

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

DN

Applicant

AND

TW

Respondent

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

DECISION

Introduction

[1] Ms DN has applied for a review of a decision in which the Standards Committee concluded no professional standards issues arose, and further action on Ms DN's complaint about Ms TW's service and fees was not necessary or appropriate.

Background

[2] Ms DN separated from her husband in March 2008, and in January 2009 instructed Ms TW to act for her. Ms DN was facing two issues: a potential claim against her and her former husband for a debt to a family trust (the trust) that may or may not have surrendered its interest in the family home to Ms DN and her husband while they were married, and the identification and division of property between Ms DN and her husband.

[3] Ms TW was assisted by Ms VS and both barristers were instructed by Mr R. There was some overlap between the works done by the two barristers, with Ms TW generally supervising Ms VS' work.

[4] Although she was not entirely certain what had happened at the time the transaction occurred, Ms DN contended that the trustees had relinquished the whole of the trust's interests in the family home to Ms DN and her husband. Ms DN's husband took the position that the trust had retained an interest in the family home, which would effectively reduce the share available to the two of them.

[5] Negotiations did not result in settlement. Ms DN applied for orders dissolving the marriage, then commenced proceedings in the Family Court seeking orders pursuant to the Property (Relationships) Act 1976 (PRA). Ms DN alleged bad behaviour in the course of the relationship on her husband's part. Her husband denied aspects of that. There were also issues around contributions, and whether the presumption of equal division was rebutted.

[6] As anticipated, the trust commenced a proceeding in the High Court against Ms DN and her husband seeking to recover the value of the trust's interest in the family home. The two sets of proceedings were joined together in the High Court.

[7] Further negotiations and a judicial settlement conference (JSC) did not result in settlement.

[8] Ms DN changed lawyers shortly after the JSC, then made a complaint about both barristers.

Complaint

[9] Ms DN's complaint was lengthy and detailed, touching on the service Ms TW had provided, her conduct and the fees she had charged, and alleging Ms TW did not provide her with information on how to make a complaint to the New Zealand Law Society Lawyers Complaints Service.

[10] Ms DN's service complaint can be summarised as allegations that the lawyers did not advise her well or manage her expectations adequately. As a result she ended up dissatisfied with the position she found herself in and her inability to resolve it. Ms DN considers that if she had been better advised she would have made different decisions, could have adopted a different strategy, got a better result sooner, and been charged lower fees.

[11] The dominant themes begin with a complaint about the timing of Ms DN's application for dissolution, move through Ms DN's experience of the negotiation and court processes, and focus on a claim she pursued under s 13 of the PRA. Ms DN asserts that no such claim could be sustained on the facts, and relies on a second opinion she later obtained that supports that view. Ms DN refers to a concession by Ms TW at the JSC that was not consistent with her understanding of the advice she had received from her barristers on the s 13 claim.

[12] Ms DN is unable to understand how the Judge's view on litigation risk could be so different from the understanding she had received from her barristers. Ms DN says Ms TW proposed settlement in terms that were not consistent with her instructions and tried to pressure her to agree to settlement at the JSC against her better judgement at the time.

[13] Ms DN says she raised her concerns with Ms TW shortly after the JSC, and wanted to put forward a settlement offer to her husband and the trust. Ms DN says Ms TW refused to follow her instructions, and expressed reservations about the continuation of the retainer.

[14] Ms DN believes neither of her barristers acted in her best interests, that they did not act in a timely manner and failed to keep her apprised of the work they were doing on her matter. Ms DN wants a reduction and refund on her fees, and compensation for costs she had incurred in pursuing her complaint.

Ms TW's reply

[15] Ms TW says she acted for Ms DN initially on instructions from Mr R and then on instructions from Mr H. In both cases Ms TW sent a letter of engagement to her instructing solicitor, and a copy of the letter to Mr R went to Ms DN's father who had been the first point of contact with Ms TW. From May 2009 communications were directly between Ms TW and Ms DN, although Mr DN also remained involved on his daughter's behalf.

[16] Ms TW says she acted in a timely, competent way throughout the retainer, and the fees rendered, which totalled \$45,032.47 for both barristers, were reasonable in the circumstances and consistent with the estimates given. Ms TW says the s 13 argument was sustainable but not the strongest ground. She sent a copy of the written advice she had provided in response to Mr DN's queries, and other documents, correspondence and file notes. She says Ms DN had not paid \$8,634.40 of her fees.

Ms DN's reply

[17] Ms DN provided a lengthy and detailed response disagreeing with much of what Ms TW had said, repeating and expanding on her complaint. Ms DN also took issue with the Committee having granted Ms TW an extension of time in which to provide further comments.

Ms TW's response

[18] Mr N, representing Ms TW, replied and expanded on Ms TW's response, and denied the extended complaint.

Standards Committee decision

[19] The Committee considered all of the materials and determined the complaint on the basis that it could find no evidence of conduct on Ms TW's part that was unsatisfactory within the definition in s 12 of the Lawyers and Conveyancers Act 2006 (the Act) and determined that further action was not necessary or appropriate.

Review application

[20] Ms DN's grounds for review relate to unfairness in the Committee process. She does not believe the Committee considered all of the materials she provided or all the areas of complaint, and objects to the Committee having allowed Ms TW more time to reply. Ms DN retains her concerns about the s 13 claims and refers to particular aspects of her complaint that the Committee did not explicitly address, including that Ms TW failed to provide her with clear information and advice. As the information and advice to which she refers was contained in the letter of engagement Ms TW sent to Ms DN's father, there is no purpose in engaging further with that concern.

Review on the papers

[21] The parties have 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 Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[22] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in

my mind that necessitate any further submission from either party. On the basis of the information available I have concluded that the review can be adequately determined in the absence of the parties.

Nature and scope of review

[23] The nature and scope of a review have been discussed by the High Court, which said of the process of review under 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.

[24] 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.

[25] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee’s determination, has been to:

- (a) Consider relevant materials afresh, including the Committee’s decision; and
- (b) Provide an independent opinion based on those materials.

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].

Discussion

Committee process

[26] Ms DN complains that the Committee extended the timeframe for Ms TW's response without affording her the same latitude. Her concern is based on the following factors:

- (a) Delays in the Committee process that adversely affected her interests because she was involved in a continuing proceeding without access to Ms TW's files.
- (b) The Committee process being an adversarial one.
- (c) Claims being made against her by the lawyers.

[27] The Committee process is not a means by which to resolve issues over liens, which is at the heart of Ms DN's concern about the continuing proceeding in which she was involved. As to extensions of time, Committees delegate to Standards Officers and exercise discretion over the process followed for each complaint. An extension of time to enable the practitioner to respond was well within the reasonable exercise of discretion.

[28] The Committee process is inquisitorial, not adversarial. Lawyers may give evidence about the part played by a client, but to say that claims are made against clients in the disciplinary process misconceives the purpose of the process. The disciplinary process relates to whether a lawyer's professional conduct has met minimum standards.

[29] There is nothing in the material available on review that suggests the Committee did not consider all of the material provided. Ms DN's concerns about the Committee not taking her interests into account lack a proper basis. Committees are not expected to address the minutiae of complaints. The focus is on whether standards have been met.

[30] I agree with the LCRO to whom Ms DN's concerns were referred at the time.³ There was no procedural unfairness arising from the Committee process.

[31] Furthermore, Ms DN has had the opportunity to add to her already lengthy and detailed complaint and submissions in the course of the review process. I have

³ Letter from LCRO to the Complaints Service (2 April 2013).

considered all of those materials, as well as the information that was before the Committee, and the Committee's decision. This decision focuses on the key areas of the complaint.

Dissolution

[32] Ms DN says she was not told of the limitation the PRA imposes on claims. She says when she applied for dissolution, she did so on advice from Ms TW, without realising she would be imposing a 12-month limitation on herself. Ms TW does not say she gave that advice, and there is no evidence of her having done so. While that apparent omission was an imperfection, it does not reach a point where a disciplinary response is required.

Section 13 advice

[33] Ms DN objects to Ms TW having advised her to base a claim on s 13 of the PRA, and to her then departing from that advice shortly before or at the JSC. Ms DN says that Ms TW capitulated at the JSC, saying the s 13 claim could not succeed.

[34] Ms TW says that the s 13 claim was made as part of an overall strategy aimed at putting pressure on Ms DN's husband and undermining his credibility and was based on evidence Ms DN said she had, but did not provide until shortly before the JSC. An analysis of that evidence resulted in a change to the advice, with Ms TW explaining that, without proper evidential support, the s 13 claim was not her strongest argument. Ms TW says she did not capitulate.

[35] Commentaries relating to s 13 suggest that, on Ms DN's initial instructions, a claim to an increased share in the relationship property could at least have been argued based on her reports of conduct by her husband.⁴ It is not clear why Ms DN is so adamant that no such claim could have been made or sustained other than with reference to her view of the evidence, which was not strong, or what she had been told by her husband's lawyer, which is not a reliable basis for concern.

[36] The key point, from the perspective of professional standards, is that on Ms DN's instructions there was some basis for the s 13 argument, and it was Ms TW's role to put forward the strongest case she could for Ms DN, even if parts of that case were weaker than others. If Ms DN could not produce adequate evidence to support her claim, there was little Ms TW could do about that.

⁴ *Fisher on Matrimonial and Relationship Property* (loose-leaf end, LexisNexis) at chapter 12.

[37] Ms DN was not present at the JSC, which tends to undermine her contention that Ms TW capitulated. Firm reliance on correspondence from her husband's lawyer in the course of negotiations again would be misplaced.

[38] In the circumstances no professional standards issues arise in relation to the s 13 issue.

Valuation

[39] Ms DN objects to Ms TW having relied, in the course of the JSC, on the valuation figure provided by Ms DN's valuer. That figure was the only formal valuation provided by any party. Ms TW says she was not told that Ms DN and her father believed the house was worth an additional \$100,000 until after the JSC.

[40] There is nothing objectionable in Ms TW having relied on the valuer's figure. That was the figure Ms DN's expert valuer had provided. There was no contradictory evidence from an expert. The only other views that may have been expressed were from Ms DN, her father and the other parties, none of whom claim to be expert valuers.

[41] No professional standards issues arise.

Litigation risk

[42] Ms DN objected to Ms TW having formed a view on litigation risk, and advising her on that basis, when the Judge formed a different view and directed negotiations at the JSC on that basis.

[43] Litigation risk is more than simply a scale costs risk, which is what Ms DN seems to suggest by her comments about ordinary litigation risk. It includes the risks attendant on there being so many variables in litigation that the outcome often cannot be predicted with any degree of accuracy. In her very early correspondence with Ms TW, Ms DN acknowledged that she could not recall the deal struck with the trust when she and her husband had replaced the trustees on the title to the family home.

[44] While Ms DN may have been able to convince herself that the trust had relinquished all its interests and given the whole property to her and her husband, it is apparent that the Judge at the JSC was not readily persuaded. Thus, that Judge's assessments of risk that litigation, had it proceeded, may not go in her favour was greater than Ms DN was willing to acknowledge. The settlement figure Ms DN and Ms TW discussed the day before the JSC was around \$395,000 to \$400,000. That must have been based primarily on an assumption of a 50/50 share in the whole of the

equity in the family home based on the valuation figure put forward by her valuer. Given the Judge's view that the trust could at least argue it had retained an interest, offers put to Ms DN were generous. Although Ms DN says the trustees' evidence could not be relied on, it was not tested in cross examination in the JSC, as it could be in a trial.

[45] The short point is that no one could predict litigation risk with a high degree of accuracy. There is no evidence that suggests Ms TW should be held accountable for Ms DN's decision to refuse the offer.

[46] No professional standards issues arise.

Fees

[47] The fee complaint included a concern about GST which is beyond the jurisdiction of the Committee and this Office to determine. From a professional standards perspective, when Ms DN identified there may be an issue around charging GST, Ms TW checked and acted in accordance with what she had found out. No professional standards issue arises.

[48] The Committee considered the fee complaint without appointing a costs assessor, and decided further action was not necessary because the fees were fair and reasonable.

[49] Ms DN's objection to the amount of the fees is mostly based on her belief that the s 13 claim was unsustainable, and on an estimate being exceeded and not revised.

[50] The s 13 claim has been addressed above. There is no basis for a reduction in fees arising from that.

[51] As to the provision of an estimate, estimates are one factor among several to consider. The estimate Ms TW gave, \$30,000 to \$50,000 for the whole retainer, was not exceeded, and it must be recalled that the \$45,032.47 the barristers charged included disbursements and GST.

[52] There is nothing in the materials that indicates the fee component of the invoices was unfair or unreasonable having regard to either party's interests, and when the reasonable fee factors in rule 9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 are considered. There is no good reason to form a different view to that formed by the Committee, and no reason to form the view that further action is necessary or appropriate.

[53] Ms TW's fee, including amounts Ms DN has already paid and excluding GST and disbursements, is confirmed as fair and reasonable.

Summary

[54] Although not every aspect of Ms DN's fulsome complaint and review application is referred to in this decision, all aspects have been considered on review. While Ms DN's concerns are acknowledged, after due consideration my opinion is that there is no reason to take a different view to the Committee on any of the matters Ms DN canvases in her complaint or on review. There is nothing in the materials that indicates further action is necessary or appropriate. The decision is therefore confirmed.

Decision

Pursuant to s 211 of the Lawyers and Conveyancers Act 2006 the Committee's decision is confirmed.

DATED this 8th day of August 2017

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:

Ms DN as the Applicant
Ms TW as the Respondent
Mr N as Ms TW's representative
[Area] Standards Committee
The New Zealand Law Society