LCRO 249/2012

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of [Area] Standards Committee
BETWEEN	**VM** Applicant
AND	**ND and HB** Respondents

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

Introduction

[1] Mr VM complained that Mr ND had not represented him to a satisfactory standard when acting on his behalf in respect of proceedings issued against Mr VM by Mr PR.

[2] Mr VM also complained about Ms HB as Mr ND's instructing solicitor.

[3] The Committee made four findings of unsatisfactory conduct against Mr ND and imposed the following sanctions:

a. It censured Mr ND pursuant to s 156(1)(b) of the Lawyers and Conveyancers Act 2006.

b. It ordered Mr ND to pay Mr VM the sum of $3,000 pursuant to s 156(1)(d) of the Act by way of compensation for the stress and anxiety caused to Mr VM.

c. It ordered Mr ND to pay costs of $1,500 pursuant to s 156(1)(n) to the New Zealand Law Society.

[4] The Committee determined to take no further action in respect of the complaint against Ms HB.

[5] Mr VM has applied for a review of the Standards Committee's determination, in particular, seeking further compensation from Mr ND.

Background

[6] Mr PR issued proceedings against Mr VM in which he sought to recover various payments and benefits from Mr VM totalling approximately $135,000. The causes of action were pleaded as deceit and money had and received.

[7] Mr VM instructed Mr TL of the Law Firm 1, to act on his behalf. It is apparent from correspondence on Mr ND's file that Mr VM did not pay Mr TL's accounts, and in a letter dated 19 September 2008 to Mr VM, Mr TL confirmed a discussion with Mr VM that he could not continue acting "unless the issue of costs is satisfactorily resolved".

[8] This led to a situation where there was an urgent need for Mr VM to file a statement of defence to Mr PR's claim.

[9] Mr ND is the uncle of Mr VM's wife, and he was approached by his niece and Mr VM to assist. A statement of defence was prepared and filed by Mr ND and he continued to act for Mr VM up until, and at, a judicial settlement conference.

[10] Mr VM's complaints relate to the advice and representation provided by Mr ND. The events and advice giving rise to the complaints, are set out in detail in the Standards Committee's determination, and there is no need for me to traverse these again.

The Standards Committee determination

[11] The Standards Committee determination (comprising 20 pages) is comprehensive in its record of the background to the proceedings, the events, the conduct complained about and the Committee's consideration of the issues. There is nothing to fault in the Committee's consideration and determination of the issues or the detailed reasoning provided in the written determination.

[12] The Committee reached the following findings:[1]

> a. [Mr ND] Failed to provide adequate and timely client care information to Mr VM at the outset of the retainer…
>
> b. [Mr ND] Failed to keep Mr VM [adequately] informed of the progress of the matter…
>
> c. [Mr ND] Failed to obtain and follow Mr VM's informed instructions on significant decisions in respect of the conduct of the litigation…
>
> d. [Mr ND] Failed to provide advice to Mr VM in writing, which (together with his wider conduct) fell below the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

[13] After a careful consideration of the appropriateness of the orders to be made pursuant to s 156(1) of the Lawyers and Conveyancers Act 2006, the Committee made the orders set out in [3].

[14] It is these orders with which Mr VM takes issue.

Ms HB

[15] The Committee processed Mr VM's complaints as being against Mr ND and his instructing solicitor Ms HB. Ms HB accepted what is referred to as a "reverse brief" from Mr ND and the Committee noted that the error she fell into was "to enter into a reverse brief arrangement without attending to the necessary formalities of client care (or ensuring that Mr ND would do so)".[2]

[16] The Committee then went on to say:

> 100. The implications for Ms HB of a finding of unsatisfactory conduct would be, in the Committee's view, beyond those which her conduct deserves particularly when it is common ground that Mr ND took upon himself the burden of providing client care information to Mr VM. In the Committee's view it would be going too far to criticise Ms HB for not having ensured that Mr ND did so, or that he did so in appropriate terms. She was entitled to assume that Mr ND would attend to those responsibilities and obligations appropriately.
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> 101. Accordingly the Committee makes a determination to take no further action in respect of the complaint against Ms HB, pursuant to s 152(2)(c) of the Act.

[1] Standards Committee determination, [Date] at [102].
[2] Standards Committee determination, [Date] at [99].

[17] Ms HB advised this Office on receipt of the application for review, that she relied on her submissions to the Standards Committee and did not, and was not required to, participate further in this review.

[18] Although Mr VM says that "from [his] point of view [he has] no complaint against Ms HB"[3] I confirm I have considered the evidence concerning the complaint against her and the Committee's determination. I record that I consider the determination of the Standards Committee with regard to Ms HB to be the appropriate determination in the circumstances, and endorse the comments of the Standards Committee as set out in [16] above.

The application for review

[19] Mr VM's application for review was accompanied by 11 pages of detailed comments on the Standards Committee determination. The comments are directed, in the main, at highlighting the egregious nature of Mr ND's conduct. At the review hearing, Mr YK also went to some lengths to take issue with the dates referred to by Mr CN[4] on which certain events occurred,[5] and other responses by, or on behalf of Mr ND, with which Mr VM and Mr YK take issue. They argue that, as the statements are untrue (in other words, not accepted by them) they evidence dishonesty on Mr ND's part. The spuriousness of this submission is readily apparent.

[20] Mr VM's submissions are directed at supporting the desired outcome of this review which he records in the following way: "I am asking that the review award the maximum compensation within its capability plus the above mentioned legal costs".[6]

Review

[21] A review hearing was held in [Area] on 18 November 2015. Mr VM attended with his wife and his father-in-law, Mr YK. Mr ND attended, supported by Mr DE. Mr DE was in attendance if there was a need for evidence to be provided as to the events which took place at the settlement conference. I did not require to hear from Mr DE.

[22] At the review hearing, Mr YK handed up 14 pages of written submissions, which reiterated the supporting reasons provided with the review application. It is apparent from

[3] Reasons for review application at 10.
[4] Mr CN represented Mr ND in the complaints process.
[5] Letter CN to NZLS (11 January 2011).
[6] Above n 3.

the type print of the complaint, the application for review, and the submissions, that all have been prepared by Mr YK. Mr YK is Mr VM's father-in-law, and Mr ND's former brother-in-law. Mr YK provided advice and assistance to Mr VM throughout the proceedings and also attended the judicial settlement conference. Mr YK also represented Mr VM at the review hearing. In response to a question from me, Mr VM said he was in agreement with all that Mr YK had written and said, and Mr YK's statements have been recorded in this decision as those of Mr VM.

[23] Although the review application and the submissions made at the hearing are directed at achieving greater compensation, this review must also consider all of the investigation and determination of the Committee.[7] This necessarily included a consideration of the findings against Mr ND.

[24] At the hearing, I asked Mr ND to advise as soon as possible whether he wanted to respond to the submissions handed up by Mr YK and if so, when his response would be available. Notwithstanding a follow up call from this Office, Mr ND has not advised he wishes to respond. I have therefore proceeded with this decision.

[25] Notwithstanding that there are no submissions from Mr ND directed against the findings of the Standards Committee, I record here that I have considered all of the material relating to the complaints and the findings against Mr ND. As noted above, the consideration and the record of the determinations by the Standards Committee are comprehensive, as are the reasons provided by the Committee for its conclusions. I record here my endorsement of all of the reasoning of the Committee and confirm the findings against Mr ND.

[26] It would however be unfair to Mr ND to fail to specifically record the following paragraphs in the Committee determination:

> 32. It must be remembered that Mr VM was seeking urgent legal advice, which need Mr ND responded to and fulfilled. There was no criticism of the statement of defence filed by Mr ND, and he did so on time (and under significant time constraints).
>
> 33. In those circumstances the Committee's view is that it has not been shown that Mr ND did not have the requisite legal ability to undertake the case competently, and there is no evidence to show that it was inappropriate for him to undertake the work generally. While there are other concerns that the Committee has about the way the case was conducted, this aspect of the complaint is not sustained.

[7] *Deliu v Hong* [2012] NZHC 158 1 NZAR 209 at [39].

[25] It seems to me that credit is due to Mr ND for the work he undertook for Mr VM on an urgent basis. It is also pertinent to observe that a settlement conference must necessarily be approached from the point of view that each party will concede certain positions with the view to reaching a settlement. Mr PR's claim for $135,000 was settled for $50,000 but Mr VM (and Mr YK) are not happy with this.

The claim for compensation

[26] At [18] of its determination the Standards Committee noted:

> For completeness it should be noted that prior to the bringing of this complaint Mr VM had instructed GCA Lawyers who wrote asserting negligence on the part of Mr ND and Ms HB. There was an exchange of correspondence, but ultimately no formal claim was pursued and instead the lawyers assisted Mr VM to bring this complaint, as an alternative to such proceedings.

[27] It is extremely relevant to this review that in an email from GCA Lawyers, the author of the letter, Mr NM, wrote:[8]

> I regret the delay getting back to you but you sent a letter recently seeking a response to your client's position on the alleged negligence. Our client is still reflecting on the issues but has taken on board the difficulties seemingly associated with establishing neglect in the course of settlement discussions. We will provide further advice on that point but in the meantime our client has instructed us to assist in the preparation of a complaint to the Law Society as he feels 'fitness to practice' issues should now be explored. Among other things, that complaint will put in issue the appropriateness of the fee sought by Mr ND. We will advise further shortly.

[28] It is readily apparent from this email that Mr VM turned to the Lawyers Complaints Service in circumstances where there were acknowledged difficulties in pursuing a claim in negligence against Mr ND.

[29] In addition, Mr YK referred to an opinion provided to Mr NM by Mr DT dated 12 August 2010. This is an opinion as to whether or not a claim in negligence lay against Mr ND. An opinion, is just that – an **opinion**. Mr DT refers to possibilities. For example, referring to possible strike out applications Mr DT says:

> 31. As Mr PR's evidence did not support the debt claim, it is **likely** that such an application would have been successful.
>
> 32. As a result of these oversights:
>
> …

[8] Email NM to CN (9 August 2010).

> c. Had these applications been brought, the outcome **could** have been that the claims were brought to an end, with an order for costs against Mr PR.
> (emphasis added)

[30] Mr VM interprets these statements as statements of fact. He says: "The thorough assessment by Mr DT would suggest that a competent lawyer would have succeeded in having the claim struck out with costs awarded to me".[9]

[31] In addition, at [45] of his letter, Mr DT says: "At the very least, Mr VM has lost the chance to apply to strike out the claim (and if necessary, apply for summary judgment on the debt claim)". He had previously stated, at [41] of his letter: "The identification of loss in a negligence claim can be difficult".

[32] It is important to first of all disabuse Mr VM (and Mr YK) of their apprehension that a finding of unsatisfactory conduct is the same as a finding of negligence. Unsatisfactory conduct is defined in s 12(a) of the Lawyers and Conveyancers Act as "conduct of the lawyer…that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer…"

[33] The tort of negligence has been developed by the courts over centuries and it is only necessary to pay a cursory glance to any text book on the law of negligence to realise that it does not follow as a simple fact, that if a lawyer's conduct is adjudged to be unsatisfactory conduct in terms of the Lawyers and Conveyancers Act, then he or she is ipso facto negligent. Similarly, the reverse also applies.

[34] I refer for example to *The Law of Torts in New Zealand* where the author states:[10]

> This broad notion of carelessness is undoubtedly an integral part of negligence as a foundation for legal liability, but other elements are also involved. If one or more of those elements is lacking then an action will fail, even though the defendant may have been careless, even grossly so, in a popular sense.

[35] It is misleading to suggest that the principles of negligence are the touchstones for a finding of unsatisfactory conduct. It follows therefore, that it is a futile exercise, to refer to possible damages awards following a finding of negligence by the court, as the outcome to follow a finding of unsatisfactory conduct.

[36] Even if that statement is not accepted, compensation in terms of s 156(1)(d) may only be ordered where a person "has suffered loss by reason of any act or omission of"

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[9] Above n 3 at [106].
[10] Stephen Todd (ed), *The Law of Torts in New Zealand* (6th ed, Thomson Reuters, Wellington, 2013) at [5.1].

the lawyer. Consequently, it must be shown that the loss arose from a lawyer's breach of obligations and would not have arisen but for that breach.

[37] It is not for me to consider and pronounce on what "would" have happened if Mr ND had proceeded with strike out applications. The Standards Committee finding is not that he should have taken these steps, but that he failed to provide advice in writing, and failed to obtain informed instructions. I have already indicated my confirmation of the findings of the Committee.

[38] In addition, with regard to the failure to advise and discuss the strategy to be followed at the settlement conference, or the failure to follow instructions, it is pure speculation what the outcome would have been. Consequently, there are absolutely no grounds for making an award of compensation in favour of Mr VM.

[39] The Standards Committee did award Mr VM the sum of $3,000 for stress and anxiety. The Committee addressed the basis for such an award, and discussed the appropriate quantum in several paragraphs of its decision. Again, I endorse completely, the detailed comments and consideration by the Standards Committee, and the award of $3,000, on the basis as set out by the Committee.

Censure

[40] Mr VM queries what a censure "entails".[11] At the review hearing, referred Mr VM and Mr YK to comments made by the Court of Appeal in *New Zealand Law Society v B* as to the nature of a censure. In discussing the nature of a reprimand or censure, the Court said:[12]

> Both words envisage a disciplinary tribunal, here a Standards Committee, making a formal or official statement rebuking a practitioner for his or her unsatisfactory conduct. A censure or reprimand, however expressed, is likely to be of particular significance in this context because it will be taken into account in the event of a further complaint against the practitioner in respect of his or her ongoing conduct. We therefore do not see any distinction between a harsh or a soft rebuke: a rebuke of a professional person will inevitably be taken seriously.

It is apparent from these comments, that a censure is not something that will be recorded

[11] Above n 3 at [118].
[12] *New Zealand Law Society v B* [2013] NZCA 156 [2013] NZAR 970.

lightly, and without cognisance of its seriousness, by a Standards Committee, taken lightly by a lawyer.

Conclusion and decision

[41] It will be apparent from the foregoing comments, that I am in absolute agreement with the determination of the Standards Committee. Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Committee is confirmed.

DATED this 30th day of November 2015

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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:

Mr VM as the Applicant
Mr ND & Ms HB as the Respondents
Ms ES as a Related Person
[Area] Standards Committee
The Secretary for Justice
The New Zealand Law Society