

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of [A North Island] Standards Committee

**BETWEEN**

**MR BU**

Applicant

**AND**

**MR DG**

Respondent

**PENALTY DECISION**

**Introduction**

[1] This review application was the subject of a decision issued from this office dated 17 September 2013 (the substantive decision) which made a finding of unsatisfactory conduct against Mr DG in respect of breaches of Rules 2.3, 2.7 and 2.10 of the Conduct and Client Care Rules.<sup>1</sup> Mr DG was found to have used the complaints process for an improper purpose. This decision deals with penalty and costs now that both parties have filed submissions.

[2] The details surrounding the complaint are set out in the substantive decision, which reversed the decision of the Standards Committee to take no further action pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006.

[3] While it is apparent that Mr DG laid the complaint against Mr BU in part on Mr DN's instructions, and in part of his own volition, it does not follow that laying the complaints was a legitimate use of the complaints process. A practitioner cannot act on his or her client's instructions to breach a Rule.

---

<sup>1</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

**Submissions for Mr DG**

[4] Mr DG breached three separate but linked rules, resulting in a single finding of unsatisfactory conduct against him. While Mr DG's breaches are not grave, he is an experienced practitioner who might be expected to have known better. However, Mr DG requested guidance early on around the extent to which practitioners should involve themselves in negotiations over another lawyer's outstanding account which is the subject of a complaint to the NZLS.<sup>2</sup> That was a responsible approach to take, and paragraphs 53 and 54 of the substantive decision respond to that enquiry.

[5] A number of experienced professional colleagues have provided testimonials in support of Mr DG. Those colleagues refer to Mr DG's professional career spanning 24 years, and rate his standards as high to impeccable. Counsel mentioned one minor complaint against Mr DG earlier this year which was resolved without reference to a Standards Committee, and was a "minor exception" to Mr DG's otherwise untarnished professional record.

[6] I am left with the sense of a practitioner who works hard, strives to achieve excellent outcomes for his clients, and is generally cognisant of his professional obligations. In this apparently isolated instance it appears that Mr DG's drive to achieve an excellent outcome for his client Mr DN got the better of his professional judgment. It is also relevant to penalty that there is no evidence that Mr DG set out to deliberately breach any of the Rules. I accept Mr DG's assurance to the Committee that his "involvement was well-intentioned", and note that the findings on review were made with the benefit of Mr DG's clear admission in his response to the review application.

[7] Overall, I consider that the finding of unsatisfactory conduct against Mr DG sits towards the very lowest end of the disciplinary spectrum. Any orders imposed on him should therefore be moderated accordingly.

**Power to Make Orders**

[8] The power to make Orders as to penalties arises under ss 211 and 156 of the Act. Compensation is available pursuant to s 156(1)(d) which provides a discretion:

where it appears... that any person has suffered loss by reason of any act or omission of a practitioner...[to] order the practitioner... to pay to that person such sum by way of compensation as is specified in the order, being a sum not exceeding [\$25,000].

---

<sup>2</sup> Letter from Mr DG to NZLS (13 May 2011) at [24].

[9] The power to order the practitioner to pay a fine arises under s 156(1)(i) of the Act which provides a discretion to:

order the practitioner to pay to the New Zealand Law Society...a fine not exceeding \$15,000.

[10] The discretion to make orders as to the payment of costs and expenses is set out in s 210(1) of the Act which provides:

The Legal Complaints Review Officer may, after conducting a review under this Act, make such order as to the payment of costs and expenses as the Legal Complaints Review Officer thinks fit.

## **Orders**

### *Compensation*

[11] Mr BU seeks compensation for the fees he agreed to waive. To succeed in his application for compensation, it would have to appear that Mr BU's loss was suffered by reason of Mr DG's act of threatening to make a complaint. Although Mr BU says he is entitled to compensation because Mr DG improperly threatened to lay a complaint, Mr BU's approach must fail because he accepted in the fee negotiation that his dominant reason for agreeing to a reduction was to meet his professional obligations to Mr DN.<sup>3</sup>

[12] Mr BU and Mr DG were clearly both aware that other legal remedies were available to Mr BU for the recovery of fees from Mr DN. The "without prejudice save as to costs" tag on Mr DG's letter<sup>4</sup> would only be relevant to a settlement offer put to Mr DN in an action to recover Mr BU's unpaid fees. That letter was effectively a pre-emptive strike. In his response to that letter, Mr BU observed "that an opportunity for a settlement may be prejudiced if the costs situation is not finalised urgently",<sup>5</sup> referring to Mr DG's comment that:<sup>6</sup>

Our client has been negotiating with Mrs DN for resolution of relationship property matters. As conclusion is now imminent, to enable our client to calculate net benefit available to him, he wishes to conclude an arrangement to settle payment and withdraw his complaint.

---

<sup>3</sup> Letter from Mr BU to Mr DG (19 October 2010) [6].

<sup>4</sup> Letter from Mr DG to Mr BU (27 September 2010).

<sup>5</sup> Letter from Mr BU to Mr DG (4 October 2010) [2].

<sup>6</sup> Letter from Mr DG to Mr BU (27 September 2010).

[13] Mr BU's letter is ambiguous as to which of two distinct settlement opportunities may be prejudiced: the opportunity Mr DN had to settle with his wife, or Mr BU's opportunity to settle Mr DN's debt to him.<sup>7</sup> The two settlement opportunities were not interdependent.

[14] However, in his response Mr BU says that he was "...mindful of the duties which Mr DN's lawyers (former and current) have to ensure that his interests are represented and protected as well as possible".<sup>8</sup> It was on that basis that Mr BU offered a 25% discount on his fees for prompt payment, withdrawal of the complaints against him, and confidentiality of settlement. Doubtless, Mr BU would also have been mindful of the cost, uncertainty and litigation risk associated with pursuing Mr DN for his fees.

[15] Mr DN's settlement with his wife could make no difference at all to whether he had resolved his disagreement over fees with Mr BU. Mr DN was in the same position as any potential defendant in an action to recover Mr BU's outstanding fees. At most, therefore, Mr DG's correspondence could only have conveyed that Mr DN's preference was to settle with Mr BU.

[16] It appears that Mr BU saw what he considered to be a realistic settlement opportunity, was aware of the benefits and burdens of the settlement proposal, and took those into account when he agreed to reduce his fees. As a result of his choice, Mr BU precluded himself from recovering compensation on this review for the balance of the fees he agreed to waive.

[17] I therefore make no orders as to compensation under s 156(1)(d) of the Act.

*Fine*

[18] A fine pursuant to s 156(i) of the Act is an appropriate penalty in respect of a relatively minor breach such as this. Aside from acting as an individual deterrent, it is important that the penalty in this case reflects the need to generally deter practitioners from using the complaints process for improper purposes.

[19] In all the circumstances a fine of \$500 pursuant to s 156(1)(i) of the Act is the appropriate penalty. A fine at that low level is appropriate in all the circumstances, recognising Mr DG's previous professional history, reflecting the level of seriousness of the unsatisfactory conduct, and meeting the need for general deterrence.

---

<sup>7</sup> Letter from Mr BU to Mr DG (4 October 2010) [2].

<sup>8</sup> Letter from Mr BU to Mr DG (4 October 2010) [2].

## **Costs**

[20] Pursuant to s 210 of the Act, orders for payment of costs and expenses are discretionary. The finding of unsatisfactory conduct demonstrates that Mr BU's complaint was justified. It was obvious from Mr DG's correspondence leading up to him laying complaints to the Law Society on behalf of Mr DN and himself what his motivation was for laying complaints against Mr BU. Mr DG's clear early admission on review brought the application of Rule 2.10 into sharp focus, and simplified the review process considerably. That is clearly a factor to be taken into account in making an appropriate costs order.

[21] The primary purpose for which costs orders are made in favour of the Law Society is to help defray the costs to the profession overall of funding complaints and discipline, including reviews. Where a finding of unsatisfactory conduct has been made against a practitioner, costs orders will usually be made against the practitioner in favour of the Law Society. Those orders may relate to the costs of the inquiry before the Standards Committee and the costs of review in accordance with s 210(3) of the Act.

[22] I have not been able to identify anything that would disturb the presumption that Mr DG should contribute to the costs. There were no costs orders at the Committee stage because there was no adverse finding. However, it is appropriate to order costs on this review. It was necessary for this Office to convene a review hearing with both parties present, and the result was an adverse finding against Mr DG.

[23] An adverse finding after a hearing generally results in the practitioner bearing approximately half of the costs of the review. Overall, this review fits comfortably into the category of "straight forward" reviews. As there was a hearing in person, the usual cost is \$1,200. Mr DG's early admission supports a discount, which reduces the usual fee to \$900.

[24] Mr DG is therefore ordered to pay costs on review of \$900 to the New Zealand Law Society pursuant to s 210(1) of the Act.

### *Costs between the Parties*

[25] Section 210(1) of the Act provides a general power to make such orders as to the payment of costs and expenses as the LCRO thinks fit. This may extend to an award of costs as between the applicant and practitioner in respect of the review, however, such power will be exercised sparingly. While Mr BU exercised his right to instruct

counsel, it does not follow that Mr BU should recover counsel's fees from Mr DG, particularly where Mr BU's conduct is not under scrutiny on review. Overall there is no reason to depart from the usual principle in this case.

[26] As a consequence, I make no orders in Mr BU's favour as to costs.

*Costs payable by the Law Society to the Applicant*

[27] Mr BV submits that pursuant to ss 157(1)(a) and 211(1)(b) of the Act, the New Zealand Law Society should pay a contribution to Mr BU's legal costs in respect of the Standards Committee proceeding. Section 157(1)(a) provides for costs to be awarded where the Committee has made a determination under s 152(2)(c). No such determination has been made here. An order requiring the Law Society to pay costs to Mr BU is therefore not appropriate under this heading.

**Decision**

Mr DG is ordered to pay, within 28 days of the date of this decision:

- a. Pursuant to s 156(1)(i) of the Act, a fine to NZLS of \$500;
- b. Pursuant to s 210(1) of the Act, costs to NZLS of \$900.

**DATED** this 6<sup>th</sup> day of November 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:

Mr BU as the Applicant  
Mr DG as the Respondent  
Mr DI as a related person or entity  
[A North Island] Standards Committee  
The New Zealand Law Society