's complaint and the available materials, and concluded there was no basis on which to take further action in respect of Mr FG's conduct.

Review application

[10] In his application for review Mr ZR focuses on the manner in which Mr FG served the notice to attend mediation on the builder, or rather, on the builder's lawyer. Mr ZR says Mr FG did not properly serve the notice in accordance with the contract

which required service on the company's registered office. Mr ZR contends that if Mr FG had properly served the notice on the building company's registered office, the trust could have avoided most of the costs that followed.

Nature and scope of review

[11] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Lawyers and Conveyancers Act 2006 (the Act):[1]

> … 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.

[12] More recently, the High Court has described a review by this Office in the following way:[2]

> 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.

Discussion

[13] Mr ZR's view is that Mr FG did not serve notice of mediation in accordance with the contract. Instead he served it on the builder's lawyer.

[14] The Committee did not address this concern directly but said:

> [20] Mr ZR complained that Mr FG did not proceed by way of mediation.

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[1] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].
[2] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

> [21] In the Committee's view that discloses a misunderstanding of the position that the Trust was in at the time. [ABC Limited] had issued proceedings through the District Court and was at least initially successful. This put the Trust on the back foot.

[15] Mr ZR's argument on review is slightly different. He has come to believe that service of the mediation notice could only have been effective if the notice was served in accordance with the notice requirements of the contract. His argument relies on the flawed premise that the dispute would have been fully and finally settled through mediation.

[16] The argument is based on the contractual terms and how those operate between the parties. However, contractual issues are better suited to determination in a civil jurisdiction than to comment by this Office. Nonetheless, if it is accepted that serving the notice on the builder's lawyers instead of at the builder's registered office was wrong, the question is how that might translate into a professional standards issue.

[17] The first point is that when Mr FG was initially instructed, he knew the builder was represented by a lawyer. That lawyer had confirmed to Mr FG that his firm was authorised to accept service on the builder's behalf. As Mr FG had checked the service provisions in the contract, he was aware it specified the company's registered office. In the circumstances, rule 10.2 of the Lawyers' Conduct and Client Care Rules[3] generally obliged him not to communicate directly with the company. That is the usual operating position for lawyers unless one of the exceptions to the rule applied.

[18] One of the exceptions is rule 10.2.6, which allows a lawyer to communicate directly with a person represented by another lawyer where the communication is a notice or other document that must be given to the other lawyer's client personally in order to be effective. Rule 10.2.6 is not mandatory. It says a lawyer "may" communicate a notice or other document directly.

[19] It was entirely appropriate for Mr FG to rely on what the other lawyer had told him, and it was open to him to serve the first notice on the builder's lawyers, as he did on 21 February 2012. Although service may have been contestable elsewhere, in the context of professional standards, it cannot be said that Mr FG's conduct in serving the notice on the builder's lawyer was plainly wrong.

[20] Even though service did not accord with the terms of the contract, and the builder's cooperation could not be guaranteed, Mr FG could not have predicted that the builder would take a technical approach to service, particularly when mediation was the primary dispute resolution mechanism the contract provided for.

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[3] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[21] The builder's subsequent conduct suggests a general reluctance to engage in mediation. If that is correct, it is far from clear that the dispute would have been resolved early on through mediation even if the notice had been properly served. It is possible that the parties could have faced the cost of mediation on top of the cost of arbitration. That could have been even worse for the trust.

[22] I have considered the available material and can find no reason to take any further action in respect of any aspect of Mr ZR's complaint, none of which falls within any of the definitions of unsatisfactory conduct contained in s 12 of the Act. In the circumstances, the Committee's decision to take no further action in respect of Mr ZR's complaint about Mr FG's conduct is confirmed. Without a determination of unsatisfactory conduct there is no statutory basis on which this Office can order Mr FG to pay compensation or make any other orders pursuant to s 156 of the Act.

Decision

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

DATED this 29TH 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:

Mr ZR as the Applicant
Mr FG as the Respondent
Ms SH as a related person
[Area] Standards Committee
New Zealand Law Society