

CONCERNING

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

AND

CONCERNING

a determination of the Auckland Standards Committee

BETWEEN

BU

Applicant

AND

DG

Respondent

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

DECISION

Introduction

[1] This is an application by BU for a review of a Standards Committee decision dated 27 October 2011 to dismiss the complaint against DG pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act). Both parties to this complaint are lawyers. BU initially represented DN in a relationship property dispute with his former wife. Before the dispute settled, DN moved his instructions to DG. The complaint arises from the circumstances surrounding DN's transfer of his instructions, and his non-payment of BU's fees.

Standards Committee Decision

[2] The Standards Committee decided that further action was unnecessary or inappropriate because it could find no evidence to substantiate BU's claims that DG had failed to use legal processes for proper purposes, or had assisted in a fraud or crime, when DG wrote to BU on behalf of DN seeking to negotiate a reduction in the client's fees.

[3] The Standards Committee had also dealt with BU's complaint against DG's junior, DH, separately. The Committee exercised its discretion to dismiss that

complaint on the basis that no further action was necessary or appropriate pursuant to s 138(2) of the Act.

Review Application

[4] BU submitted his review application to this Office expressing his dissatisfaction with the decision. He submitted that the decision was procedurally and substantively flawed. In his covering letter attached to the review application, BU also referred to DH as the other party he had laid a complaint about, and indicated he sought a review of the Committee's decision in respect of both DG and DH.

[5] A separate right of review arises as a consequence of each decision made by a Standards Committee. BU's right to seek a review of the Committee's decision about DH arose as a result of that decision, separately from the decision on DG's conduct. As BU did not make a separate review application in respect of the Committee's decision on DH, I have no power to review the Committee's decision in respect of DH's conduct.

[6] As a consequence, this review relates solely to the Committee's decision on DG's conduct.

Grounds for Review

[7] BU's grounds for seeking a review are that the Committee reached the wrong decision because it did not:

- a. Give proper weight to relevant facts;
- b. Properly analyse the facts;
- c. Identify the principles it was relying on;
- d. Apply principles to findings of facts; and
- e. Make a properly reasoned decision.

Review Issues

[8] BU raised a number of complaints about DG's conduct. I have reviewed the correspondence and heard from DG and BU. I am satisfied that this complaint can be narrowed down to a single issue on review, whether DG's complaints against BU were made for an improper purpose.

Role of the LCRO on Review

[9] The role of the Legal Complaints Review Officer (LCRO) on review is to reach her own view of the evidence before her. Where the review is of an exercise of discretion, it is appropriate for the Review Officer to exercise particular caution before substituting her own judgement for that of the Standards Committee, without good reason.

Review Hearing

[10] DG and BU, with counsel BV, attended and participated in a review hearing in Auckland on 10 September 2013.

Background

[11] The complaint by BU arises from two letters sent by DG in which BU says DG's "threatening, discourteous, disrespectful and arrogant behaviour"¹ constitutes breaches of Rules 2.3, 2.4, 2.7 and 10.1² of the Conduct and Client Care Rules (RCCC). While BU is affronted by the tone and content of DG's correspondence, my view is that although the tone of the correspondence is robust, and in parts unnecessarily provocative, it does not reach the threshold for an adverse conduct finding against DG. For the purposes of this review, I will put those issues aside, and concentrate on the content of the correspondence, which is where the real issue arises in respect of Rules 2.3, 2.7 and 2.10.

[12] The focus of this review, and the nub of BU's complaints, is that, in breach of Rules 2.3, 2.7 and 2.10, DG used the Law Society's complaints process against BU as leverage to persuade BU to reduce the fees he charged to DN.

[13] Rule 2.10 relevantly provides:³

A lawyer must not use or threaten to use, the complaints or disciplinary process for an improper purpose.

[14] In addition, BU says that DG's conduct constitutes a breach of Rules 2.3 and 2.7, which provide:

A lawyer must use legal processes only for a proper purpose...;

¹ Letter from BU to NZLS (17 April 2011).

² Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

³ Above n2.

and

A lawyer must not threaten... to make any accusation against a person...for any improper purpose.

[15] I agree with BV's submissions that there is no suggestion of personal gain by DG, nor is personal gain required to find a breach of Rules 2.3, 2.7 or 2.10. In order to reach a finding as to whether or not DG breached those Rules, and if he did what the consequences should be, it is necessary to consider the correspondence and its purpose in some detail, in the context of DN's instructions to BZ, her instructions to BU as counsel, and DG.

[16] In 2007 DN instructed BZ to retain BU as counsel to resolve relationship property and child care disputes between DN and his wife. BU took various steps over three years to progress both aspects of DN's instructions. However, for various reasons the parties were unable to reach agreement over contact or property. BU reports that DN and his wife's post-separation issues became increasingly complex, preventing the parties from reaching settlement. Eventually proceedings were issued, and the relationship property matter was set down for a two hour hearing in the Family Court on 22 September 2010.

[17] At the review hearing BU indicated that, in his view, he was well on the way to concluding DN's matters. He did not get the chance because, without DN giving any prior indication he was not satisfied with BU's service, on 14 July 2010 DN withdrew his instructions from BZ and BU, and instructed DG.

[18] At various times BU had issued interim bills to BZ. BZ had forwarded those to DN for payment and received funds on account of costs, which she paid on to BU. At some point, however, DN indicated that he could not afford to pay any more money. BU says he agreed to suspend interim billing, and render a final invoice for all of DN's fees, when DN settled matters with his wife, because at that stage DN expected his cashflow to improve. As matters transpired, however, DG took the file over before DN and his wife reached settlement.

[19] DG says that at their first meeting in mid-July 2010, DN appeared to have lost all confidence in BU, and said that he wanted to make a complaint. DG was therefore aware from the outset that DN was a disgruntled client.

[20] DG says he agreed to act for DN and sought to uplift BU's file, but was met with resistance on the basis that DN had not paid BU's fees. DG says that it took time and

effort for him to ascertain from BU what his fees were. DG's letter to NZLS of 13 September 2010 indicates that when BZ contacted him in late July she advised that she had been absent from work for a period of time, and that she would send the files the following day, 9 August. However, when BZ contacted DG the following day it was to advise him that she would not release the files because she had obligations to BU with respect to his (unsecured) fees.

[21] DG's correspondence makes much of BU's purported delays in providing a note of his fees, and that he had not even given an indication of what his fees might be. I note that, as counsel, BU was not obliged to provide an estimate of fees unless DN had requested one, and in any event BU would have provided a note of his fees to his instructing solicitor BZ, not directly to DN.

[22] The correspondence does not support an allegation that BU delayed in providing a note of his fees. The correspondence shows that BU rendered his invoice for \$34,837.98 to BZ promptly after she contacted him on 9 August, because she was able to forward BU's invoice to DN on 16 August 2010. DN then passed the invoice on to DG, and raised concerns about the amount of the fee. These were fees that had accumulated over the period of time that DN was not receiving interim bills, because BU had extended him some latitude by not interim billing.

[23] At the review hearing DG said he did not dispute that BU had put in the hours for which he billed in his final invoice, but that DN's question was whether the time had been wisely spent. In any event, DG says his instructions were to negotiate a reduction, and to write to the Law Society laying a complaint about BU's conduct, and seeking to have the fees assessed.

[24] DG says that without the file BU had accumulated, DG and his assistant had to try and pull DN's file together from what paperwork DN had provided, the Court file and that provided by counsel for [DN's wife], at relatively short notice before the 22 September hearing date which was set down on 23 July 2010. DG's position is that BU refused to make the file available.

[25] On 3 September 2010 DG wrote to BZ saying that he understood she had physical control of the files, the hearing was only a month away, and he had been unable to negotiate an agreement with BU over costs owed to him by DN. DG said it was costing DN more money for DG to collate the file, and referred to complaints he intended to lay against BU because he had failed to release the file and delayed rendering his invoice. DG said he found BU's delay in providing the file was

“unacceptable”. DG also said that he would not give an undertaking to pay BU’s costs in priority to his own.

[26] On DN’s instructions DG then wrote to the Law Society on 13 September, without the benefit of the file BU had compiled, setting out DN’s complaints about BU’s conduct and his fees.

[27] Up to that point BU had been unwilling to negotiate with DN about fees. DG had reached an impasse. BZ had the files, an obligation to meet BU’s fees but no funds, no security and no incentive to increase her exposure in having to meet BU’s fees from her own resources. BU had significant unpaid costs, no file and no instructions. DG had instructions, an incomplete copy of DN’s file, increasing costs and a rapidly approaching hearing. DN owed substantial fees to BU and DG, could add nothing further to his files without paying or reaching agreement with BU over his fees, and needed representation at the approaching hearing.

[28] DG says he was frustrated by BU’s refusal to release the file, but he continued to progress DN’s file towards the 22 September hearing. BU says he sent DN’s file to BZ in July, so it he was not holding the file. Nonetheless, BU says he offered to make documents available to DG to avoid prejudice to DN. BU says he invited inspection of his files so that DG could identify the documents he wanted, but DG did not take that offer up. There is a conflict between this evidence and the evidence given by DG that BU would not make the file available.

[29] BU could not recall when he issued his invitation. It is not clear whether it was subject to conditions, whether he communicated the offer directly to DG or DH, or whether he communicated it to his instructing solicitor, BZ. DG says it is clear that no open invitation had been extended to him at that stage, because DG was continuing to press for the release of the files. DG says he would not have written to the Law Society about BU’s conduct in the terms he did, if he had had open access to the file.

[30] DG denied that he had “contrived”⁴ a situation that enabled him to lay a conduct complaint on the basis of BU’s purported refusal to release the file. In his letter to the Law Society DG refers to correspondence with BZ, and reports BZ as saying that BU “was refusing to let her release the files”, and that he had “reminded her of her obligations as an instructing solicitor as to payment of his fees”.⁵

⁴ Letter from DG to NZLS (13 May 2011) at [15].

⁵ Letter from DG to NZLS (13 September 2010) at [8].

[31] Having laid the complaint, DG continued with his preparations without the file. When 22 September came around, it appears DN and his wife had both reached the point where they were, in principle, willing to settle. DG says that the parties agreed to convert the hearing into a settlement conference, and that DN and his wife made significant progress towards settlement.

[32] After three years in dispute with his wife, DN was understandably keen to conclude his legal matters, including finalising payment of his total legal costs to BU and DG. In an attempt to bring DN's dispute with BU over his fees to a head, on 27 September 2010 DG wrote to BU, on DN's instructions, under the heading "[DN] – FEE DISPUTE". The letter was tagged "without prejudice save as to costs", referred to the complaint DG had sent to the Law Society on DN's behalf, and proposed that BU accept \$15,000 in settlement of his outstanding invoice (which included BV's costs as well as BU's). DG indicated that DN and his wife were to conclude their relationship property issues imminently, and that the offer was open for acceptance for seven days. Notably, DG said that DN "wishes to conclude an arrangement to settle payment and withdraw his complaint".⁶

[33] BU responded on 4 October 2010, in a letter tagged "without prejudice", rejecting DN's criticisms, and expressing his resentment at being drawn into a negotiation over fees under pressure of a formal complaint. He observed, however, that DG's letter seemed to indicate "...that an opportunity for a settlement may be prejudiced if the costs situation is not finalised urgently".⁷ BU says that he was "...mindful of the duties which [DN]'s lawyers (former and current) have to ensure that his interests are represented and protected as well as possible",⁸ and offered DN a 25% discount, reducing his fees from \$34,837.98 to \$22,428.49. BU's offer was contingent on payment being promptly made, the complaints being withdrawn, and settlement being strictly confidential.

[34] DG's response on 15 October was again broadly critical of BU's conduct of DN's file and his costs, rejected BU's offer of a 25% reduction, and threatened to raise:

...a substantial number of concerns...with the Law Society if agreement cannot be reached on costs. In the interests of settlement and on the basis that our client would withdraw his complaint, he is prepared to increase his offer to settle to...\$18,500.

⁶ Letter from DG to BU (27 September 2010).

⁷ Letter from BU to DG (4 October 2010).

⁸ Above n6.

[35] A reduction to \$18,500 would represent BU waiving almost half of his invoice. BU's response of 19 October again deflected the criticisms levelled by DG, noted DG's acknowledgement that he had not seen BU's file, and disagreed with DG's strategic approach to reaching settlement for DN, i.e. by using the complaints system as leverage. BU also reminded DG that he had already provided his file to BZ some two months earlier. BU said that DG could have uplifted the file if he had been willing to undertake that BU's fees would be paid in advance of DG's. Despite his apparent misgivings, BU agreed to accept payment of \$18,500 on condition that the money would be paid by the settlement date anticipated for DN's relationship property, and that DG would withdraw, and not renew, his complaints to the Law Society.

[36] Settlement was agreed on those terms, and DH wrote to the Law Society on 29 October 2010 withdrawing DN's complaints against BU.

[37] BU then wrote to the Law Society on 17 April 2011 laying his complaint about DG's conduct that is the subject of this review. After the Law Society had considered and dismissed BU's complaints, he applied for a review, and DG sent his response to the review application on 11 January 2012.

[38] DG's letter in response contained information that had not been before the Standards Committee. He discusses the background to the complaint, and the exchange of letters, and goes on to say:⁹

The purpose of these letters was to enter into negotiations on behalf of a client, [DN], to resolve the issue of outstanding legal costs incurred by [DN] for BU's services.

[39] DG says that his comment must be considered in the context of the correspondence and surrounding circumstances at the time, the details of which are set out above.

[40] BU says that because of DG's deficient conduct he has waived fees he would otherwise be entitled to. By way of a remedy, BU seeks reimbursement of \$13,312.98 from DG being the amount of the fees he agreed to waive payment of by his former client, DN.

⁹ Letter from DG to LCRO (11 January 2012) a [4].

Discussion

[41] Rules 2.3, 2.7 and 2.10 of the RCCC have previously been considered in this decision. Rule 2.10 protects the integrity of the complaints process, and was considered in *DV v WE*.¹⁰ In that review the LCRO adopted the earlier comments made in LCRO 215/2010:¹¹

...if a practitioner makes use of the process for the purpose of waging a personal vendetta, or for vexatious reasons, then the provisions of Rule 2.10 will apply and a practitioner will expose himself to the consequences of breaching that Rule.

[42] Rule 2.10 applies by extension to a threat to use the complaints process to assist in negotiations. Broadly, the complaints process exists to provide a legal framework within which to address legitimate complaints about lawyers and their conduct. Its purpose does not extend to providing a mechanism for lawyers to use it to help their clients to negotiate their way out of fee disputes. If DN had genuinely believed that BU's fees were unreasonably high, he could have maintained his application for an assessment of those costs, but he chose not to. As DG admits, the purpose of the complaint he laid on his client's behalf, laying the foundation for his client's successful negotiation, was not a proper one.

[43] Rule 2.3 also constrains lawyers to use legal processes more broadly only for proper purposes. In considering the wording of Rule 2.3 in *Alloa v Ullapool*¹² the LCRO says:

The wording of rule 2.3 is important. It refers to "proper purposes", indicating that a lawyer could have more than one purpose for using legal processes. Thus, while the letter...may have been proper in relation to R's claim against the vendors, it is possible for it to have had a second purpose. If there was a second purpose and this was the predominant purpose then, if such purpose was improper, there would be a breach of Rule 2.3.

[44] According to that Decision, where the predominant purpose is improper, Rule 2.3 is breached. That reasoning must apply equally to the situation where there is only one purpose, and that is improper.

[45] In *UF v OU*,¹³ which relates to a breach of Rule 2.7, the LCRO states:

¹⁰ *DV v WE* LCRO 172/2010 (17 August 2011).

¹¹ *BC v YT* LCRO 215/2010 (1 April 2011) at [34].

¹² *Alloa v Ullapool* LCRO 159/2009 (22 June 2010) at [19].

I find it difficult to accept that a statement that a complaint to the Law Society will be made if [the former lawyer] did not comply with [present lawyer]’s demands is any different from the determinations referred to. The lodging of a complaint should have no ulterior motive.

[46] Again, I note that DG’s ulterior motive was to lay the foundation, from which he could negotiate a reduction in BU’s fees for his client. There is ample authority from this Office to the effect that using the complaints process as leverage against a practitioner to force an outcome in a negotiation is an improper use of the complaints process. In this case DG has told this Office that his sole purpose was “...to enter into negotiations on behalf of a client, [DN], to resolve the issue of outstanding legal costs incurred by [DN] for BU’s services”.¹⁴ However you read it, that phrase is a clear admission that DG’s only purpose was improper. As that admission was not before the Standards Committee, it is acceptable for me to depart from the Committee’s findings, and to make a different finding on this review without intruding on the Committee’s discretion.

[47] While DG explains that the chronology of the correspondence contextualises his statement; that context, however, can only go to mitigation on penalty. I accept that DG had already laid the complaints on DN’s behalf on the basis of incomplete information from DN, the Court file and opposing counsel. However, where the complaint is made for an ulterior purpose, any difference between threatening to lay the complaint, threatening to continue the complaint or threatening not to discontinue the complaint is purely semantic.

[48] As to BU’s contention that DG “contrived” the complaint on the basis of BU’s purported refusal to release the file, DG must have realised that, as counsel, BU is in no position to refuse to allow his instructing solicitor to release a file. Instructing solicitor’s files are not counsel’s to command.

[49] Evidently BU, BZ and DG had reached a stalemate. BU was relying on BZ, and they had not come to any arrangement that would relieve her from her professional responsibility to pay his fees. Since she was responsible for meeting his fees, BZ had a stake in the outcome. While BZ had no security for BU’s fees, and had lost DN as a client, she was still able to exercise a lien over the file. It would have been important to her to obtain some security for, or relief from, BU’s fees, so she used the file.

¹³ *UF v OULCRO* 90/2011 (20 March 2013) at [33].

¹⁴ Above n8.

[50] Neither DG, nor DN, was prepared to give BZ security, and BU was clearly reluctant to accept a reduction in his fee. On the basis of that analysis, DG did “contrive” a situation whereby he could lay a complaint against BU. As BU says, he only had the file because he was acting as counsel on instructions from BZ. The file was not his file to hold, and from late July 2010 the evidence is that he did not hold it. Unfortunately for DG, he needed a direct line to BU to obtain leverage in his negotiation with BU.

[51] Even though it was BZ who was holding the file, DG could only gain leverage by laying a complaint against BU. A complaint against BZ would have been an ineffectual tool in a negotiation aimed at persuading BU to reduce his fees. DG’s purpose could not have been served by laying a complaint against BZ for refusing to release the file because BU’s fees were not hers to waive. DG’s strategy of laying DN’s conduct complaints against BU, including the allegation that he had refused to release the file, cannot be correct when BZ, not BU, had possession and control of the file.

[52] DG acted without the benefit of seeing BU’s files. His strategy paid no apparent regard to the nature and purpose of the intervention rule that governed the relationship between DN as client, BZ as instructing solicitor and BU as counsel. It was an inappropriate strategy on a number of levels. In the circumstances, I find it difficult to avoid the conclusion that DG contrived a situation whereby he could make a complaint against BU. While DG says he sought to resolve the impasse by an appeal to BU’s sense of collegiality, DG could, and should, have done things differently.

[53] DG knew he was acting on the instructions of a disgruntled client. There was no reason for DG to expose himself to the risk he took in laying the complaint on behalf of DN. DN could not have got himself into trouble because he is not bound by the Rules. DG could have drafted the complaint against BU for DN, and DN could have signed it himself. DG could even have posted the complaint off for his client, taking no professional risk at all.

[54] Alternatively, if DG had genuine concerns about BU’s conduct he could have made a confidential report to the Law Society under Rule 2.9 of the RCCC. He did none of those things.

[55] Contrary to the findings of the Standards Committee, in all the circumstances of this review, it is apparent that DG’s threats to lay, continue and make further complaints against BU for an improper purpose constitute breaches of Rules 2.3, 2.7 and 2.10 which are practice rules made under the Act. The breach of a Rule

constitutes unsatisfactory conduct as defined by s 12(c) of the Lawyers and Conveyancers Act 2006 which provides:

In this Act, unsatisfactory conduct, in relation to a lawyer...means—

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

[56] The findings of this review are that DG used, and threatened to use the complaints process against BU for an improper purpose in breach of Rules 2.3, 2.7 and 2.10. Those breaches constitute unsatisfactory conduct as defined by s 12(c) of the Act.

Penalties

[57] I indicated to the parties at the review hearing that if my findings varied from those of the Standards Committee, as they do, I would invite submissions on penalty and costs. That invitation was made because the parties did not make submissions on penalty to the Standards Committee. The parties are therefore invited to file any submissions as to penalty and costs within 10 working days of the date of this decision.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is reversed, and replaced with the finding that DG's breaches of Rules 2.3, 2.7 and 2.10 constitute unsatisfactory conduct pursuant to s 12(c) of the Lawyers and Conveyancers Act 2006.

DATED this 17th day of September 2013

Dorothy 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:

BU as the Applicant
DG as the Respondent
DI as a related person or entity
The Auckland Standards Committee
The New Zealand Law Society