

LCRO 238/2012

CONCERNING

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

AND

CONCERNING

a determination of the Standards Committee

BETWEEN

YM

Applicant

AND

RP

Respondent

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

DECISION

Introduction

[1] Mr YM has applied for a review of a decision by the Standards Committee to take no further action in respect of his complaint concerning the conduct of the respondent, Ms RP.

Background

[2] Contemporaneous with pursuing this application, Mr YM also sought review of a Committee's decision involving another practitioner in Ms RP's firm (Mr QA). The complaints, and the review applications, arose from identical background.

[3] In considering this complaint I have had the advantage of considering the comprehensive material provided in support of the review pursued against Mr QA.

[4] The background to both complaints is set out in the decision delivered in LCRO 239/2012. I do not propose to comprehensively traverse the background further in this decision.

[5] The background to this review involves a dispute over the management of an elderly lady's affairs (Mrs EW). Managing Mrs EW's affairs in circumstances where her health was declining, and there were conflicting views as to the instructions she was providing, presented as challenging.

[6] Ms RP's colleague, Mr QA, was representing Mrs EW. Mr QA also held a power of attorney in respect of property for Mrs EW.

[7] A complaint was made to Police that Mr YM had been causing Mrs EW distress. Both Mr QA and Ms RP made statements to the Police.

[8] Mr YM's concerns regarding the statement made by Ms RP is at the heart of his complaint.

The complaint and the Standards Committee decision

[9] Mr YM filed his complaint with the New Zealand Law Society Lawyers Complaints Service on 19 December 2011. Mr YM submits that:

- (a) Ms RP made a number of statements to the Police which were unsupported by evidence. The effect of the statements was to result in the Police being significantly misled.
- (b) Ms RP had failed to disclose significant information to the Police.
- (c) Ms RP's allegation that Mr YM had engaged in controlling or intimidating behaviour was not supported by evidence.
- (d) Ms RP's misrepresentations, constitute breaches of rules 11.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, (the Rules) and section 6 of the Lawyers and Conveyancers Act 2006.

[10] In response, Ms RP submitted that:

- (a) The statement she made to the Police was never intended to be an exhaustive catalogue of all of the incidents which had contributed to the impression she had formed of Mr YM.
- (b) She had attended a lengthy meeting with Mrs EW, during which Mrs EW had made clear her concerns about Mr YM.
- (c) Mrs EW had been well able to articulate her concerns.
- (d) She did not resile from her view that Mr YM's behaviour and actions had significantly impacted upon Mrs EW in a negative way.
- (e) She had sufficient information to form the views expressed.
- (f) She had no involvement in contacting the Police to make a complaint.
- (g) Her statement to the Police was made from the context of having reviewed correspondence, addressed legal issues, and her discussions with Mrs EW.
- (h) She rejects allegation that her statements were misleading or deceptive.

[11] The Committee distilled the issue to be considered was whether the statement made by Ms RP was misleading and deceptive.

[12] The Committee delivered its decision on 22 August 2012. The Committee determined that no further action was necessary. The Committee concluded that:

- (a) Ms RP's statement did not have the force of a sworn statement.
- (b) The statement was a distillation of Ms RP's views.
- (c) Mr YM's objection to aspects of the statement did not mean that Ms RP's conduct amounted to unsatisfactory conduct.
- (d) Mr YM had not provided any evidence that Ms RP was in any way deliberately misleading or deceitful in the content of her statement.

Application for review

[13] Mr YM filed an application for review on 11 September 2012. He submits that:

- (a) Ms RP's statement contained half truths and false statements.

- (b) Her statement relied on anecdotal evidence.
- (c) Claims made by Ms RP were extravagant.
- (d) Ms RP's statements carried the force of statement made by a professional person, and greater weight would have been placed on those statements than if they had been made by a lay person.
- (e) The statement, whilst not unlawful, constituted a breach of professional standards.
- (f) Ms RP's contact with Mr YM had been limited. Her information to the Police was in large part based on hearsay evidence.
- (g) Ms RP had minimal understanding of Mr YM's involvement with Mrs EW, and was not able to responsibly comment on it.
- (h) Sources from whom Ms RP had gleaned information were not disinterested parties.
- (i) Elements of Ms RP's statement were demonstrably untrue.

[14] By way of remedy, Mr YM seeks compensation of \$15,000, and for Ms RP to be censured and fined.

[15] In response to the review application, Ms RP submitted that:

- (a) There was no reasonable legal or factual basis for amending or replacing any of the orders made by the Standards Committee.
- (b) She reiterates her belief that her statement to the Police was neither misleading nor deceitful.
- (c) She had no doubt that when she attended on Mrs EW, Mrs EW was able to discuss matters in a lucid manner.
- (d) Her statement made to the Police was a fair reflection of the impressions she had gained through her personal involvement with Mrs EW and her knowledge of the communications between Mr QA, Mr YM and Ms OO, her discussions with various counsel, and her involvement in negotiating an arrangement with Mr YM.

[16] Further submissions were received from both parties.

Review on the papers

[17] Mr YM and Ms RP 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 Lawyers and Conveyancers Act 2006 (the Act), which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all the information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

The role of the LCRO on review

[18] The role of the LCRO on review is to reach his own view of the evidence before him. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting his own judgment for that of the Standards Committee, without good reason.

[19] In *Deliu v Hong* it was noted that a review is:¹

... 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.

[20] I note that the submissions filed by the parties were extensive.

Analysis

[21] Mr YM levels serious accusation at Ms RP. He submits that Ms RP provided a statement to the Police that was misleading and deceptive. He contends that the Police would have given considerable weight to the statement because Ms RP was a lawyer, and would have placed some reliance on her considerable experience as a practitioner practising in the area of mental health and protection of personal and property rights (PPPR).

[22] This review engages consideration of the extent to which a practitioner can be said to have breached their professional obligations, as a consequence of providing a statement to the Police, which is alleged to be inaccurate to the point of misleading.

[23] Ms RP was not acting for Mr YM.

¹ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [40]-[41].

[24] The extent to which a practitioner owes obligations to third parties is limited.

[25] The Conduct Rules which are engaged when considering a complaint of providing a misleading statement are, rules 11.1, 2, and 2.3.²

[26] A statement, improperly made to Police, may also engage consideration as to whether a practitioner has breached his or her obligations to uphold the rule of law, and to facilitate the administration of justice.³

[27] A statement made to the Police with deliberate intent to deceive or mislead, or made with a wilful or reckless regard to the truth of the statement made, may also engage a consideration as to whether the more serious charge of misconduct arises,⁴ being conduct that would reasonably be regarded by lawyers of good standing as being disgraceful or dishonourable. Neither the Standards Committee nor this Office, have jurisdiction to make findings of misconduct.

[28] Rule 11.1 provides that 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.

[29] Matters captured by rule 11.1, have been described as concerned with misleading or deceptive conduct in relation to the lawyer's practice. It concerns matters such as the lawyers practising certificate status, expertise in particular areas of the law, the existence of an association, affiliation or endorsement, or fee charging practices. The rule is not directed at misleading and deceptive conduct in the lawyer's advocacy work. That matter is more directly addressed by rule 13.1 which emphasises a lawyers' duty of fidelity to the Court.⁵

[30] In my view, Ms RP's conduct in providing a statement to the Police, does not constitute conduct which could be seen to engage her making representations on any aspect of her practice.

[31] In his initial complaint, Mr YM contended that Ms RP's conduct raised issues under s 6 of the Act. Section 6 of the Lawyers and Conveyancers Act is the interpretation section of the Act. I assume that Mr YM was intending, when referencing

² Lawyers: Conduct and Client Care Rules 2008.

³ Lawyers and Conveyancers Act 2006, s 4(a).

⁴ Section 7.

⁵ Duncan Webb *Ethics, professional responsibility and the lawyer* (2nd ed, LexisNexis, Wellington, 2006) at 410 and 510.

that section, to be advancing argument that Ms RP's conduct constituted either unsatisfactory conduct, or misconduct.

[32] Fundamental to a consideration as to whether Ms RP's statement raises conduct issues, is:

- (a) an examination of the statement.
- (b) A consideration of the context in which the statement was made.
- (c) A consideration as to whether the statement was made with intent to mislead or deceive, or made with a wilful disregard for accuracy.

[33] Ms RP did not initiate the complaint to the Police. The statement was not made in the context of a criminal inquiry. The complaint to the Police had been initiated by Mrs EW's welfare attorney, and supported by a representative from the organisation Aged Concern. Ms RP's statement was not in the form of a formal affidavit. The statement was not signed. The statement is clearly recorded by Ms RP to be a presentation of her views.

[34] I have given careful consideration to the statement made by Ms RP, and the criticisms Mr YM raises.

[35] A significant component of Ms RP's statement is factual and non-contentious.

[36] Matters raised in the statement which led to allegation of misleading and deceptive conduct, are those where Ms RP contends that Mr YM:

- (a) Acted in a blatantly self-interested manner.
- (b) Breached his role as property attorney.
- (c) Harassed and intimidated Mrs EW.
- (d) Exercised unnecessary control over Mrs EW.
- (e) Attempted to usurp Mrs EW's wishes.
- (f) Employed Mrs EW's funds for improper purpose.
- (g) Had endeavoured to control Mrs EW's discretionary spending.

[37] Mr YM considered that Ms RP had little knowledge or appreciation of the background to the dispute, minimal understanding of the nature of his relationship with Mrs EW, and a propensity to provide inaccurate account of matters in which she had little personal experience.

[38] Whilst Mr YM argues that Ms RP's statement was underpinned by a lack of first-hand knowledge, that was not the case. Ms RP had attended a lengthy meeting with Mrs EW, during which time, she had formed a clear view that Mrs EW was a person well able to verbalise her views in a coherent and logical manner. Further, Ms RP reports that she discerned that Mrs EW was apprehensive and concerned at the prospect of upsetting Mr YM. She reports that Mrs EW had expressed to her in general terms, concerns about Mr YM.

[39] Ms RP's knowledge of Mrs EW's circumstances were not gleaned solely from her single meeting with Mrs EW. Ms RP had been asked to assist Mr QA because of her particular experience in dealing with PPPR matters. Mr QA had known Mrs EW for a number of years. Ms RP also had discussions with Mrs EW's personal attorney.

[40] Argument advanced by Mr YM that Ms RP lacked an understanding of his relationship with Mrs EW, did not preclude Ms RP from providing observation as to the impression she had formed of Mrs EW. Nor does argument that Mrs EW lacked capacity exclude Ms RP from providing her views. Ms RP, a practitioner experienced in PPPR matters, had formed a clear impression that Mrs EW was able to provide lucid and coherent instructions. Ms RP was in no doubt that her client was expressing genuine reluctance, and a degree of apprehension, in dealing with Mr YM.

[41] It is from that background that Mr YM's conclusion that Ms RP was not qualified to make a number of the comments she made to the Police, must be considered. I do not consider that Ms RP's comments were made in circumstances where she was so ill informed as to the background giving rise to the complaint, as to materially prejudice her ability to provide a view.

[42] In large part, Mr YM's objections, whilst couched in the language of allegation of misleading and deceptive conduct, engage matters where he and Ms RP have diametrically opposing views.

[43] Mr YM considers that the impression Ms RP had formed of his relationship with Mrs EW was inaccurate, and unsupported by the evidence of his longstanding relationship with Mrs EW, but Ms RP, providing accurate recount of the impression she had formed of Mrs EW, does not constitute conduct which is misleading or deceptive.

[44] Nor do I consider that the comments made by Ms RP, concerning Mr YM's management of Mrs EW's financial matters, raise issues of inappropriate conduct.

[45] Ms RP criticises Mr YM's decisions to close Mrs EW's cheque account, and to pay his legal fees. Neither of the positions advanced (qualified in the statement as "her views"), presents as misleading or deceptive, or statements made with ulterior motive. The issue of payment of legal fees was contested. That issue was to be determined by the court, but apparently remained unresolved when the proceedings before the court were withdrawn.

[46] Ms RP considered that there was no legitimate basis for Mr YM's decision to close Mrs EW's cheque account. Whilst Mr YM submits that his decision was supported by the bank, Ms RP did not consider that there was any evidence to support conclusion that Mrs EW was incapable of managing her account. It is not the role of this Office to resolve conflicts of opinion, nor is it possible, on the facts presented, to conclude that Ms RP had been irresponsible in her assessment as to the appropriateness of Mr YM closing the account. She had formed a view on the basis of the evidence available to her, and her opinion as to how Mrs EW's financial affairs should at the time have best been managed, with particular focus on the principles of least intervention that she was well aware, underpin the management of an elderly persons affairs.

[47] Mr YM considers that he was unfairly excluded from having contact with Mrs EW, and that his role as Mrs EW's property manager was usurped on the basis of unfair allegation that he was not acting in Mrs EW's best interests.

[48] To a degree, the detailed submissions and comprehensive account of the background to the dispute provided by Mr YM in support of his application, reflect his efforts to provide response to that criticism.

[49] Ms RP is criticised for advancing argument that Mr YM was not acting in Mrs EW's best interests. Whilst that allegation was hurtful to Mr YM and considered by him to be false, the fact that Ms RP had formed an unfavourable view of Mr YM's conduct, and reported that view to the Police, does not in itself raise disciplinary issues. Ms RP's opinion was based on her assessment of Mr YM's conduct.

[50] It is clear from the statement provided, that Ms RP places a degree of reliance on information that had been reported to her, as well as the impressions she had formed herself. The statement is not in the form of a sworn affidavit. She repeatedly emphasises that she is providing a view of Mr YM's conduct. Importantly, her

assessment of Mr YM's conduct is measured by reference to what she, as a practitioner experienced in the area, considered was appropriate conduct for a person acting in the capacity of property attorney for an elderly person.

[51] Whilst Ms RP concedes that perhaps the "wording and order of the paragraphs in the statement would have resulted in a document better expressing my view,"⁶ she does not resile from the position that she had formed the view that Mr YM's actions had impacted on Mrs EW in a negative way.

[52] It is not clear precisely how a rewording or ordering of her statement would have resulted in a better expression of her position.

[53] I accept that Mr YM emphatically rejects Ms RP's views of his conduct, but I do not consider that the statement, considered in its totality, and considered within the context from which the statement was made, merits a disciplinary response.

[54] The statement cannot reasonably be construed as a statement made by Ms RP with intention to mislead or deceive. Nor do I consider that the statement reflects Ms RP exercising a legal process for an improper purpose,⁷ or that the statement establishes a reasonable basis for conclusion that Ms RP was in breach of her duty to uphold the rule of law and to facilitate the administration of justice.

[55] It is argued for Ms RP, that Mr YM's approach to the complaints process has been argumentative, and that he provided no reasoned basis for arguments advanced on review.

[56] I do not agree with that assessment. Whilst Mr YM has been thorough and comprehensive in the approach he has adopted to pursuing his complaints, I consider that the complaints were progressed with genuine conviction.

Decision

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

DATED this 31st day of March 2016

⁶ Correspondence Mitchell to NZLS (14 February 2012).

⁷ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rule 2.3.

R Maidment
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 YM as the Applicant
Ms RP as the Respondent
CL as a Related Person
JJ as the Respondent's Representative
The Standards Committee
The New Zealand Law Society
Secretary for Justice