

**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**

**CS**

Applicant

**AND**

**RV**

Respondent

**DECISION**

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

**Introduction**

[1] Mr CS has applied for a review of a decision by the [Area] Standards Committee dated 17 July 2013 in which the Committee concluded that Mr CS's failure to progress Mr RV's file over a number of years constituted unsatisfactory conduct pursuant to the Lawyers and Conveyancers Act 2006 (the Act).

**Background**

[2] In 2006 Mr RV, believing he was entitled to make a claim against the estate of his grandmother, instructed Mr CS's firm (the firm) to assist him.

[3] The firm's name appeared on proceedings subsequently issued in the Maori Land Court (the court) and correspondence. Although the firm provided services to Mr RV from time to time without charging him, and remained on the Court record at least until November 2011 when Mr CS sold the firm, legal aid was granted for Mr RV's matter to a local barrister with lead provider status on 12 April 2006. The grant of aid

appears to have been exhausted by February 2007, with no legal aid payments having been made to Mr CS or the firm.

[4] Mr RV instructed a new lawyer in 2012, then made a complaint to New Zealand Law Society Complaints Service (NZLS) alleging delays on the part of Mr CS's firm. Mr RV's complaint about delay is driven by his inability to secure further funding from the Legal Services Agency (LSA) to progress his claims and the misapprehension that Mr CS's firm was in receipt of legal aid. Mr RV said that his matter had been with the firm for over five years and they had produced no results. He referred to the cost of legal aid ultimately being his debt, and to other losses, including interest, which he considers the firm should pay.

[5] Mr CS set out what he knew of Mr RV's involvement with employees of the firm. Mr CS says he was aware his employees were acting for Mr RV without charging him, and at times under the supervision of others better qualified than him and paid by LSA.<sup>1</sup>

[6] In the absence of the firm's file, the Committee obtained information from the court and LSA then wrote to Mr CS asking him what had happened between November 2011, when he had sold the firm, and June 2012 when Mr RV instructed his new lawyer. Mr CS was unable to answer in any detail, and did not have access to the firm's file.

### **Standards Committee Decision**

[7] After inviting submissions from the parties, the Committee considered the available materials and decided that Mr CS's conduct between 2006 and 1 August 2008 did not fall below a proper standard. As to conduct after 1 August 2008, when the Act came into effect, it considered whether Mr CS had contravened rules 3, 11 or 11.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the rules) which say:

3 In providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

...

11 A lawyer's practice must be administered in a manner that ensures that the duties to the court and existing, prospective, and former clients are adhered to, and that the reputation of the legal profession is preserved.

...

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<sup>1</sup> Mr CS referred to a loose arrangement between his firm and the barrister which appears to have involved the barrister paying some money to the firm. That is not relevant to this review.

- 11.3 A lawyer in practice on his or her own account must ensure that the conduct of the practice (including separate places of business) and the conduct of employees is at all times competently supervised and managed by a lawyer who is qualified to practise on his or her own account.

[8] The decision contains a chronology beginning in 1969 when Mr RV's grandmother died, through to June 2012. The involvement of others outside the firm who had the file from time to time is noted, as is the work the firm did without receiving payment. The Committee understood Mr H ceased working at Mr CS's firm around November 2011 and records that another lawyer, Mr P, held the file between 27 May 2010 and 13 September 2011.

[9] The decision proceeds on the basis that although others were involved at various times, the firm was responsible to Mr RV. Although that overlooks the involvement the lead providers appointed by the LSA, the appearance of Mr CS's firm on the Court proceeding is relevant to the decision, and to this review. The Committee referred to a seven month delay from 13 September 2011 to June 2012 that is attributed to the firm, and noted that Mr CS was unable to explain inaction between September 2011 and June 2012.

[10] The Committee considered Mr CS should have properly documented the retainer and amended the court record so it was clear who was responsible for the matter and on what basis. The Committee's view was that if arrangements satisfactory to Mr CS could not have been made, he should have terminated the retainer.

[11] The Committee concluded that Mr CS was professionally responsible for the file, except where others were involved as lead providers, and was personally responsible for delay between 13 September 2011 and June 2012. The Committee concluded Mr CS had not administered his practice in a manner that ensured his duties to Mr RV were adhered to and had not competently supervised and managed his employees' conduct. The Committee concluded that Mr CS's conduct contravened rules 3, 11 and 11.3 because of a lack of timeliness in providing services to Mr RV between September 2011 and June 2012, and deficiencies in managing and administering his practice and supervising his staff.

[12] The Committee did not order Mr CS to pay any money to Mr RV, but ordered him to pay a fine of \$1,500 and costs of \$500, both to NZLS, pursuant to s 156(1)(i) and (n) of the Act.

### **Review application**

[13] In his review application Mr CS says:

- (a) I have no information except the notice of determination – decision of the Committee.
- (b) I employed Mr T and Mr H for periods and had some knowledge of the complainant RV. It appears that Mr H worked with Mr P from May 2010 to September 2011. I had ceased to employ Mr H by 31 July 2011.
- (c) Mr P returned the file on about 13 September 2011. I do not believe I received or had notice of it. I sold the practice and ceased working on my own account about 1 November 2011.
- (d) I refer to [58] of the Standards Committee decision. Mr H may have received the file again, but he was no longer in legal practice or employed by me or the firm. I do not know who had the file. Nor can I explain the delay. I refer to [62]–[63] of the Standards Committee decision. I deny responsibility for the file or for the delay.
- (e) I was not invited to meet or address the Standards Committee and had no knowledge of or access to the file. I would plead natural justice.

*Mr RV's reply*

[14] Mr RV confirmed his earlier submissions, and contends that Mr CS's firm should refund money paid to them by LSA, because the case did not progress. He considers the exercise to have been a waste of his "time, effort, possible revenue, etcetera etcetera".<sup>2</sup>

[15] Mr RV wrote again on 16 January 2014 refreshing his claim for money, seeking a refund of fees paid to Mr CS's firm by LSA.

*Mr CS's response*

[16] Mr CS says that matters were beyond his control, but accepts that "the whole matter was unsatisfactory".<sup>3</sup>

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<sup>2</sup> Letter RV to Legal Complaints Review Officer (LCRO) (10 September 2013).

<sup>3</sup> Letter CS to LCRO (8 January 2014).

## Review Hearing

[17] Mr CS attended a review hearing in [Town] on 2 November 2016. Mr RV was not required to attend, and the review was determined in his absence with his consent.

## Nature and scope of review

[18] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:<sup>4</sup>

... 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.

[19] More recently, the High Court has described a review by this Office in the following way:<sup>5</sup>

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.

[20] 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 all of the available material afresh, including the Committee’s decision; and
- (b) Provide an independent opinion based on those materials.

<sup>4</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

<sup>5</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

## Analysis

### *Did LSA pay the firm?*

[21] It is evident from the LSA file that all of the fees were paid to the lead provider, and LSA made no payments to Mr CS's firm. Mr RV does not say he paid any money, so from his perspective, the firm acted without charging him. Mr CS said the firm did not benefit financially from the matter. That is not to say the firm, with Mr CS as its sole principal, did not owe Mr RV professional responsibilities.

[22] Before the Act came into effect on 1 August 2008 the conduct of lawyers was regulated by the Law Practitioners Act 1986 (LPA), and guided by the Rules of Professional Conduct for Barristers and Solicitors (ROPC). Under the LPA professional conduct that was not acceptable was misconduct. The transitional provisions of the Act limit the extent to which complaint can be made about conduct before 1 August 2008 to "conduct in respect of which proceedings of a disciplinary nature could have been commenced" under the LPA.<sup>6</sup>

[23] There is no evidence of conduct on Mr CS's part between 2006 and 1 August 2008 that could constitute misconduct, and no reason to further consider his conduct between those dates.

### *Unsatisfactory Conduct*

[24] With the Act coming into effect on 1 August 2008 unsatisfactory conduct became a professional standard defined in s 12 of the Act which relevantly says:

In this Act, unsatisfactory conduct, in relation to a lawyer or an incorporated law firm, means—

...

(c) conduct consisting of a contravention of this Act, ... or practice rules made under this Act that apply to the lawyer ...

[25] The rules the Committee considered, rules 3, 11 and 11.3, are practice rules made under the Act that applied to Mr CS.

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<sup>6</sup> Lawyers and Conveyancers Act 2006, s 351(1).

*Rule 3*

[26] Rule 3 obliged Mr CS to ensure that in providing regulated services to Mr RV his employees acted in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

[27] Mr RV's complaint alleges delay. He is not specific about when delay occurred or how delay was inconsistent with the terms of the retainer or the duty to take reasonable care. Mr RV's complaint conveys the general sense that five years was too long to wait for a determination from the Court. However, once the claim was made and the evidence was in, the lawyers had little control over timing. Evidence and submissions appear to have been filed in a timely way. Beyond those steps, there is no evidence to assist in determining what, if anything, should have been happening. No assistance is available from the Court or LSA files. No evidence was provided by either of the lead providers involved.

[28] The only lack of timeliness the Committee identified related to the period from September 2011 to June 2012. By that time the grant of legal aid had been exhausted, with no extension applied for and the file had not been closed. By June 2012, Mr RV had instructed a new lawyer and made a complaint that was essentially based on his inability to secure a further grant of legal aid, so the new lawyer could be paid. The Committee does not say what, if anything, should have been done between September 2011 and June 2012.

[29] A request that the Committee provide any further information that it relied on did not result in anything more being provided to this Office.

[30] Although Mr CS should have been, but was not actively monitoring the file, it is unclear what, if anything, he or his employees should have been doing between September 2011 and June 2012. It is not clear from the materials available on review where the September 2011 date came from. There is no evidence from the lawyer who was lead provider at that time. Mr CS refers to "a mountain of files" regarding Mr RV's parenting issues being sent back to the firm by another lawyer, which does not fairly describe the file relating to Mr RV's estate claim. None of Mr CS's correspondence acknowledges the lead provider delivered Mr RV's files to his office. It appears Mr CS is unable to say quite where the file was in September 2011. Although the position is not satisfactory, it is not possible to say that there was any lack of timeliness on the part of Mr CS or any of his employees.

[31] Without a proper evidential foundation the determination that Mr CS contravened rule 3 is unsafe. In the circumstances, the determination of unsatisfactory conduct based on a contravention of rule 3 is reversed.

*Rule 11*

[32] Rule 11 required Mr CS to administer his practice in a manner that ensured the duties to the Court and Mr RV were adhered to.

[33] The Committee made an adverse finding also arising from delay on the part of Mr CS between September 2011 and June 2012. Again, the difficulty with that determination is that there is no information to indicate what, if anything, was delayed.

[34] The real problem is that at times no one was actively monitoring the proceeding, and all the other lawyers involved appear to have left that responsibility to Mr CS. Although the evidence suggests the file may have been left at Mr CS's office in September, he cannot say for sure whether it was or not.

[35] It appears from the Court file that Mr CS's name first appeared on the Court record as Mr RV's lawyer when the proceeding was commenced on the basis of pleadings drafted by the legal provider. Mr CS, through his firm was in the position of instructing solicitor to barrister involved at the start. It is not clear why the second lead provider returned the file to Mr CS's office, if indeed he did. The second lead provider was a barrister and solicitor so Mr CS's firm was not required as instructing solicitor, but it appears Mr CS remained solicitor on the court record.

[36] As he cannot deny his involvement at that level, Mr CS cannot say whether or not duties to the Court and/or Mr RV were adhered to. Mr CS cannot prove his practice was administered in a manner that ensured the duties to the Court and Mr RV were adhered to while the proceeding, with his name on it, remained before the court. Although there is no evidence of any breach of duty to the court, Mr CS was obliged to ensure Mr RV's file was properly monitored. It was not. Responsibility fell back on Mr CS because he was named as Mr RV's lawyer on the Court record. It is not clear why neither of the lead providers took responsibility by having the Court record amended.

[37] However, if Mr CS had been alert to the associated professional obligations, he could have applied to the Court to be discharged from his obligations to Mr RV and the Court. As he was not generally aware of the file or the proceeding, he did not manage his practice in a way that ensured those obligations were met or brought to an end.



[38] In the circumstances, the finding that Mr CS contravened rule 11 has a proper basis. Mr CS's failure in that regard falls within the definition of unsatisfactory conduct in s 12(c) of the Act. The Committee's determination to that effect is therefore confirmed.

### *Rule 11.3*

[39] Rule 11.3 required Mr CS to ensure that conduct of his practice and his employees was at all times competently supervised and managed by a lawyer qualified to practise on his own account.

[40] Mr CS says he had no litigation practise, so delegated supervision and management of employees to others better qualified to undertake those functions. When those employees were no longer employed, Mr CS was relieved of his obligations in relation to them. Both of the lead providers involved were in practice on their own account outside the firm: one was a barrister, the other a principal in his own firm. The evidence does not support a finding that, where appropriate, Mr CS's employees were not competently supervised or managed by a lawyer in practice on his own account.

[41] As he was not actively involved in the file, believing others had accepted responsibility, although Mr CS contravened rule 11.3, it is appropriate to consider the exercise of discretion before making a determination that his conduct was unsatisfactory.

[42] The Committee considered his conduct was unsatisfactory, but it did not have the opportunity to discuss the situation with Mr CS. Mr CS found himself unable to properly defend himself without access to his file, which he says others have destroyed. As Mr CS describes his situation, having relinquished his practice, he is not in practise on his own account and is unlikely to return to practise as a principal.

[43] The more significant conduct issue is that Mr CS did not administer his practice in a manner that ensured the duties to the Court and Mr RV were adhered to. That has been addressed by the determination of unsatisfactory conduct arising from a contravention of rule 11 recorded above.

[44] In the circumstances it is not necessary to add a further determination of unsatisfactory conduct.

[45] The determination that there has been unsatisfactory conduct on Mr CS's part for a contravention of rule 11.3 is reversed.

### **Orders – s 156**

[46] Mr RV sought orders of a financial nature. The firm was not paid by LSA or Mr RV. There is no evidence that the firm caused him any loss. There is no basis on which to make any of the financial orders Mr RV seeks.

[47] The Committee ordered Mr CS to pay a fine of \$1,500 and costs of \$500.

[48] A fine is an appropriate way to address the conduct by way of penalty. However, on the basis that two of the three determinations of unsatisfactory conduct made by the Committee have been reversed, the fine is reduced to \$500.

[49] There is no reason to amend the costs order. That is confirmed.

### **Costs on Review**

[50] Section 210 of the Act provides the Legal Complaints Review Officer (LCRO) with discretion to order costs on review. As Mr CS's application was partially unsuccessful following a hearing convened at his request, he is ordered to pay costs on review of \$900. That reduction to the Costs Orders Guidelines amount of \$1,200 recognises Mr CS's partial success on review.

### **Decision**

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 determinations of unsatisfactory conduct pursuant to s 12(c) for contraventions of rules 3 and 11.3 are reversed.

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination that there has been unsatisfactory conduct on Mr CS's part pursuant to s 12(c) for contravention of rule 11 is confirmed.

Pursuant to s 156(1)(i) of the Lawyers and Conveyancers Act 2006 Mr CS is ordered to pay a fine of \$500 to the New Zealand Law Society within 28 days of the date of this decision.

Pursuant to s 156(1)(n) of the Lawyers and Conveyancers Act 2006 Mr CS is ordered to pay costs of \$500 to the New Zealand Law Society within 28 days of the date of this decision.

Pursuant to s 210 of the Lawyers and Conveyancers Act 2006 Mr CS is ordered to pay costs on review of \$900 to the New Zealand Law Society within 28 days of the date of this decision.

**DATED** this 18<sup>th</sup> day of July 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 CS as the Applicant  
Mr RV as the Respondent  
[Area] Standards Committee  
The New Zealand Law Society