

LCRO 296/2013

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of the North Island Standards Committee

**BETWEEN**

**BW**

Applicant

**AND**

**FM AND LC**

Respondents

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

**DECISION**

**Introduction**

[1] Mr BW has applied for a review of a decision by North Island Standards Committee making findings of unsatisfactory conduct against him in respect of a complaint made by Mr FM and Mr LC, and an inquiry initiated by the Standards Committee.

**Background**

[2] Mr FM and Mr LC were the owners of a commercial unit which was leased to Mr BW's clients.

[3] His clients got into arrears with their rent. Mr FM and Mr LC took steps to cancel the tenancy. There were problems in establishing whether the parties had formally recorded the lease arrangements in a formal deed.

[4] Matters were eventually resolved.

[5] Mr FM and Mr LC considered that Mr BW had adopted an obdurate and unhelpful approach in his dealings with them.

### **The Complaints and the Standards Committee decision**

[6] For ease of reference, I propose to refer to the Committee's enquiry into concerns that Mr BW had made an inappropriate comment in his correspondence to the Complaints Service, as an enquiry into a second complaint, and in doing so, recognise that complaint, as defined in the Act, is a complaint made under s132 of the Act and not an own motion investigation. It is convenient however to refer to the two matters as the first and second complaints.

[7] Mr FM and Mr LC lodged a complaint with the Law Society Complaints Service. The substance of the complaint was that Mr BW had acted unprofessionally in his dealings with Mr FM and Mr LC. Complaint was made that his communications to them were not made with the level of respect, integrity and courtesy required of a lawyer. Complaint was also made that Mr BW had breached the intervention rule.

[8] Mr BW was invited to provide response to the complaints.

[9] In correspondence to the Complaints Service dated 30 October 2012, he made comment that "Mr FM appears to be making out he is a poor Chinese immigrant".

[10] A copy of that correspondence was provided to Mr FM who promptly advised the Complaints Service that he considered Mr BW's response to be unprofessional and discriminatory.

[11] An exchange of correspondence then ensued between Mr BW and the Complaints Service on the question as to whether the Complaints Service should have provided Mr FM with a copy of the correspondence which had caused offence.

[12] Mr BW's view was that his correspondence was administrative in nature, and should not have been disclosed. The Complaints Service took a contrary view, noting that they had advised Mr BW that copies of all responses received would be provided to the other parties.

[13] The disclosure argument became irrelevant. On 15 November 2012 Mr BW provided a formal response to the complaint. In that correspondence he repeated his comment that Mr FM was "not some poor Chinese immigrant". Mr BW would have made that comment in the knowledge that his correspondence would be provided to Mr FM.

[14] The Standards Committee delivered its decision on 23 August 2013.

[15] The Committee determined to make a finding of unsatisfactory conduct against Mr BW pursuant to s 152(2)(b) of the Lawyers and Conveyancers Act 2006 (the Act) in relation to his communications with Mr LC and Mr FM and his communications with the Committee. In making this finding the Committee considered the application of rules 10 and 12 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[16] Rule 10 places an obligation on lawyers to “promote and maintain proper standards of professionalism in the lawyer’s dealings”. Rule 12 directs that “a lawyer must, when acting in a professional capacity, conduct dealings with others, including self-represented persons, with integrity, respect, and courtesy”.

[17] The Standards Committee determined to take no action in regard to the element of the complaint that Mr BW accepted instructions other than from a person who holds a practicing certificate as a barrister and solicitor.

[18] The Committee:

- (a) Censured Mr BW pursuant to s 156(1)(b) of the Act.
- (b) Ordered Mr BW to pay a fine of \$500 pursuant to s 156(1)(i).
- (c) Ordered Mr BW to pay the Law Society the sum of \$500 in respect of the costs and expenses of and incidental to the investigation to the complaint and the hearing on the papers which was conducted.
- (d) Determined that no publication of the determination or facts of the matter was necessary or appropriate.

### **Application for Review**

[19] Mr BW filed an application for review on 7 October 2013. Mr BW submitted that the Standards Committee decision:

- (a) Was unjustified and wrong.
- (b) Imposed an excessive penalty in the circumstances.
- (c) Was flawed as he had not been given an opportunity of being heard despite his request for an oral hearing.

[20] Mr FM and Mr LC provided response to the application for review. They disagreed with the Committee's decision to take no action on complaint that Mr BW had acted without an instructing solicitor. They complained about Mr BW's actions in respect of the lease on behalf of his client. They considered that his actions had caused them financial loss and emotional harm.

### **Role of the LCRO**

[21] 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.<sup>1</sup>

### **Analysis**

[22] At hearing Mr BW submitted that:

- The Committee had erred in refusing to allow him an opportunity to appear in person to answer the complaints.
- He had been denied an opportunity to make submission on penalty.
- His correspondence with Mr FM was not discourteous.
- His description of Mr FM in correspondence to the Complaints Service was not, and was not intended to be discourteous.
- The financial penalty imposed was excessive.

#### *Denial of opportunity to be heard in person*

[23] After initial assessment of the complaints, the Committee determined to proceed with inquiry into the complaints and advised the parties that the matters would be set down for an "on the papers" hearing.

[24] Section 153(1) of the Act provides that a hearing conducted by a Standards Committee under s 152(1) of the Act is to be a hearing on the papers, unless the Standards Committee otherwise directs.

[25] The Committee is empowered to deal with complaints on the papers and indeed in most cases does so.

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<sup>1</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [40]-[41].

[26] No objection to the Committee's decision can be sustained on grounds that the Committee failed to allow Mr BW an opportunity to appear before the Committee. It would only be in an unusual or exceptional case that a Standards Committee would depart from the statutory norm. I do not regard this as such a case.

*Denial of opportunity to make submissions on penalty*

[27] After inquiring into the complaint and conducting a hearing with regard to that complaint, a Committee may make one or more of the determinations described in s 152(2) of the Act. Amongst the determinations a Committee may make, is a determination that there has been unsatisfactory conduct on the part of the practitioner.

[28] If the Committee concludes that there has been unsatisfactory conduct, it may make any of the orders available to it under s 156 of the Act, including orders that the practitioner pay a fine not exceeding \$15,000 to the New Zealand Law Society.

[29] The legislation does not require the Committee to advise the practitioner as to the nature of the penalty it proposes to impose, consequential upon its finding that unsatisfactory conduct has been established.

[30] It is relevant to note, that the notice of hearing provided to the parties, invites the parties to address any matters of fact or law that the party considers should be taken into account including the appropriate orders the Standards Committee may make under s 156, in the event that a finding of unsatisfactory conduct is made.

*Correspondence to Mr FM*

[31] I have carefully considered the email correspondence which forms the basis for complaint that Mr BW failed to maintain a proper standard of professionalism in his communications.

[32] I agree with the Standards Committee that the first two emails of which complaint is made would not, in themselves, justify complaint. However the subsequent emails, considered in their totality, do in my view offend against rules 10 and 12 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) which relevantly provide that a lawyer must promote and maintain proper standards of professionalism in their dealings and conduct their dealings with others, including self-represented persons, with integrity, respect, and courtesy.

[33] Mr BW argued that the emails had to be considered in context. There is little force in that submission. Whilst it is so obvious as to approach the trite, that the tone

one party adopts in responding to correspondence can be influenced by the tone adopted by the other party, lawyers are required to put themselves above the fray. The Rules require lawyers to ensure that their communications are framed in a professional and courteous way. This in no way impedes a lawyer's ability to provide robust and vigorous response.

[34] Nor can it be argued that Mr BW's responses were influenced by Mr FM adopting a provocative approach in his correspondence. Mr FM's correspondence is courteous and professional.

[35] It is pertinent to note that Standards Committees are made up of practising lawyers, familiar with the general area of law that is the subject of the complaint. Standards Committees must also include a lay member.

[36] Complaints of this nature which require assessment as to the tone, flavour and appropriateness of written communications, and judgements to be made as to whether those communications offend against the relevant Rules, can be fairly addressed in a forum where the collective mind of a range of practitioners is able to make a collective assessment, with the assistance of a lay member, as to whether the correspondence presents as unprofessional.

[37] I agree with the Committee that Mr BW's communications displayed a lack of respect and courtesy, and fell below the accepted standard for practitioners. The Committee's findings in respect to the correspondence forwarded to Mr FM, in themselves, support a finding of unsatisfactory conduct.

#### *Communications with the Law Society*

[38] When providing response to the Law Society, Mr BW made comment that Mr FM was presenting himself as a "poor Chinese immigrant".

[39] The Committee was concerned by the comment and initiated an own motion investigation. The Committee considered that Mr BW had failed to maintain a proper standard of professionalism in his communications.

[40] A Standards Committee may investigate on its own motion any act, omission, allegation, practice, or other matter that appears to indicate that there may have been misconduct or unsatisfactory conduct on the part of a practitioner.<sup>2</sup>

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<sup>2</sup> Lawyers and Conveyancers Act 2006, s 130(c).

[41] Notice of the second complaint was included in the notice of hearing forwarded to Mr BW, and he was given opportunity to respond to the complaint.

[42] Whilst I understand the Committee's decision to initiate its own investigation, I consider that it would have been more procedurally sound if the Committee had pursued inquiry on the matter it had initiated as a stand-alone inquiry rather than conflating the complaints into a single inquiry.

[43] I do note that the second complaint arises out of a similar context to the first, and that Mr FM, whilst he did not pursue a formal complaint in respect to the second matter, had raised objection to the "poor Chinese" comment, and had given the Committee a clear indication that he considered the comment to be distasteful.

[44] In the circumstances, it is understandable that the Committee adopted what could be seen as a pragmatic approach to dealing with the two matters in an expeditious fashion.

[45] But the complaints are separate complaints, the first initiated by members of the public, the second by the Standards Committee.

[46] In my view, it would have been difficult for the Committee to bring unclouded judgement to its assessment as to whether Mr BW's "poor Chinese" comment was of sufficient concern to constitute a breach of rules 10 and 12.

[47] It is reasonable to pose question as to whether Mr BW's comment to the Law Society would, if considered in isolation from the earlier complaints, have been construed by the Committee as a comment which required the imposition of a disciplinary sanction.

[48] I do not consider it is adopting an overly technical approach to suggest that the complaints should have been considered independently of each other.

[49] Arguments that the matters arose out of the same factual context, and the desirability of considering the conduct in its totality to achieve expeditious resolution have obvious merit, but they are separate complaints initiated by separate parties.

[50] The relevant question is whether the Committee's inquiry into the complaint it initiated had potential to be compromised by the views it had formed in respect to the first complaint.

[51] I conclude that there was possibility of the Committee's views on the second complaint being influenced by information gleaned from the first.

[52] The Committee notes in its decision that it considered Mr BW's comments introduced a racial overtone. That is a serious allegation to level at a practitioner and it would be important, in the context of this case, for the allegation to be given careful consideration, independent of any other conduct issues being considered at the time.

[53] I consider it appropriate that the Committee's determination that Mr BW's comment in his correspondence to the Law Society constituted (in conjunction with its findings on initial conduct complaints) unsatisfactory conduct, be reversed.

[54] I have given careful consideration to sending the second complaint back to the Committee for further consideration, but have decided that there is merit to bringing these matters to conclusion.

[55] In reaching that view I am mindful that a finding of unsatisfactory conduct has been made, and penalty imposed.

[56] I am also mindful that Mr BW presented his submissions at review in a courteous fashion, and indicated that he had not intended, in making the comment, to cause offence and that he was genuinely regretful if he had done so.

[57] Mr BW was ordered to pay a fine of \$500. That penalty flowed from a finding of unsatisfactory conduct in respect to two discrete conduct issues.

[58] In assessing appropriate penalty, the Committee would have arrived at a global figure which it considered appropriate to reflect its findings on the two matters.

[59] As I have determined it is appropriate to reverse the Committee's findings in respect to one of the matters, it is appropriate that there be a reduction in penalty.

[60] I consider it appropriate to reduce the fine by 50 per cent.

[61] In all other respects, the decision of the Standards Committee is confirmed.

### **Costs**

[62] The Applicant has been partially successful on review, but not to the extent where there has been interference with the Committee's finding of unsatisfactory conduct.

[63] I consider it appropriate that the Applicant pay the sum of \$600 towards the costs of this review, such sum to be paid to the New Zealand Law Society within 30 days of the date of this decision.

### **Decision**

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

- [1] The determination that the Applicant breached accepted standards for practitioners in communications with the Law society is reversed.
- [2] Direction that the applicant pay a fine of \$500 to the New Zealand Law Society is amended to direction that the applicant pay a fine of \$250 to the New Zealand Law society, that sum to be paid within 30 days of the date of this decision.
- [3] In all other respects the decision of the Standards Committee is confirmed.

**DATED** this 27<sup>th</sup> day of March 2015

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R Maidment  
**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 BW as the Applicant  
Mr FM and Mr LC as the Respondents  
North Island Standards Committee  
The New Zealand Law Society