

LCRO 263/2015

CONCERNING

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of [City] Standards Committee [X]

BETWEEN

DH

Applicant

AND

**EI
(deceased)**

Respondent

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

Introduction

[1] Mr DH has applied for a review of the determination by [City] Standards Committee [X] that Mr DH's conduct constituted unsatisfactory conduct. The Committee censured Mr DH, imposed a fine of \$3,000 and ordered him to pay the New Zealand Law Society \$2,000 by way of costs.

[2] A fact that must be noted immediately is that Mr DH sought and acted on advice from senior counsel. The Committee has in effect disagreed with counsel's advice by finding that Mr DH's conduct amounted to unsatisfactory conduct.

Background

[3] Mrs EI's complaint arose after litigation in the High Court between Mrs EI and her son (Mr FJ) was resolved by way of a consent order made on 12 June 2013. In the Order, Gendall J directed that Mrs EI was "to receive the full balance of sale proceeds

from the sale” of a particular property. For her part Mrs EI agreed to remove a caveat over that property which had been lodged to protect her interests.

[4] Mr DH acted for Mr FJ on the sale¹ and deducted legal fees and disbursements incurred by Mr FJ relating to various matters totalling \$11,760 rather than conveyancing costs of \$1,612.50 directly associated with the sale.

[5] Mr DH asserted that the terms of the order included the fees that he had deducted, and in addition, he was acting on the instructions of his client.

[6] The consent order had not resolved a discrepancy in the documentation as to how much had been advanced by Mrs EI to Mr FJ and his wife. A property sharing agreement recorded the amount as being \$44,400 whereas Mr FJ asserted the amount was \$40,400. Correspondence between Mrs EI’s lawyer and Mr DH failed to resolve this issue and the meaning of the consent order.

[7] During the course of the complaint Mrs EI advised that a declaratory judgment as to the meaning of the consent order and what fees could be deducted from the sale proceeds had been sought and the Standards Committee investigation was stayed until the judgment was issued.

[8] In a judgment issued 27 February 2015 Dobson J made the following comments:

[7] The point of interpretation is a simple one: full proceeds of sale is capable of a common sense literal interpretation. In order to sell the property, the vendor had to discharge mortgages and meet other costs necessarily involved in effecting the sale transaction. Using the analogy of a sale being directed by a third party, such as the Registrar of the Court, the legitimate payments would include repayment of any mortgages, any arrears of rates, and the costs of sale including real estate agent’s commission and solicitor’s conveyancing charges. The residue otherwise available at that point is the “full proceeds of sale.”

[8] Accordingly, the words “full balance of sale proceeds” in the consent order dated 12 July 2014 means the gross proceeds of sale subject to the deductions of the type I have just addressed. It does not authorise deduction of other legal fees owed by the vendor.

[9] Mr FJ continued to object to paying the full balance to Mrs EI because of the dispute over the amount actually due to her. He declined to instruct Mr DH to make any further payments to Mrs EI.

¹ Another lawyer acted for Mr FJ in the litigation and formulation of the consent order.

[10] In May 2015 Mr DH instructed Mr KL QC to advise him on what he should do. He and his client considered that to give effect to the judgment of Dobson J would result in Mrs EI receiving more than the amount owed to her, and Mr DH was concerned that if he paid Mrs EI the amounts claimed by her, Mr FJ would challenge him for not following instructions.

[11] Mr KL advised Mr DH to pay an amount to Mrs EI which he considered was the balance due to her, and to pay the remaining funds into the trust account of an independent solicitor to be held as a stakeholder for both Mrs EI and Mr FJ.

[12] Mr DH followed Mr KL's advice and paid the sum of \$6,043.26 to Mrs EI's solicitors, and the balance of \$4,104.24 plus accumulated interest to an independent solicitor.²

[13] Mrs EI passed away on 15 September 2015.

The complaint

[14] The substance of Mrs EI's complaint was that "Mr DH [was] in willing breach of his duty to hold money in trust on [her] behalf and ha[d] failed to rectify the breach".³

[15] Mrs EI rejected what she saw as Mr DH's position including his "interpretation" of the "balance of sale proceeds" term used in the consent order, and submitted that he was "not entitled to rely on his client's instructions where those instructions [were] in breach of a court order".⁴ She went on to submit that "where there is ambiguity a responsible lawyer would take a prudent position and request clarity from the Court".⁵

The Standards Committee decision

[16] The Standards Committee identified the following issues to be determined:⁶

1. Did Mr DH's initial decision to withhold funds from the sale of the property raise any disciplinary issues?

² It has not been possible to ascertain the date on which these payments were made but Mr DH advises that he made the payments as soon as he had received advice from Mr KL, following Mr KL's return from overseas in June 2015.

³ Letter from Mrs EI to Complaints Service (23 July 2013) at 1.

⁴ Above n 4 at p.2.

⁵ Above n 4 at p.2

⁶ Standards Committee decision (23 October 2015) at [12].

2. Did Mr DH's conduct in continuing to withhold the remaining funds following the declaratory judgment raise any disciplinary issues?

[17] The Committee noted that Mr DH was not a party to the consent order, and at all times he was acting on Mr FJ's instructions. It accepted that at the time of the sale Mr DH believed the terms of the consent order allowed him to deduct fees other than those directly relating to the sale of the property.

[18] It accepted there was a genuine dispute regarding the interpretation of the consent order wording, and that Mr DH believed he was obliged to act on his client's instructions until such time as the dispute over the terms of the consent order was resolved.

[19] It concluded:⁷

... DH's conduct, when initially withholding the funds from Mrs EI, was not at a level which crossed the threshold for disciplinary action to be taken. It accepted that there was a genuine dispute over the interpretation of the terms of the consent order, and that Mr DH's actions, in withholding the funds in advance of the dispute being addressed by the Court, were not at a level that warranted the imposition of disciplinary action.

[20] As a result the Committee decided to take no further action in relation to this issue.

[21] The Committee then recorded its concern "that Mr DH may have inappropriately continued to withhold the funds from Mrs EI, despite being put on notice of his obligations by the declaratory judgment".⁸

[22] It formed the view that the declaratory judgment clarified the situation regarding Mr DH's obligations and "from [that] point onwards it ought to have been clear to Mr DH that he had no authority to withhold the funds from Mrs EI".⁹ The Committee was "particularly mindful that lawyers have an overriding obligation to the court, even if they may disagree with the court's directions".¹⁰

[23] The Committee then referred to s 110 of the Lawyers and Conveyancers Act 2006 which provides that:

⁷ At [18].

⁸ At [20].

⁹ At [21].

¹⁰ At [22].

- (a) A practitioner who, in the course of his or her practice, receives money for, or on behalf of, any person –
...
- (b) must hold the money, or ensure that the money is held, exclusively for that person, to be paid to that person or as that person directs.

[24] It concluded that s 110 obliged Mr DH to pay the funds as directed by Mrs EI, especially as Mr DH, through counsel, “had accepted that he held the full proceeds of the sale of the property on behalf of Mrs EI”.¹¹ The Standards Committee was satisfied that Mr DH had acted in breach of s 110, and that his conduct amounted to unsatisfactory conduct.

[25] By way of penalty, the Committee:

- (a) censured Mr DH;
- (b) imposed a fine of \$3,000; and
- (c) ordered Mr DH to pay the sum of \$2,000 by way of costs.

[26] The Committee declined the claim for legal fees incurred by Mrs EI in pursuing Mr DH for the funds and further determined that it was not appropriate to make any order for compensation for distress or anxiety, as Mrs EI had passed away. The Committee made no orders for publication of its determination.

Application for review

[27] Mr DH applied, through counsel, for a review of the Committee’s determination. The grounds for review were expressed as follows:¹²

- (a) The considerable confusion over the amount actually owed to Mrs EI and the subsequent complexity which arose;
- (b) The difficult position faced by Mr DH as he was placed in the middle of instructions from Mr FJ (who did not want any further payment made) and the terms of the judgment which suggested payment had to be made;

¹¹ At [24].

¹² Letter from NO to LCRO (7 December 2015) accompanying application for review.

- (c) The confusion as to whether the judgment bound Mr DH when he was not a party to the proceeding or was limited in effect to his client Mr FJ;
- (d) The fact that Mr DH relied on advice received from Mr KL QC; and
- (e) The Committee's earlier indication that payment of the money would "adequately resolve" the issues appears to have been abandoned without explanation.

The role of the LCRO on review

[28] The role of the Legal Complaints 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 judgement for that of the Standards Committee, without good reason.

Nature and scope of review

[29] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:¹³

... 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.

¹³ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

[30] More recently, the High Court has described a review by this Office in the following way:¹⁴

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.

Review

[31] This review has been completed on the basis of the material before me with the consent of both parties. Mr DH's application for review was received at this Office on 7 December 2015 and this Office had no contact from any person prior to that date.

Section 110 Lawyers and Conveyancers Act 2006

[32] The Committee noted that Mr DH, through his counsel Mr KL QC, accepted he held the full proceeds of sale on behalf of Mrs EI. It formed the view that Mr DH was therefore obliged to pay the funds as directed by Mrs EI pursuant to s 110 of the Act. "Although the Standards Committee accepted that Mr DH may have been confused about his obligations prior to the declaratory judgment, it was satisfied that the declaratory judgment sufficiently clarified the situation and that there was no reason for Mr DH to continue to hold the funds, or to transfer the funds, contrary to the instructions of Mrs EI."¹⁵

[33] The Committee determined that Mr DH had acted in breach of s 110 and that his conduct therefore amounted to unsatisfactory conduct.

[34] That reasoning cannot be faulted if the matter is looked at solely from the point of view of what costs could be deducted, which was the subject of the declaratory judgment. However, the dispute remained as to what the balance of the loan from Mrs EI was. It followed, if the amount was less than Mrs EI asserted, then funds were available to Mr FJ, who owed further costs to Mr DH, and it was therefore in order for Mr DH to deduct those fees from the proceeds of sale.

[35] The declaratory judgment clarified precisely what costs could be deducted, but the disagreement over the amount of the loan due to Mrs EI remained.

¹⁴ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

¹⁵ Standards Committee decision at [24].

[36] I do not disagree with the Committee as to its comments relating to the overriding obligations of a lawyer to pay funds which are held for a client, to pay those funds as the client directs. It seems to me however, that the Committee may not have appreciated the complexity of the issues faced by Mr DH, and on which he sought and received advice from Mr KL.

[37] The essence of the issue is referred in [30] of Mr KL's submissions to the Standards Committee:¹⁶

As soon as Counsel had been able to work through the significant body of material in relation to this complaint and had given advice to Mr DH he acted promptly and paid over to Mrs EI's solicitors the sum plus interest at the Judicature Act rate from 27 February 2015 which would provide Mrs EI with the full amount of \$40,500 to which she was entitled under the Profit Sharing Agreement. The balance of \$4,104.24 plus interest at the Judicature Act rate was paid to another practitioner to be held by him pending Mrs EI establishing her entitlement to this balance sum. Mr DH remains concerned at a possible challenge by Mr FJ and has chosen to interplead in this way. If the outcome is that Mr FJ is entitled to this sum (or Mrs EI agrees that she has no entitlement to any further sum [plus interest from 27 February 2015 [than the sum of \$40,500) then the sum held would be subject to Mr DH's lien for costs.

[38] Whether or not Mr DH was in breach of s 110 depended on resolution of the disagreement as to how much was owed to Mrs EI. It would seem that matter remains unresolved. The finding of unsatisfactory conduct for breach of s 110 is based on unresolved issues.

Conduct prior to the declaratory judgement

[39] Mr DH held funds in his trust account in the name of Mr FJ. The consent orders required Mr DH to pay Mrs EI the full proceeds of sale from the sale of the property. Mr FJ instructed Mr DH that all costs incurred by Mr FJ in relation to removing the caveat that Mrs EI had lodged against the title to the property should be deducted from the amount paid to her. The caveat had to be removed before the property could be sold.

[40] Mrs EI contended that it was only the costs incurred in relation to the sale itself that should be deducted.

[41] Mr FJ was opposed to any payments in excess of what he thought was due and payable to Mrs EI being made, and it was reasonable for Mr DH to be careful he did not expose himself to complaints from Mr FJ.

¹⁶ Letter from Mr KL to Standards Committee (26 June 2015) at [30].

[42] Mr DH needed authority to make payments from funds held in his trust account for Mr FJ to persons other than Mr FJ or to persons authorised by him. Mr DH could not be required to make a payment to Mrs EI in the face of competing views as to what should be paid and it follows that an adverse disciplinary finding against him cannot be sustained. The Committee has expressed this as being conduct which does not cross the “threshold” for disciplinary action and I concur with the Committee’s view.

Conduct following the declaratory judgment

[43] The declaratory judgment of Dobson J directed that the costs that should be deducted in terms of the consent order were “solicitor’s conveyancing charges”.¹⁷ Mr FJ continued to assert that the costs relating to removing Mrs EI’s caveat should be paid and that Mr DH should not pay Mrs EI the disputed amounts.

[44] Mr DH sought advice from Mr KL QC. Mr DH acted in accordance with that advice. He paid \$6,043.26 to Mrs EI, being the amount Mr FJ considered was the balance of the loan payable to Mrs EI, and the remainder (\$4,104.24) was paid to an independent solicitor to hold as a stakeholder on behalf of both Mr FJ and Mrs EI.

[45] Mr KL states:¹⁸

In this way I considered that Mr DH would be complying with his obligations under the judgment of Dobson J to release the full proceeds of sale and would be protected against a claim being brought against him by his client for the overpayment that would be involved.

[46] In reaching a view that Mr DH’s conduct constituted unsatisfactory conduct, the Committee is not only disagreeing with Mr KL’s advice, but in addition, establishing a principle that a lawyer who seeks advice from an appropriate independent person and acts on that advice, is nonetheless subject to an adverse finding if the Committee disagrees with that advice.

[47] This is unreasonable. In *BI v CW*¹⁹ a lawyer sought advice from a respected practitioner (Mr O) for an opinion as to whether or not a proposed fee was fair and reasonable. Mr O’s opinion was that the proposed fee was fair and reasonable. Following a complaint by the client, the costs assessor and the Standards Committee disagreed. Following a finding of unsatisfactory conduct, the Standards Committee censured the lawyer and ordered him to reduce his bill.

¹⁷ *EI v Iles* [2015] NZHC 312 at [7].

¹⁸ Above n 16, at [6].

¹⁹ *BI v CW* LCRO 23/2012.

[48] The LCRO reversed the censure, leaving the finding of unsatisfactory conduct in place because of the particular facts of the matter. The LCRO took particular note of the fact that the lawyer had sought an independent opinion when reaching a view that the censure was not warranted.

[49] A censure has been described by the Court of Appeal as a rebuke to be taken seriously by a professional person.²⁰ Mr DH takes the adverse finding and the censure seriously.

[50] Following an indication by the Standards Committee that repayment of the funds held by the independent solicitor may resolve the matter, Mr DH again complied.

[51] Mr DH acted reasonably and properly throughout. He sought advice, and acted on that advice. He also followed the suggestion by the Standards Committee to repay the undisputed amount in an effort to resolve the complaint. In the circumstances, it is setting an unfortunate precedent that, even if there are reasonable grounds for a lawyer acting on advice and attempting to resolve the complaint, they are nevertheless subject to an adverse disciplinary finding coupled with a “serious rebuke”.

[52] In these circumstances, I am led to the conclusion that the finding of unsatisfactory conduct should not stand. The finding and the consequent penalties are reversed.

Decision

[53] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006:

- (a) the determination of the Committee to take no further action in relation to the complaint about Mr DH's conduct prior to the Dobson J judgment, is confirmed;
- (b) the determination of the Committee that Mr DH's conduct following the Dobson J judgment constituted unsatisfactory conduct is reversed.

[54] Pursuant to s 138(2) of the Act, further action in respect of that aspect of the complaints neither warranted or necessary.

²⁰ *The New Zealand Law Society v B* [2013] NZCA 156 at [39].

DATED this 12th day of May 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:

DH as the Applicant
NO as counsel for the Applicant
PR for the Respondent
[City] Standards Committee X
The New Zealand Law Society