

LCRO 30/2015

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of the [Area] Standards Committee [X]

**BETWEEN**

**GN**

Applicant

**AND**

**HJ**

Respondent

**DECISION**

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

**Introduction**

[1] Ms GN has applied for a review of a decision by the [Area] Standards Committee [X] dated 15 December 2014. The Committee found that Mr HJ's failure to provide information to Ms GN contravened rule 3.5 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. The Committee concluded the fees charged for services provided to Ms GN were fair and reasonable pursuant to rules 9 and 9.1, and decided that further action on the other issues Ms GN raised in her complaint was not necessary or appropriate. A finding of unsatisfactory conduct was recorded against Mr HJ, and he was fined \$500.

**Background**

[2] The lawyers files disclose that Ms GN first instructed Mr HJ in January 2013 about difficulties she was having in relation to her employment, and the taking of annual leave. Ms GN sought further advice from Mr HJ the next day because she had concerns about her relationship. Ms GN explained she had given \$30,000 to her former partner, was feeling financially dependent on him, but was not happy in the relationship. Mr HJ

says he delegated aspects of Ms GN's files to Ms LM, a lawyer under his supervision, who also provided services to Ms GN.

[3] Ms GN again contacted Mr HJ in late May because her home was under threat of sale. Mr HJ's file contains a handwritten file note dated 27 May 2013 recording instructions taken from Ms GN. Ms GN's position was that the house she and her sons were living in was the family home she shared with her partner. It appears that as her relationship deteriorated her partner was coming around to a different view. He had control over ownership of the house, and was taking steps to put it on the market. Ms GN received letters from her partner's lawyer telling her to stop harassing him and his wife. Matters deteriorated between Ms GN and her former partner over the days that followed.

[4] On 29 May 2013, Ms GN arranged for a friend to contact Mr HJ, enquiring whether it might be possible for her to register a caveat to protect her interest in the property, pursuant to the Property (Relationships) Act (PRA). Ms GN also began gathering evidence to support a claim under the PRA at about that time.

[5] Mr HJ's office received what appears to have been a settlement proposal from Ms GN's partner, which she was not satisfied with.

[6] On 9 June 2013, the telephone records Ms GN has provided indicate that she had received a deluge of text messages from her partner. On 11 June 2013, through a friend, Ms GN indicated she had resolved to proceed with an application for protection and associated orders against her partner and would provide evidence in support by way of text messages and emails. Ms GN expressed a reluctance to include a doctor's report because it might affect her ability to retain care of her children (who were not the children of her partner), but indicated that if the lawyers advised her that it was helpful, she would provide a medical report to be used in evidence in support of her application. There is no evidence to support the suggestion that any medical report would have become available to the children's father.

[7] Ms LM's advice at that stage was that "a medical report is essential to obtaining a protection order" against her partner. She indicated that once the medical report was available, the lawyers would be in a position to advance the protection order application.

[8] On 12 June 2013, Ms GN's friend emailed apologising for not having called back earlier, and saying she had followed up with Ms GN that day who had "been having some issues getting hold of the doctor today to get the report". She said Ms GN had indicated she would provide the lawyers with a report the next day, but she was "still a bit all over the place", and her friend was having difficulties keeping her focused.

[9] On 16 June 2013, a Sunday evening, Ms GN sent an email to Ms LM instructing her to go ahead with an application for protection orders based on text messages from her former partner.

[10] On 17 June 2013, Ms LM confirmed that she could progress application for protection orders and asked Ms GN to forward copies of the text messages because they would be helpful for the application.

[11] In a later email, sent on 22 July 2013, Ms LM referred to a telephone conversation she said she had had with Ms GN on 17 June 2013. In the course of that telephone call, Ms LM said Ms GN had instructed her not to proceed with the application for protection orders because she was expecting a settlement proposal from her former partner, and did not want to "rock the boat".

[12] On or about 18 June 2013, a proposal arrived at Mr HJ's offices from Ms GN's partner's lawyer. That letter set out his without prejudice proposal to settle matters.

[13] In an email to Ms LM on 20 June 2013, Ms GN said the proposal was not acceptable to her and disputed aspects of what was said. Ms LM responded inviting her to make an appointment with Mr HJ the following week.

[14] On 8 July 2013, Mr HJ drafted a counter offer to put to Ms GN's partner.

[15] On 11 July 2013 Ms GN's partner's lawyers sent a letter requiring Ms GN to stop harassing him and his family. She was told that all contact was to be through the lawyers, or her partner would apply for protection orders. There is evidence of negotiations between Ms GN and her partner by email before 11 July 2013.

[16] On 13 July 2013, Ms GN was served with temporary protection orders made by the Family Court, naming her partner as the protected person, and making provision for his wife to also be a protected person if she consented to that course. The same day, Ms GN went to see a psychotherapist, and the next day there is evidence of her having discussed the evidential situation with Mr PT, a forensics expert. On 16 July 2013, Ms GN was in touch with Vodafone in an attempt to get evidence about call histories.

[17] Mr HJ made a file note on 18 July 2013 indicating that Ms LM understood Ms GN's instructions were not to proceed with the protection order application, and recording that they had both acted on that instruction, and had held back correspondence they had prepared, while Ms GN continued her discussions with her former partner.

[18] On 18 July 2013 Ms GN instructed Mr HJ to file a defence and cross notice, and to seek further information. He advised her that any relationship property claim would be

affected by difficult legal issues. Mr HJ's file note records that he had some concerns about Ms GN's "mental and psychological well-being", but said he had formed the view that she was able to give clear instructions and had support and assistance from third parties. He recorded having invited Ms GN to seek a second opinion on the approach he and Ms LM had taken, and to consider instructing other lawyers. He recorded Ms GN being "very quick to respond on that point, and to advise she had every confidence in LM and I to act in her best interests, with diligence and skill". The lawyers drafted an affidavit in support of Ms GN's application for temporary protection orders and associated relief against her partner.

[19] Ms GN had seen a psychotherapist twice by 20 July 2013 and told Ms LM in an email that "I now understand I can't go back". That email is ambiguous, but I assume Ms GN meant she either cannot go back to her relationship with her partner, or she cannot go back and change the way she dealt with the breakdown of the relationship, including her instructions to the lawyers.

[20] On 22 July 2013, Ms LM sent the email referred to in paragraph [11] above, explaining that Ms GN had instructed her on 18 June 2013 to stop work on the protection order applications. Ms LM asked Ms GN to provide her instructions in writing in future.

[21] On 31 July 2013, the Family Court made temporary protection orders against Ms GN's partner naming her as a protected person. Those were served on him on 1 August 2013, and he filed an objection to attending a programme as directed in those orders.

[22] On 9 August 2013, Ms GN sought advice from the lawyers on what she should do now that she and her partner were each protected from one another by orders.

[23] It is apparent from emails between Ms GN and her partner that her financial position was difficult, that she was experiencing difficulties at work, and she wanted stability for her and her children. Ms GN's instructions to Mr HJ reflect her desire for stability, with the relationship apparently over.

[24] Mr HJ continued to negotiate on behalf of Ms GN without success. Information was requested and some was provided. It is apparent from Ms GN's emails to her lawyers that she felt strongly that she had been poorly treated by her partner.

[25] On 13 August 2013, Ms GN emailed Ms LM about a meeting with her former partner, and shortly after, she emailed Ms LM to say Mr HJ had advised her that he could no longer act for her. Her email refers to arrangements to collect her file and pay the lawyers' fees.

[26] On 15 August 2013, Ms GN emailed Mr HJ and Ms LM with information about her case. Again, on 16 August 2013, Ms GN appears to have telephoned Mr HJ's firm, and left a telephone message asking him to obtain information in advance of a meeting that was being arranged with her partner. That evening, Ms GN sent an email to Mr HJ saying she had received a telephone message from him, she did not require his services and had engaged another lawyer because he had told her he could no longer act. Ms GN indicated she would not attend the meeting with her partner and would instruct her new lawyer to attend a hearing on the 23rd. Ms GN requested an account be sent to her home address so she could arrange payment.

[27] Mr HJ arranged for invoices to be prepared for the two files. Both invoices are dated 19 August 2013. The invoice on the employment and relationship property file on which Mr HJ had acted contained fees of \$6,750. The fees on the protection order file were \$4,620.

[28] Mr HJ's bills were sent to Ms GN by email on 19 August 2013 with a letter advising her that he was no longer acting. Mr HJ advised the Court on 19 August 2013 that his retainer had been terminated and sought leave to be removed as solicitor on the Court's record in the protection order proceeding.

[29] There follows a two month gap until 24 October 2013, when the Family Court sent a copy of a temporary protection order to Mr HJ's office indicating that Ms GN's partner's wife had consented to being named as a protected person. Mr HJ's office brought that correspondence to Ms GN's attention by email.

[30] In November 2013, Ms GN laid a complaint to the New Zealand Law Society (NZLS) about Mr HJ's conduct, service and fees.

### **Complaint**

[31] Ms GN set out a short history of her dealings with Mr HJ, saying she saw him in each case relatively briefly. The essence of her complaint is that Mr HJ's advice did not protect her best interests, was not sound legal advice, and did not result in her being protected or her interests advanced.

[32] She describes being bombarded by her former partner with abusive text messages and telephone calls, and asserts Mr HJ took no steps to prevent the abuse reoccurring. She says he did not open a letter from the psychotherapist until long after he had received it.

[33] Ms GN relates a number of behaviours by her partner that she believes Mr HJ should have promptly addressed by applying for protection orders on her behalf. She is critical of Mr HJ for his delay. Ms GN says she had a breakdown, which she attributes to Mr HJ's inaction. She refers to a response she had from Mr HJ and/or Ms LM saying they understood her instructions that she did not want to go ahead with the application for protection orders, because she was trying to negotiate the return of her money with her former partner, and did not want to upset those negotiations. Ms GN says Mr HJ is wrong about that: she wanted him to proceed.

[34] She says Mr HJ's advice was to continue communicating with her partner in an attempt to negotiate a resolution to their property dispute, and she acted on that advice. Ms GN appears to believe that she lost an advantage in negotiations by failing to secure protection orders against her partner in advance of him obtaining protection orders against her. She considers he could not have obtained orders if Mr HJ had acted promptly on her instructions and on the psychotherapist's report that he did not open promptly. She believes Mr HJ was not interested in making enquiries to assist her in furthering a claim under the PRA.

[35] Ms GN describes being persuaded by Mr HJ to allow him to continue acting for her at the meeting in July with her former partner, and says that she lost faith in Mr HJ when he did not make the enquiry as requested.

[36] Ms GN says she instructed Mr HJ on the basis that she had no money apart from that which she had given to her partner to invest, and she still has no money because that has not been paid back to her. She says Mr HJ knew from the start that she would not be able to pay his fees, and says she did not know what his fees would be or how he would bill her, because he did not tell her.

[37] Aside from the fact that he acknowledges he did not provide the information required by rule 3.5, Mr HJ's response is that he and Ms LM generally met their obligations to Ms GN and conducted themselves in a manner that was consistent with the rules. He defends the advice provided to Ms GN, and says that when she wanted to apply for protection orders, those instructions were carried out. However, when Ms GN instructions were to do nothing further, while the settlement discussions progressed, that is what he and Ms LM did. He says that as they received no further instructions until after Ms GN was served with protection orders, they do not accept they failed to provide a proper service, and says they have conducted themselves in accordance with the rules.

### **Standards Committee**

[38] The Committee considered the complaint and the parties' correspondence and concluded that the only difficulty with the conduct, service or fees arose from Mr HJ's failure to provide information to Ms GN in advance of undertaking significant work under the retainer.

[39] As to fees, the Committee considered the firm's timesheets, formed the view there was nothing unusual about the way in which the employment and relationship property file had been managed, and concluded the fee was fair and reasonable given the factors set out in rule 9.1. In respect of the protection order file, the Committee observed that the fee was on the high side. However, the Committee considered the matter had not been straightforward, and not all of the time spent on the file appeared to have been recorded. The Committee's view was that the fee was not unfair or unreasonable.

[40] Except for the contravention of rule 3.5, for which a finding of unsatisfactory conduct was made, the Committee determined Ms GN's complaints on the basis that further action was not necessary or appropriate.

[41] Ms GN disagreed and has applied for a review.

### **Application for Review**

[42] Ms GN's application for review largely repeats the concerns set out in her complaint. She places some emphasis on a statement she says Ms LM made to the effect that Mr HJ had "dropped the ball" on a protection order application. Ms GN says Mr HJ was wrong to delay making the application pending receipt of the psychotherapist's report.

[43] Mr HJ maintains that aside from not providing information in advance, he and Ms LM did nothing wrong.

### **Review on the Papers**

[44] The parties have agreed to the review being dealt with on the papers. This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct a review on the basis of all the information available, if the LCRO considers that the review can be adequately determined in the absence of the parties. That is the case here.

[45] Further information was requested pursuant to s 207 of the Act, and the parties have had the opportunity to comment on that.

### **Nature and Scope of Review**

[46] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:<sup>1</sup>

... 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.

[47] More recently, the High Court has described a review by this Office in the following way:<sup>2</sup>

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.

[48] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

- (a) consider all of the material available on review afresh, including the Committee's decision; and
- (b) provide an independent opinion based on those materials.

### **Review Issues**

[49] The questions on review are:

<sup>1</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

<sup>2</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].



- (a) Did Mr HJ and Ms LM meet their obligations in providing regulated services to Ms GN to act competently and in a timely manner, consistent with the terms of the retainer and the duty to take reasonable care (rule 3); and
- (b) Did Mr HJ and Ms LM charge Ms GN more than a fee that was fair and reasonable for the services provided, having regard also to the factors set out in rule 9.1 (rules 9 and 9.1).

## **Analysis**

### **Did the lawyers meet their obligations pursuant to Rule 3?**

[50] Rule 3 says:

In providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

[51] Ms GN places some emphasis on a comment she says Ms LM made, but which Ms LM denies having made, that Mr HJ had “dropped the ball” on the application for protection orders. If Ms LM had made that comment, it would not, in any event, be conclusive as to whether Mr HJ’s conduct fell below a proper standard by a failure to act in a timely manner.

[52] The relevant enquiry relates to what Ms GN instructed Mr HJ to do: go ahead or stop. That question is best answered by the records at that time. Unfortunately, there is no contemporaneous file note of Ms GN’s instructions to stop. However, there is substantial evidence that around the time Ms GN was in negotiations with her former partner in an attempt to secure her own future and that of her children. That appears to have been her focus, rather than an application for protection orders. There was a fairly intense period of negotiations, following which Ms GN was served with temporary protection orders naming her partner as the protected person. That appears to have been the final straw for her. Those orders appear to have generated a renewed enthusiasm for orders to be made against her former partner. That, naturally enough, presented some difficulties to Ms GN who was, on the one hand defending herself, and on the other mounting an attack on her former partner.

[53] The evidence on the point suggests that Ms GN’s instructions from 18 June to 18 July was to suspend work on her application for protection orders.

[54] Ms GN's comment to Ms LM of 20 July 2013 that she understood she could not go back suggests a dawning recognition of the need to deal with the position she then found herself in. She appears to have recognised that her options were limited.

[55] It is unfortunate that there is no contemporaneous record of those instructions, but Ms LM's email of 22 July 2013 explaining that the instructions had been provided orally, and in future were to be provided in writing, is indicative of the need to maintain a clear record of Ms GN's instructions. Mr HJ's email indicating he had concerns about Ms GN's mental state, and his referral of her to a psychotherapist help to paint a picture of Ms GN being in an unfortunate state, because of her breakup with her former partner. The psychotherapist's notes supports the view that Ms GN was in a fragile condition.

[56] Nonetheless, the lawyers can only act on the instructions they are given, and in accordance with their obligations. There is no evidence of any lack of competence by the lawyers. The only allegation that Ms GN really makes is that their provision of regulated services was not in a timely manner. That, however, is guided by the terms of the retainer. She does not say that the lawyers breached any duty to take reasonable care, and there is no evidence to support the proposition that they did.

[57] The evidence points to the lawyers having been instructed to make application for protection orders, and then that instruction being countermanded, and not refreshed until after Ms GN had been served with temporary protection orders by her former partner. There is insufficient evidence to be satisfied that the lawyers did not act in accordance with Ms GN's instructions, and evidence, albeit not by way of contemporaneous file notes, that they did.

[58] There is no reason, based on all of the evidence available on review, to form a different view to that adopted by the Standards Committee. There is also no reason to take any further action. The decision of the Committee in that respect is confirmed.

### **Fees – Rules 9 and 9.1**

[59] Ms GN says that the fees were too high, and Mr HJ knew from the outset that she would not be able to pay them.

[60] Mr HJ and Ms LM's obligations are to charge fees in accordance with rules 9 and 9.1 which say:

#### **9 Fees**

A lawyer must not charge a client more than a fee that is fair and reasonable for the services provided, having regard to the interests of both client and lawyer and having regard also to the factors set out in rule 9.1.

### 9.1 Reasonable fee factors

The factors to be taken into account in determining the reasonableness of a fee in respect of any service provided by a lawyer to a client include the following:

- (a) the time and labour expended:
- (b) the skill, specialised knowledge, and responsibility required to perform the services properly:
- (c) the importance of the matter to the client and the results achieved:
- (d) the urgency and circumstances in which the matter is undertaken and any time limitations imposed, including those imposed by the client:
- (e) the degree of risk assumed by the lawyer in undertaking the services, including the amount or value of any property involved:
- (f) the complexity of the matter and the difficulty or novelty of the questions involved:
- (g) the experience, reputation, and ability of the lawyer:
- (h) the possibility that the acceptance of the particular retainer will preclude engagement of the lawyer by other clients:
- (i) whether the fee is fixed or conditional (whether in litigation or otherwise):
- (j) any quote or estimate of fees given by the lawyer:
- (k) any fee agreement (including a conditional fee agreement) entered into between the lawyer and client:
- (l) the reasonable costs of running a practice:
- (m) the fee customarily charged in the market and locality for similar legal services.

[61] The Committee concluded that the fees were fair and reasonable with respect to both matters. In terms of the protection order application, the Committee noted that although the fee was high it was not outside the range of fair and reasonable fees, given the complexity of the matter, and that not all of the time apparently spent on the file had been recorded.

[62] The nub of Ms GN's concern is that she has no money and cannot pay. That does not equate to the lawyers' fees being unfair or unreasonable.

[63] I have considered the invoices and both files in their entirety.

[64] The files support the level of billing. It appears that not all of the time spent providing services to Ms GN may have been recorded or charged for, but time is only one factor. Both files required a reasonable level of skill and specialised knowledge, as well as responsibility for performing the services properly. It is clear from the file notes and the other contemporaneous evidence that all three matters, employment, relationship

property and protection order applications were important to Ms GN. The protection order application was successful. The relationship property claim was always going to be difficult, and the employment issue was resolved early on it seems.

[65] Urgency is a factor to be considered in relation to the applications for protection order and the potential loss of Ms GN's home. In the case of protection orders urgency does not appear to have been a driving force for Ms GN as it sometimes is. Mr HJ appears to have done what he could in relation to the threats to Ms GN's home. Generally, matters were attended to in a timely way, but without a significant degree of urgency until the protection order application was re-engaged in mid July. There is no evidence of Mr HJ having loaded a premium for urgency.

[66] The protection order application was slightly complicated by the volume of material, and difficulties in obtaining telephone records without court orders. The relationship property questions were complicated by the particular qualities of the relationship between Ms GN and her partner; the way in which she had parted with money without keeping her own records, and the suggestions that at least some of that money had been paid back to her, if her partner's version of the figures was to be relied on. Although Ms GN says the money was all she had left, the amount in dispute was not large enough to warrant a protracted legal fight.

[67] There is no evidence of Mr HJ having offered a fixed or conditional fee or giving Ms GN a quote or estimate. There was no evidence of a fee agreement, which is where the unsatisfactory conduct finding arises in relation to rule 3.5. Mr HJ appears to accept that finding, and there is no obvious reason to disturb it.

[68] There is nothing alarming about the hourly rates or fees that make them unfair or unreasonable.

[69] In the circumstances, the fees aspect of the Committee's decision is also confirmed.

## **Decision**

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

**DATED** this 22nd day of June 2016

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**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:

GN as the Applicant  
HJ as the Respondent  
RP as a Related Party  
[Area] Standards Committee [X]  
The New Zealand Law Society