

LCRO 258/2012

**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**

**ZA**

Applicant

**AND**

**GL**

Respondent

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

**DECISION**

**Introduction**

[1] Mrs ZA has applied for a review of a decision by the Standards Committee to take no further action in respect of her complaint concerning the conduct of the respondent, Mr GL.

**Background**

[2] In 2008, Mrs ZA, her husband Mr ZA, and her adopted daughter EM, instructed [Law Firm] to act for them in respect to immigration matters.

[3] Mr GL had the carriage of the file.

[4] Mr GL made application to Immigration New Zealand (INZ) for permanent residency for the family members. The applications were processed as separate applications.

[5] On 14 October 2008, INZ advised that Mrs ZA's application for residency had been approved. To finalise the matter INZ required Mrs ZA's passport to be forwarded to their office, and payment of a \$300 levy to be made. Mrs ZA contends that she

made arrangements for a bank cheque to be drawn in favour of INZ, and forwarded that cheque directly to INZ.

[6] On 25 November 2008, INZ granted Ms EM's application for a residence permit, on identical terms to her mother.

[7] On 9 June 2009 Mr GL forwarded further submissions to INZ. He attached with those submissions, Ms EM's passport and a cheque for payment of Ms EM's levy.

[8] On 10 June 2009 Mr GL was advised by INZ that Mrs ZA's application had been declined. Payment of the \$300.00 levy had not been received in time.

[9] It appears that the \$300 levy paid by Mrs ZA had inadvertently been credited to her daughter's application.

[10] Mrs ZA was served with a removal order.

[11] Mr GL made application to the Minister of Immigration to reverse the decision to decline Mrs ZA's application. The Minister declined to intervene in the case.

### **The Complaint and the Standards Committee decision**

[12] Mrs ZA lodged a complaint with the New Zealand Law Society Complaints Service on 4 March 2012. She made complaint that Mr GL had:

- (a) Failed to act competently or in a timely manner.
- (b) Failed to discuss his objectives and how those objectives were to be achieved.
- (c) Failed to provide information about the services to be provided.
- (d) Failed to act in a respectful manner.
- (e) Failed to provide information about the progress of the case.
- (f) Failed to provide information as to how to pursue a complaint.
- (g) Failed to communicate effectively.
- (h) Charged unreasonable fees for services provided.

- (i) Contributed, through his oversight, to the administrative error which led directly to Mrs ZA's application for permanent residence being declined.

[13] In response, Mr GL submitted that:

- (a) The residence applications presented particular difficulties because of the family circumstances.
- (b) Communication with his clients was hampered by language difficulties.
- (c) Problems with non-payment of the levy were the responsibility of INZ.
- (d) Fees provided for services were fair and reasonable.

[14] The Standards Committee delivered its decision on 7 September 2012.

[15] The Committee determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) that no further action on the complaint was necessary or appropriate.

[16] In reaching that decision the Committee concluded that:

- (a) Fees charged for work completed were fair and reasonable.
- (b) There was no evidence that would give rise to a finding of unsatisfactory conduct.
- (c) The misapplication of the \$300 residence levy fee was an issue that should be raised with INZ.

### **Application for review**

[17] Mrs ZA filed an application for review on 20 September 2012.

[18] Ms ZA submits that:

- (a) The Standards Committee failed to make adequate inquiry into her complaint.
- (b) Mr GL failed to forward her passport to INZ in the time-frame required.

- (c) Mr GL had represented that he had provided a cheque to pay the fee for her daughter's application, but there was no evidence of INZ receiving a cheque.
- (d) Mr GL failed in his duty of care.
- (e) Mr GL had advised that he had written to the Minister of Immigration but failed to do so.

[19] Mr GL was invited to comment on Ms ZA's review application. In response, he submitted that:

- (a) He placed reliance on submissions provided to the NZ Law Society.
- (b) He had been advised that Mrs ZA's cheque had been forwarded directly to INZ.
- (c) He considered that once advised that a cheque had been forwarded, he was entitled to rely on INZ advising receipt of that payment before attending to having the passport endorsed.

#### **The role of the LCRO on review**

[20] The role of the Legal Complaint Review Officer (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.

[21] In *Deliu v Hong* it was noted that a review is:<sup>1</sup>

... 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.

[22] In *Deliu v Connell*<sup>2</sup> it was observed that whilst a LCRO will be cautious to interfere with a Committee's decision, those seeking a review of a Committee's decision are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. That approach was seen to be consistent with

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

<sup>2</sup> *Deliu v Connell* [2016] NZHC 361 at [19].

what the Court considered was the broad and robust approach to be adopted on review.

### **The Hearing**

[23] A hearing proceeded with both parties on 22 March 2016.

### **Analysis**

[24] There has been considerable delay in bringing this matter to hearing. It is regrettable for both the applicant and the practitioner that this review has remained unresolved for such a considerable period of time.

### **Issues**

[25] Mrs ZA's complaints can be summarised under three heads:

- (a) Complaint that Mr GL failed to communicate effectively, and manage the file competently.
- (b) Complaint that Mr GL's fees were unreasonable.
- (c) Complaint that Mr GL's failure to monitor the progress of her application fatally compromised Mrs ZA's application for permanent residence.

[26] There is a degree of overlap in the complaints, but the critical issue, and the issue of most importance to Mrs ZA, is complaint that Mr GL's lack of diligence, fatally compromised her application for permanent residence. It is appropriate to address that issue first.

#### *Mr GL's failure to monitor the progress of her application/ forward passport*

[27] Some further background is necessary to fully contextualise the complaint.

[28] On 14 October 2008, INZ advised Mr GL that Mrs ZA's application for a residence permit had been approved in principle. Mrs ZA was advised that before the permit would be issued, she would be required to provide INZ with her passport for endorsement, and to pay a migrant levy of \$300. Mr GL held Mrs ZA's passport.

[29] On 25 November, Mr GL received correspondence from INZ for Ms EM in similar terms. Ms EM had also been successful in her application for a residence permit.

[30] In its correspondence of 14 October, INZ advises Mrs ZA that she will be provided with a copy of information relating to returning residents visas when her passport is returned. INZ emphasise that the passport and fee is required by 14 April 2009, and that INZ may decline her application if she does not satisfy the requirements.

[31] Mrs ZA arranged for a bank cheque to be drawn on 7 November 2008. Mrs ZA contends that she arranged for that cheque to be sent directly to INZ.

[32] On 9 June 2009, Mr GL wrote to INZ. That correspondence is drafted under two headings. He firstly refers to the applications involving Mr ZA and Mrs ZA, although he makes no comment on Mrs ZA's application. His focus is on endeavouring to resolve a serious problem with Mr ZA's application. Secondly, he provides Ms EM's passport and a bank cheque for payment of her migrant levy. Mr GL's correspondence records that the passport is enclosed to enable the passport to be endorsed with the residence permit.

[33] On 10 June 2009, INZ write to Mr GL advising that Mrs ZA's application has been declined. Information requested had not been provided within the required timeframe. Attempts to appeal the decision to the Minister of Immigration were unsuccessful.

[34] The consequences for Mrs ZA of her information not being filed with INZ within the required time frame were serious. She lost the ability to secure a residence permit, in circumstances where she had been successful with her application. She lays the blame for this administrative failure squarely at Mr GL's door. Mr GL was, she contends, remiss in not ensuring that INZ was supplied with her passport.

[35] Mr GL denies responsibility for the breakdown. He says that he was advised by Mrs ZA that she had forwarded her fee for the levy directly to INZ, despite his initial instructions to forward the fee to his office. Assured that the levy had been sent, Mr GL says he was awaiting confirmation from INZ that payment had been received before attending to having the passport endorsed with the necessary permit. This task could, says Mr GL, have been more conveniently attended to at an immigration office located in proximity to his office.

[36] After being advised that Mrs ZA's application had been declined, Mr GL commenced enquiries to ascertain why INZ had not received Mrs ZA's cheque.

[37] Criticism was initially made of INZ that they had misplaced the cheque, but further enquiry established that the bank cheque obtained by Mrs ZA in November 2008, had been used to pay Ms EM's fee in June 2009.

[38] The Standards Committee in brief explanation for its decision to make no conduct finding against Mr GL, recorded its view that the misapplication of the \$300 residency fee paid to INZ was a matter that should be pursued with INZ.

[39] Criticism of INZ was unfounded. INZ had received correspondence from Mr GL which recorded that he was providing, as requested, Ms EM's passport, together with a bank cheque for the required fee. His correspondence referred to Ms EM's date of birth, client number, and the application number for the file. On receipt of those instructions, INZ did precisely what it was requested to do and deposited the bank cheque for payment of Ms EM's fee.

[40] At hearing, Mrs ZA confirmed that it had remained her understanding throughout that her cheque for payment of the INZ fee had been directly forwarded by her daughter to INZ. That was not the case, and it is regrettable that Mrs ZA continued to labour under that misapprehension for a considerable period of time

[41] The question then arises as to how Mrs ZA's cheque was inadvertently deployed for the benefit of her daughter, and importantly, whether any disciplinary consequences should properly arise for Mr GL as a consequence of the error.

[42] How did a cheque intended for payment of Mrs ZA's levy be incorrectly forwarded to INZ to settle Ms EM's fee? When responding to the Complaints Service in the early stages of the complaints process, Mr GL indicated that he was uncertain as to how the cheque arrived on his file. He could point to no record of when the cheque was received. He notes that:<sup>3</sup>

What appears to have happened is that despite the advice that was given to me by both Ms EM and Ms ZA (that Ms EM had forwarded the cheque for Ms ZA's residence endorsement directly to INZ), Ms EM (who was in charge of the process for the family), had in fact forwarded the cheque to our office. There is no correspondence on file for the delivery of this cheque to our office. This is not unusual with our immigration clients, as often documents are brought to our reception desk, and placed onto the file without any more information than that. Sometimes documents are forwarded by post in an envelope with no covering letter and the document is placed on the file for use.

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<sup>3</sup> Mr GL to NZ Law Society (21 May 2012) at [6].

[43] Mr GL says that he did not know that the cheque that was on his file was intended for Mrs ZA's application.<sup>4</sup>

[44] I think it probable that Mrs ZA's cheque was posted to Mr GL's office, and that the cheque was on receipt, placed on an immigration file without record being made of date of receipt, or any indication provided as to what the cheque was intended to be used for.

[45] Whilst Mr GL explains that it was not an uncommon practice in his office for immigration documents to be delivered to his office and placed on files without record of being made of any details relating to receipt of the documentation, that presents as a practice which has considerable potential to create problems. It is surprising that proper record would not be made of details surrounding the receipt of a bank cheque.

[46] I think it likely that Mr GL, on discovering the cheque on his file, assumed that the funds were provided for Ms EM's application and forwarded the cheque to INZ in that belief. That does not present as unreasonable in light of the advice he had received from his clients that they had forwarded Mrs ZA's cheque directly to INZ.

[47] Criticism can however be made of the office practices which allowed for clients' cheques to be placed on a lawyers' file, without apparent acknowledgement of the date the payment was received, or any confirmation as to who the cheque was received from, or record being made of the purpose of the payment.

[48] The Lawyers Trust Accounting Guidelines recommend when a lawyer receives a cheque made out to a third party, that entry should be made into the practice's valuable property records required under s 112 (1)(b) of the Act, recording full details of the cheque, the date on which it was received, and details of the disposal of the cheque including the date on which, and the person to whom, the cheque was disposed of.<sup>5</sup>

[49] Whilst I do not consider that any disciplinary issues arise as a consequence of Mr GL treating the cheque received as having been intended to meet the cost of Ms EM's application, the issue then to be considered is why Mr GL, on being advised that Mrs ZA's fees had been forwarded directly to INZ, did not immediately dispatch Mrs ZA's passport, which he was holding at his office, to INZ.

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<sup>4</sup> Above n 3 at [14].

<sup>5</sup> Lawyers Trust Accounting Guidelines, p 5.10.



[50] Mr GL suggested that it was common practice for immigration lawyers to await confirmation from INZ that payment of the levy had been received and then to arrange for the passport to be endorsed at the local immigration office, in Mr GL's case, the [Area 1] office of INZ.

[51] I am uncertain as to whether the practice Mr GL describes is a common one, but what is clear from INZ's correspondence to Mr GL of 14 October 2008 is that INZ required both the levy and passport to be returned to its [Area 2] office. There is no indication from that correspondence that INZ had expectation that the passport would be endorsed at a local office once they had confirmed receipt of the fee, although I do not discount that may happen in some circumstances.

[52] But INZ's 14 October 2008 correspondence specifically directs that, "unless we already hold them, please send us valid passports or travel documents for all applicants so that we can endorse them with residence permits".

[53] Further, Mrs ZA is advised that she will receive a copy of information on how to secure a returning residence visa, when INZ return her permit and passport.

[54] Presumably to avoid any room for doubt, INZ (in bold typeface) reiterates that Mrs ZA is to forward her passport and fees to INZ before 14 April 2009, and cautions that a failure to return the documents within the specified time may result in her application being declined.

[55] In my view, Mr GL should have forwarded the passport to INZ immediately on receipt of advice that Mrs ZA had forwarded her fee to INZ. If he had done so, INZ would likely have responded by advising that no payment had been received and any confusion over where her bank cheque has been sent, could have been resolved.

[56] Whilst Mr GL suggests that it was common practice for him to arrange for passports to be endorsed at his local office, that was not the approach he adopted with Ms EM's application. He forwarded Ms EM's passport together with the required fee, directly to the [Area 2] office.

[57] It is important to emphasise that time would be of the essence in complying with a direction from INZ to file documents in a specified time, particularly so when the consequences of failing to comply would attract such serious consequences. A failure to ensure that two relatively simple administrative matters were not attended to resulted in Mrs ZA's application being declined.

[58] Mr GL received notice that Mrs ZA's application had been approved in mid-October 2008. He had six months to ensure compliance. Whilst Mr GL explained that it was his custom to speak with Mrs ZA by phone, rather than to communicate with her in writing, he conceded at hearing that he had, in failing to pursue the matter diligently, let Mrs ZA down. He accepted that he had not given the degree of conscientious attention to her file that was required.

[59] At minimum, Mr GL should have diarised the date by which time Mrs ZA's documents needed to be provided. He should not have relied on assumption that Mrs ZA's fee had been forwarded and simply waited for confirmation from INZ of receipt of funds, before attending to the passport issue.

[60] Significantly, the time by which Mrs ZA was required to file her documents, came and passed without Mr GL appearing to be aware of the fact. He was only alerted that Mrs ZA's application had been declined, when INZ responded in June 2010 to submissions Mr GL had made on behalf of Mrs ZA's husband.

[61] Mrs ZA was inexperienced in dealing with government departments. She was a person who needed careful guidance to assist her through the immigration process, and in that regard, she relied heavily on Mr GL.

[62] Seven months after receiving advice that her permit had been approved she was told that her application had been declined. There was no indication, and Mr GL fairly conceded this to be the case, of Mr GL taking steps during that lengthy period of time, to ensure that her application was properly concluded.

[63] Whilst it was unfortunate that Mr GL was incorrectly advised that Mrs ZA's levy had been forwarded to INZ, and I do not discount the impact that error had on contributing to the unfortunate outcome, Mr GL's inactivity over a significant period of time fell short of what could be expected of a diligent practitioner. Once put on notice that the passport and fee had to be provided within a set time, and mindful of the consequences that would follow from non-compliance, Mr GL had a responsibility to ensure that his client was kept informed. Importantly, he had a responsibility to diarise the time-frames for compliance, and to follow up with his client when it became apparent that there was risk of his client not meeting the time-frames. Whilst I accept Mr GL's evidence that it was his practice to communicate with Mrs ZA by phone rather than by correspondence, Mr GL, over a seven-month period, did not alert Mrs ZA to the risks she faced, or make any effort to clarify why there was delay in INZ acknowledging receipt of the cheque which Mrs ZA mistakenly believed had been forwarded to them.

[64] In my view, Mr GL's conduct falls short of the standard of competence and diligence required of a practitioner, when providing regulated services.

*Complaint that Mr GL's fees were unreasonable.*

[65] I agree with the Standards Committee that the fees charged by Mr GL were fair and reasonable. Whilst it was the case that Mr GL's management of Mrs ZA's application fell short following receipt of information that her application had been approved, the work he did in achieving initial success for Mrs ZA, and a positive outcome for Ms EM was considerable, and the obstacles he faced in proceeding the applications for the three family members significant. Fees charged present as reasonable for the work completed.

[66] However, I do not consider it reasonable that the ZA family should be required to pay Mr GL's account of 30 June 2011. That account, rendered in the sum of \$625.21 (GST and disbursements included) covered work that Mr GL had completed following receipt of advice that Mrs ZA's application had been declined. It is clear from the notation to the June 2011 account, that the work covered in that account related to efforts Mr GL was making to retrieve the situation. Those efforts included making submissions to the Associate Minister of Immigration and INZ. If Mr GL had been more conscientious in finalising Mrs ZA's application, those attendances would not have been required.

[67] I am unable solely on the basis of analysis of the notation to the June 2011 account to determine whether some of the work recorded in that account reflected work that had been done for Mrs ZA's husband, but it is reasonable to assume that Mr GL was very focused on endeavouring to reverse INZ's decision. I am satisfied that it is appropriate that the fee of \$625.51 be refunded.

*Complaint that Mr GL failed to communicate effectively, and manage the file competently.*

[68] As noted, there was a degree of overlap in the complaints. Mrs ZA's initial complaint made a number of criticisms of Mr GL.

[69] In large part, the complaints traversed above,<sup>6</sup> have been addressed in the context of the discussion engaged in considering complaint that Mr GL failed to

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<sup>6</sup> At 2.

adequately manage Mrs ZA's matters competently and diligently, following receipt of advice that her application had been approved.

[70] Mr GL's failure to take steps to ascertain the state of the application, engages both issues of competency, and issues of delay.

### **Conduct finding**

[71] In considering the obligations imposed on practitioners by the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008<sup>7</sup> I conclude that Mr GL's delay in engaging with INZ breached rule 3, in that he failed to act in a timely manner.

[72] Section 12(a) of the Lawyers and Conveyancers Act 2006, defines as "unsatisfactory conduct", conduct 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". The practitioner's failure to ensure that appropriate steps were taken to ensure that his client's immigration application was finalised is, in my view, conduct that meets the threshold of s 12(a).

[73] A finding of unsatisfactory conduct is established.

### **Orders**

[74] A finding of unsatisfactory conduct has been made. In light of this I must consider the appropriate penalty. By s 211(1)(b) of the Act, I am able to make any orders that could have been made by a Standards Committee.

[75] In considering appropriate penalty, I conclude that a finding of unsatisfactory conduct, together with orders that the final fee rendered by Mr GL be cancelled, reflects an appropriate and adequate penalty.

[76] In arriving at the view, I take particular account of the fact that the difficulties faced by Mrs ZA were caused in part by the providing of inaccurate information to Mr GL. Mr GL's approach to the review, and Mrs ZA's views, were also deserving of consideration when considering penalty. Mr GL was gracious in conceding that he had made errors, and genuinely remorseful for the difficulties he had caused his client. At hearing he proffered apology to Mrs ZA which was accepted by her. It was my sense,

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<sup>7</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

that Mrs ZA's grievances were significantly addressed by the sincerity and genuineness of the apology provided by Mr GL.

### **Decision**

[77] The Standards Committee decision is reversed in accordance with the terms of this decision.

### **Costs**

[78] Where a finding has been made against a practitioner it is appropriate that a costs order in respect of the expenses of conducting a review be made. In making this costs order I take into account the costs guidelines published by this Office. The practitioner is ordered to pay costs in the sum of \$1,200.

### **Orders**

[79] The following orders are made:

- (a) The practitioner is to cancel the fee for work done and recorded in invoice 90811 in the sum of \$625.51 (s 156(1)(f)).
- (b) The practitioner is to pay the sum of \$625.51 (s156 (1)(g)) to the applicant. This payment is to be made to the applicant within 30 days of the date of this decision.
- (c) The practitioner is to pay \$1,200 in respect of the costs incurred in conducting this review pursuant to s 210 of the Lawyers and Conveyancers Act 2006. Those costs are to be paid to the New Zealand Law Society within 30 days of the date of this decision.

**DATED** this 31<sup>st</sup> day of March 2016

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**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:

Mrs ZA as the Applicant  
Mr GL as the Respondent  
Mr TW as a Related Person  
Standards Committee  
The New Zealand Law Society