

LCRO 261/2014

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

OL

Applicant

AND

MR and MRS RY and PP

Respondents

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

Introduction

[1] Mr and Mrs RY and their lawyer, Mr PP, complained about the conduct of Mr OL. On 28 August 2014 the Standards Committee issued a determination (the “findings determination”) in which it determined that certain aspects of the conduct complained about constituted unsatisfactory conduct. The Committee censured Mr OL and invited submissions from the parties as to what compensation,¹ if any, should be ordered to be paid, and whether the facts and/or Mr OL’s name should be published.

[2] Following receipt of submissions from the parties, the Committee issued a further determination on 8 October 2014 (the “penalty determination”) in which it declined to order Mr OL to pay compensation to Mr and Mrs RY for the losses they alleged they had incurred as a result of Mr OL’s actions. The Committee did however order Mr OL to pay the sum of \$2,500 to Mr and Mrs RY for stress and anxiety pursuant to s 156(1)(d) of the Lawyers and Conveyancers Act together with the sum of

¹ The Committee did not invite submissions as to what other penalties, if any, should be imposed.

\$10,000 pursuant to s 156(1)(o) of the Act for the costs and expenses incurred by Mr and Mrs RY in pursuing the complaint.

[3] The Committee determined that it was not necessary or appropriate for the facts of the complaint, or Mr OL's name, to be published. It did however, order publication of the findings determination to the Registrar-General of Land, as one of the findings was that Mr OL had provided a false certificate to the Registrar-General as to his authority to register certain documents against the title to the [Y Hotel], the property which was at the centre of the dealings between Mr and Mrs RY and another of Mr OL's clients.

[4] Mr OL applied for a review of the penalty determination. Mr PP responded to the application for review and included an application for review on behalf of Mr and Mrs RY. That application was both out of time and unnecessary, as a review is not limited to the issues raised on review by the applicant.²

[5] As some of the submissions provided in relation to this review touch on the findings of the Standards Committee and the findings determination, it is important to emphasise at this stage that this review is a review of the penalty determination only.

Background

[6] The facts giving rise to the complaints by Mr and Mrs RY (and Mr PP) are recorded in detail by the Committee in the findings determination and it is only necessary to provide some detail of the findings of unsatisfactory conduct by the Committee.

Failure to obtain authority from all members of the trust and falsification to LINZ³

[7] Mr RY was one of three trustees of the RY Family Trust.

32. The Standards Committee noted that Mr OL proceeded with the agreement on the basis that he only needed to obtain instructions and approval from Mr RY. This ignored the fact the he was acting for a trust, and was therefore required to obtain additional instructions from Mrs RY and the third trustee of the Trust, the RY's accountant.

33. In the Standards Committee's view, this led to a number of failings, including:

² *Deliu v Hong* [2012] NZHC 158 [2012] NZAR 209 at [39]-[42]; *R v D LCRO* 56/2009 10 August 2009, at [10] states the provisions of the Act relating to the review process empower the LCRO to revisit all aspects of a determination by a Standards Committee. Section 203 of the Act makes it clear that the scope of a review is confined to the Standards Committee's final determination and allows the LCRO to review any and all aspects of any inquiry or investigation relating to a final determination.

³ All quotations are from the findings determination, 28 August 2014.

- a. a failure to provide a letter of engagement to Mrs RY and the third trustee;
- b. a failure to obtain the appropriate authority from Mrs RY and the third trustee in relation to the loan;
- c. a failure to advise Mrs RY and the third trustee of the right to seek independent advice; and
- d. providing false certification to LINZ

...

37. ... In the circumstances, it was satisfied that Mr OL's conduct was sufficiently serious to warrant a finding of unsatisfactory conduct pursuant to sections 12(a) and 12(c) of the Lawyers and Conveyancers Act.

Did Mr OL fail to provide the RY's files and other relevant documentation?

[8] In addressing this issue the Committee came to the view that Mr OL breached rules 3.2 and 4.4.1 of the Conduct and Client Care Rules⁴ and that in doing so his "conduct was sufficiently serious to warrant a finding of unsatisfactory conduct pursuant to sections 12(a) and 12(c) of the LCA in relation to this aspect of the RY's complaint".⁵

[9] In summarising these findings the Committee said:

42. The Standards Committee having considered the complaint and conducted a hearing on the papers, formally determined, pursuant to section 152(2)(b)(i) of the LCA, that Mr OL had engaged in unsatisfactory conduct as a result of: his failure to provide the requisite advice to all members of the Trust, his failure to obtain the appropriate authority from all members of the Trust, the false certification he provided to LINZ and his failure to provide prompt confirmation of the registration of the RY's mortgage and their client files.

[10] The censure by the Committee pursuant to s 156(1)(b) of the Act was included in the findings determination and while it formed part of the penalty it is not subject to review. Consequently, it is only the compensation orders (\$2,500 for stress and anxiety and \$10,000 for the costs associated with the complaint) and the decision not to publish which was subject to review. I will also briefly consider whether or not other penalties should be imposed.

Review

[11] As noted above, this review commenced with an application by Mr OL. Mr PP's response of behalf of Mr and Mrs RY included an application for review by Mr and Mrs RY and also addressed the merits of the complaints. Mr OL's response, in turn, countered the submissions made by Mr PP.

⁴ Lawyer and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

⁵ Standards Committee determination at [41].

[12] A large proportion of the submissions by and on behalf of both parties therefore have no relevance to this review, being a review of the penalty determination only.

[13] Mr PP then advised that civil proceedings relating to the issues at the heart of the complaints had been set down for a hearing and submitted that the proposed review hearing be deferred until the civil proceedings had been disposed of.⁶ He also sought discovery of documents by way of a Legal Complaints Review Officer (LCRO) order, some (or all) of which no doubt had relevance to the civil proceedings.

[14] Shortly afterwards, Mr PP advised that Dr CA had been instructed as counsel for Mr and Mrs RY in relation to this review. I convened a telephone conference between the parties as it was apparent that either or both parties were labouring under some degree of misunderstandings as to the nature and ambit of this review. Following the telephone conference I issued a Minute⁷ in which I recorded how matters were to progress. Subsequently Mr OL advised that he was not going to be providing any further submissions (which he had previously indicated would be forthcoming) and Dr CA advised his request for documents was withdrawn.

[15] Both parties also provided their consent pursuant to s 206(2) of the Act to this review being completed on the material to hand. I will now address each of the penalties imposed by the Committee.

Compensation for stress and anxiety

[16] The Standards Committee ordered Mr OL to pay the sum of \$2,500 to Mr and Mrs RY pursuant to s 156(1)(d) of the Act for the stress and anxiety caused to them as a result of Mr OL's conduct. The Committee did not identify any specific conduct by Mr OL which would have resulted in Mr and Mrs RY undergoing stress and anxiety and it is necessary to relate this award back to the findings of the Committee. In this regard I refer to the finding of unsatisfactory conduct against Mr OL in respect of his failure to respond to communications from Mr PP and to report to Mr and Mrs RY, or to provide their files to Mr PP when requested.

[17] Awards for stress and anxiety in the region of the amount awarded by the Committee have been made or approved by this Office on a number of occasions. In *Wandsworth v Ddinbych* the LCRO said:⁸

⁶ Letter PP to LCRO (8 March 2015).

⁷ LCRO Minute, 23 July 2015.

⁸ *Wandsworth v Keith and Ddinbych*, LCRO 149 and 150/2009 at [19].

Given the purposes of the Lawyer and Conveyancers Act (which in s 3(1)(b) includes the protection of consumers of legal services) it is appropriate to award compensation for anxiety and distress where it can be shown to have occurred.

[18] The LCRO went on to say:⁹

There is, however, no punitive element to an award of damages for anxiety and distress. Such an award is entirely compensatory: *Air New Zealand Limited v Johnston* [1992] 1 NZLR 159 (CA). Such orders should also be modest in nature.

[19] In that case the LCRO ordered the lawyer to pay the complainants the sum of \$1,200 as compensation for the stress and anxiety suffered by them.

[20] I accept that Mr and Mrs RY have suffered some stress and anxiety as a result of Mr OL's conduct in respect of which the finding of unsatisfactory conduct have been made. The sum of \$2,500 was awarded by the Standards Committee and to vary this award by the Committee in this instance would be an unjustifiable interference with the discretion of the Committee. In the circumstances, the order to pay the sum of \$2,500 to Mr and Mrs RY pursuant to s 156(1)(d) of the Act is confirmed.

Compensation for costs of complaint

[21] The Standards Committee ordered Mr OL to pay Mr and Mrs RY the sum of \$10,000 on account of the costs and expenses incurred by them "in respect of the inquiry, investigation or hearing by the Committee".¹⁰

[22] It was satisfied "that Mr and Mrs RY have incurred costs and expenses as a direct result of Mr OL's conduct and the matters which have resulted in findings of unsatisfactory conduct".¹¹

[23] It noted:¹²

...that Mr OL failed to obtain the necessary instructions and authority from all members of the RY Family Trust before the loan was entered into. He also provided false certification to LINZ and failed to provide prompt confirmation of the mortgage that was registered. To compound matters, Mr OL failed to provide information and client files when directed to do so and he is yet to fully comply with his obligations in this regard. Whilst Mr and Mrs RY had initially sought to liaise directly with Mr OL about the issues that were raised in the complaint, their enquiries were met with obfuscation and prevarication.

In the circumstances, the Standards Committee is satisfied that it was necessary for Mr and Mrs RY to have instructed legal counsel to take steps to establish whether Mr OL had adhered to his professional

⁹ At [21].

¹⁰ Lawyers and Conveyancers Act, s 156(1)(o).

¹¹ Standards Committee determination, 8 October 2014 at [11].

¹² At [12]-[13].

obligations. It was also satisfied that Mr OL's conduct was responsible for the subsequent costs they had incurred in relation to that advice and their complaint. Those steps included the lodging of the complaint and subsequent steps in relation to the Standards Committee's investigation.

[24] The Committee went on to order that Mr OL should pay the sum of \$10,000 to Mr and Mrs RY "in relation [to] the costs and expenses that they have incurred in respect of the complaint and Standard Committee's investigation, pursuant to s 156(1)(o) of the LCA".¹³

[25] It is not necessary for any person wishing to lodge a complaint with the Lawyers Complaints Service to engage the services of a lawyer. Whilst s 134 of the Act, requires a complaint to be in writing, a putative complainant who is unable to write, may enlist the services of anyone to assist them in lodging a complaint. In addition, regulation 8(2) of the Complaints Service Regulations¹⁴ requires the Complaints Service to "give reasonable assistance to any person who wishes to make a complaint to meet the requirements of ..." lodging a complaint. This reflects the consumer orientated policy of the Act and the objective of providing an accessible and expeditious complaints process.

[26] Once a complaint is lodged, it is the function of Standards Committees to inquire into and investigate complaints (s 130(a) of the Act) or to take such other steps as are referred to in s 130. If a Standards Committee decides to inquire into and investigate a complaint, it will be required to conduct a hearing before reaching its determination. Hearings are to be on the papers, unless the Committee direct otherwise (s 153(1)).

[27] Section 156(1)(o) of the Act, enables a Committee to order a practitioner, to pay to the complainant "any costs or expenses incurred by the complainant in respect of the inquiry, investigation or hearing by the Standards Committee." Any "inquiry, investigation or hearing must necessarily occur after the complaint is lodged. Consequently, it is not possible to order a practitioner to reimburse a complainant for legal costs incurred in lodging the complaint.

[28] Once the complaint is lodged, it is the role of the Committee to inquire into and investigate the complaint, if it does not determine to take no further action. That does not require a complainant to act as a de facto prosecutor and the quality or otherwise of any material provided by a complainant, should not determine the outcome of the complaint. I accept that comprehensive and detailed submissions by a lawyer, may

¹³ Above n 11 at [14].

¹⁴ Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.

make the job of the Standards Committee easier but if a complainant does not engage the services of a lawyer to lodge and pursue the complaint, the Standards Committee is required to inquire into and investigate the complaint with the same degree of care and diligence as would be provided by a complainant's lawyer.

[29] An adverse finding by a Standards Committee, will usually result in a lawyer being ordered to pay the Standards Committee's costs and expenses pursuant to s 156(1)(n) of the Act. If a complainant has engaged a lawyer, and the Committee orders the lawyer to pay the complainant's lawyer's cost pursuant to s 156(1)(o), then the lawyer is being exposed to a double set of costs merely because of the complainant's choice to engage counsel.

[30] In my view, s 156(1)(o) should be restricted to circumstances, where, as part of its inquiry or investigation, a Standards Committee calls on the complainant to provide further information, which is only obtainable by the complainant incurring cost or expense in order to be able to comply with that request.

[31] In the present instance, Mr and Mrs RY engaged Mr PP to assist them in investigating the documentation relating to the further advance made by them, and to protect their interests, which coincided with those of Mr BT.

[32] All of these costs are not costs which relate to the "inquiry, investigation or hearing" by the Standards Committee and are not therefore costs which Mr OL could be ordered to pay pursuant to s 156(1)(o). In addition, I do not consider Mr OL should be ordered to pay Mr PP's costs in relation to the lodging or pursuing of the complaint, as this was neither necessary nor requested by the Committee.

[33] The reasons provided by the Committee for ordering Mr OL to pay Mr and Mrs RY the sum of \$10,000 in costs, read more as an order to pay the costs incurred by them as a result of Mr OL's conduct. In other words, incurring Mr PP's legal costs resulted from Mr OL's acts or omissions, and this then becomes an order pursuant to s 156(1)(d) which reads "Where it appears to the Standards Committee that any person has suffered loss by reason of any act or omission of a practitioner ..." the Standards Committee may "order the practitioner ... to pay to that person such sum by way of compensation ... a sum not exceeding \$15,000.

[34] The questions to be answered then become:

1. Was it necessary for Mr and Mrs RY to incur legal costs because of Mr OL's conduct? and if so

2. How much should Mr OL be ordered to reimburse them?

[35] Addressing these questions is not assisted by the fact that no detail of Mr PP's (or Dr CA's) accounts have been provided. All that has been supplied, is the statement by Mr and Mrs RY in their submissions to the Standards Committee in which they say that the solicitor's bills will at least equal the amount which they had been asked to pay (\$10,000) into Mr PP's trust account on account of costs.¹⁵ Neither a bill, nor any detail as to the application of those funds, has been provided.

[36] Similarly, Dr BT's bill, which they advise, amounts to \$918.35, has not been provided either. I acknowledge that I have the ability to call for these bills, but in the circumstances, it is not necessary to do so.

[37] The Committee has found that Mr OL's conduct constituted unsatisfactory conduct for two reasons:

1. The failure to obtain instructions from all three trustees and the relevant LINZ authority to register the mortgage; and
2. The failure to respond to Mr PP's correspondence, and to provide his files to Mr PP. This conduct occurred once Mr and Mrs RY had already instructed Mr PP.

[38] Any compensatory order can only be made in respect of the consequences of this conduct. The Committee considered various other aspects of Mr OL's conduct, but did not find that any other aspects of his conduct were such as to support a finding of unsatisfactory conduct.

[39] The validity or otherwise of the LINZ documentation, would certainly have consequences, and Mr and Mrs RY needed to have advice as to what those consequences were, and their options to address same.

[40] The failure by Mr OL to answer correspondence, and to provide his files, would also have resulted in the need for some in depth legal advice.

[41] Bringing these observations together, leads me to the view, that although Mr OL cannot be required to meet the costs incurred by Mr and Mrs RY in lodging and pursuing their complaint, the remainder of Mr PP's and Dr CA's costs, do flow directly from the unsatisfactory conduct findings of the Committee.

¹⁵ RY submissions to Standards Committee 11 September 2014 at [5].

[42] I am left with the choice of either requesting further information from Mr PP and Dr CA, as to how much of their bills of costs relate to the complaints, or to make an arbitrary assessment of what these costs would have been myself. I intend to adopt this course of action, as to do otherwise will only prolong this matter further.

[43] In doing so, I do not overlook the fact that one of the complainants was Mr PP himself. He was therefore closely associated with the lodging of the complaints. Mr PP's complaint was lodged largely by providing copies of correspondence from his firm to Mr OL.

[44] The complaint by Mr and Mrs RY included a two page letter of explanation, and I will assume that was prepared by Mr PP. Mr PP remained connected with the complaints, and provided advice to Mr and Mrs RY as to the professional obligations of a lawyer.

[45] I can do nothing other than to make an arbitrary assessment as to the portion of Mr PPs' bills that relate to the complaint, and assess these at \$2,000 (inclusive GST). This may include some of Dr CA's accounts also.

[46] In the circumstances, the determination of the Standards Committee is varied in the following manner:-

- (a) the order to pay costs pursuant to s 156(1)(o) is reversed.
- (b) Mr OL is ordered to pay the sum of \$8,000 to Mr and Mrs RY in compensation for legal costs incurred by them as a result of the conduct in respect of which the findings of unsatisfactory conduct were made. This order is made pursuant to s 156(1)(d) and is in addition to the order already made pursuant to that section, that Mr OL pay the sum of \$2,500 to Mr and Mrs RY for the stress and anguish caused to them by Mr OL's conduct.

Other penalties

[47] In *Workington v Sheffield* the LCRO said:¹⁶

The function of a penalty in a professional context was recognised in *Wislang v Medical Council of New Zealand* [2002] NZAR 573, as to punish the practitioner, as a deterrent to other practitioners, and to reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct. It is important to mark out the conduct as unacceptable and deter other practitioners from failing to pay due regard to their professional or obligations in this manner.

¹⁶ *Workington v Sheffield* LCRO 55/2009 at [65].

[48] It must not be overlooked that the Committee has censured Mr OL. The nature of a censure was discussed by the Court of Appeal in *New Zealand Law Society v B*. In discussing the terminology used in the Act (censure and reprimand) the Court said:¹⁷

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 soft rebuke: a rebuke of a professional person will inevitably be taken seriously.

[49] Whether or not the censure should have been imposed is not part of this review as it was contained in the findings determination of the Committee. However it does relate to both the findings of unsatisfactory conduct.

[50] In addition, the finding of unsatisfactory conduct with regard to the failure to obtain appropriate instructions is addressed by the compensatory order for stress and anguish. I have considered whether any other orders should be imposed in respect of the findings of unsatisfactory conduct, but have concluded that the orders, as modified by this decision are appropriate to the facts of the case and the findings of the Committee.

Publication

[51] After considering the principles established by this Office and the High Court, the Committee did not consider it necessary or appropriate for either the facts of the complaint or Mr OL's name to be published. In reaching this view, the Committee was "not satisfied that [Mr OL] represents a risk to the public or that it is in the interest of the public or the profession for the matter to be published".¹⁸ It did however order that a copy of the determination be provided to the Registrar-General of Land and although it did not refer to any authority for this, s 159 of the Act specifically provides for notice of a determination to be provided to the Registrar-General if it:

... considers that, the giving of notice of the making of that determination ... is or may be relevant to the discharge by the Registrar-General of his or her duties under the Land Transfer Act 1952 or any other enactment.

[52] As one of the findings of unsatisfactory conduct related to false certification with regard to registration of documents against the title to the hotel, it was entirely appropriate that the Registrar-General be notified of this determination.

¹⁷ *New Zealand Law Society v B* [2013] NZCA 156, [2013] NZAR 970 at [39].

¹⁸ Above n 11 at [19].

[53] In submissions provided in response to Mr OL's application¹⁹ Mr PP argued that the Committee misapplied the principles in LCRO 196/2010 referred to in the determination and gave undue weight to the impact of publication on Mr OL over the interests of protection of the public. He also argued that "the powerful move in recent years has been public transparency rather than defaulters' protective non-disclosure. This includes decisions of courts and regulatory bodies which strongly supports publications".²⁰

[54] Mr PP overlooks the fact that Standards Committee hearings are presumptively to be completed on the papers (s 153 of the Act) and publication is at the discretion of the Standards Committee where it considers it necessary or desirable in the public interest to do so (s 142(2) of the Act). Reviews conducted by this Office under the Act must be conducted in private (s 206 of the Act).

[55] There is therefore, a presumption of privacy in respect of both Standards Committee and LCRO proceedings. This is a legislative response to the move towards transparency referred to by Mr PP and is also in contrast to the directions in s 238 of the Act, that proceedings before the Tribunal are to be public unless the Tribunal orders otherwise. All of Mr PP's submissions in favour of publication are largely countered by reference to the legislation.

[56] The objective of the protection of the public has largely been met by providing a copy of the determination to the Registrar-General of Land and I consider that nothing further is necessary for this objective to be met. The comments made in LCRO 196/2010 are relevant in this regard. The Committee's determination to not order publication of either the facts of the matter or OL's name are therefore confirmed.

Publication of LCRO decision

[57] Section 206(4) of the Act enables the LCRO to "direct such publication of his or her decisions as he or she considers desirable in the public interest." For the same reasons as noted above, I do not consider the objectives of the Act require publication of Mr OL's name. However, this decision does contain some important comments relating to the awarding of costs and compensation, as consequently, I direct that a summary of this decision be published in such a manner as to ensure that all details of

¹⁹ These submissions were in support of Mr and Mrs RY's own application for a review.

²⁰ PP submission to LCRO (19 December 2014) at [59].

the persons involved, and the places in New Zealand where the events took place, are anonymised. In the usual manner, this decision will also be published in an anonymised format, on the website of this Office.

Decision

1. Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the order that Mr OL pay the sum of \$10,000 pursuant to s 156(1)(o) of the Lawyers and Conveyancers Act to Mr and Mrs RY is reversed.
2. Pursuant to s211(1)(a) of the Act, the determination of the Standards Committee is varied, and Mr OL is ordered pursuant to s 156(1)(d) of the Lawyers and Conveyancers Act 2006 to pay the sum of \$8,000 to Mr and Mrs RY. This is in addition to the sum of \$2,500 ordered by the Standards Committee.
3. In all other respects the determination is confirmed.

DATED this 17th day of February 2016

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 OL as the Applicant
Mr EN as the Representative for the Applicant
Mr and Mrs RY and Mr PP as the Respondents
The Standards Committee
The New Zealand Law Society