LCRO 38/2015

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of [Area] Standards Committee [X]
BETWEEN	**PF** Applicant
AND	**GG** Respondent

DECISION

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

Introduction

[1] Mr PF has applied to review a decision of the [Area] Standards Committee [X] (the Committee), in which the Committee decided to take no further action on his complaint against Ms GG.

[2] The Committee based its decision upon s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act), which allows a Standards Committee to decline to take further action on a complaint if the Committee considers that it is unnecessary or inappropriate to do so.

Background

[3] Mr PF and Ms GG are and were at the relevant time, practising as barristers with an emphasis on family law.

[4] From approximately mid-2011, each was on opposite sides of a relationship property dispute. Mr PF acted for Mr T, and Ms GG acted for Ms K as well as the trustees of a family trust (the trustees).

[5] When the dispute between the couple initially arose, Mr T was represented by another lawyer.

[6] The relationship property dispute was bitterly contested. Several aspects of it were dealt with over many Family Court appearances. In addition, Mr T was charged by the Police with assaulting Ms K.

[7] Ms K complained to the New Zealand Lawyers Complaints Service (Complaints Service) about aspects of Mr PF's conduct.[1]

[8] In responding to Ms K's complaint, Mr PF made a complaint against Ms GG.

Complaint

[9] In a letter to the Complaints Service dated 12 March 2014 responding in part to Ms K's complaint against him, Mr PF raised the following issues about Ms GG's conduct:

(a) In email correspondence to Mr T's former lawyer dated 11 April 2011, Ms GG attempted to pervert the course of justice by blackmailing Mr T into accepting settlement terms, as follows (the threat):

> I have received instructions from [Ms K] that she will settle o the following basis.
>
> This is her final offer which she requires to be signed off tomorrow before 4pm:
>
> [Conditions set out numbered 1 – 3]
>
> 4. I will do what I can with regard to his criminal charges.
>
> If [Mr T] does not agree, I will pursue his conviction to the greatest extent possible and will not consider withdrawing the protection order or furniture order. Furthermore, I will file confidentiality charges against persons who were/are under my employment barring them from testifying against me in court. I will also seek to recoup all fees for any further litigation.

[1] Ms K's complaint against Mr PF resulted in [Area] Standards Committee [X] referring Mr PF's conduct to the Lawyers and Conveyancers Disciplinary Tribunal (the Tribunal). The Tribunal made findings of misconduct against Mr PF in a decision dated [date removed] (*[case citations removed]*). The conduct issues centred around whether Mr PF had breached the intervention rule and whether he had wrongly held himself out as having an instructing solicitor in the proceedings between Mr T and Ms K. The findings of misconduct resulted in Mr PF being suspended from practise for three months (*[case citations removed]*).

> Please advise his response to this as soon as possible.
>
> Ms GG

(b) Ms GG acted as a post-box for Ms K. This revealed a lack of judgment and was unprofessional conduct.

(c) Ms GG failed to exercise professional judgment in forwarding correspondence from Mr PF to her client, Ms K, which she knew or ought to have known would cause unnecessary distress to Ms K. This was unprofessional conduct by Ms GG.

(d) Ms GG "made incompetent attempts" to serve documents on Mr T outside the jurisdiction, causing embarrassment in his employment. She then arranged for Mr PF to be served personally with the documents, "by sending a process server to [his] home on a cold dark winter evening". This was discourteous and a breach of r 10.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) (the personal service issue).

(e) In a Notice of Defence filed in the Family Court by Ms GG on behalf of Ms K and the trustees, Ms GG breached r 14.13 of the Rules in that she provided her own address as the address for service, and not that of her instructing solicitor (the r 14.13 breach).

(f) Ms GG did not provide the name of her instructing solicitors on the Notice of Defence, merely the name of the solicitor in that firm who had instructed her.

(g) Having filed a Notice of Defence indicating that she was acting, Ms GG refused to accept service of documents on behalf of the trustees (the second respondents issue).

(h) Ms GG breached her discovery obligations by not obtaining a file from the trustees' solicitors (the discovery undertaking issue).

[10] To this list of eight separate conduct complaints, in a letter to the Complaints Service dated 14 May 2014 Mr PF added a further complaint, or "enquiry" as he put it. He asked whether Ms GG had issued a letter of engagement; if so, to whom and was it accurate?

[11] In total, Mr PF raised nine separate issues of complaint about Ms GG's conduct.

Response by Ms GG

[12] In her response to the Complaints Service dated 31 July 2014 Ms GG submitted:

(a) Her email dated 11 April 2011 to Mr T's previous lawyer was not a threat. The email came at the end of a series of other email exchanges between her and the lawyer. Those in turn followed a lengthy and unsuccessful mediation between the parties. Correspondence had been emotive. The email in question had been copied and pasted by Ms GG from Ms K's written instructions to her; they were Ms K's words. Mr T had committed a "serious assault" on Ms K and was facing a criminal charge as a result. Nevertheless, Ms K was concerned about the impact a conviction might have on Mr T and she was trying to assist with that, by seeing if agreement could be reached on property issues.

(b) She had specific instructions from Ms K to forward all correspondence to her. It was not unprofessional for Ms GG to have done so.

(c) She arranged for a process server to serve her client's application for a dissolution of marriage on Mr PF.

(d) Her instructing solicitor, Ms M, is a partner in a law firm. Apart from that Ms GG was unclear how having her own contact details on documents breached professional standards.

(e) She filed a Notice of Defence on behalf of Ms K and the trustees, who were second respondents in the proceedings. For a period of time it was unclear whether she would be continuing to act for the trustees.

(f) She used her best endeavours to ensure that the trustees' solicitors forwarded the documents required for discovery to her instructing solicitor. As soon as they were received by Ms GG's instructing solicitor, they were forwarded to Mr PF.

(g) A letter of engagement was provided to Ms K.

[13] Ms GG expressed her concern that Mr PF had made a complaint about her and wondered whether it had been motivated by the fact that Ms K had made a complaint about him. Ms GG indicated that she had no knowledge of her client's complaint. She

described Mr PF's allegations as "entirely baseless" and "an unnecessary waste of time".

Standards Committee decision

[14] The Committee delivered its decision on 23 December 2014.

[15] The Committee set out Mr PF's nine issues of complaint, and dealt with each. On each, the Committee determined to take no further action.

[16] At the hearing of his application for review, Mr PF narrowed his issues of complaint to five of the nine he had initially raised.[2] In summarising the Committee's decision, I will deal only with those five issues. They are:

(a) The threat.

(b) The personal service issue.

(c) The r 14.13 breach.

(d) The second respondents issue.

(e) The discovery undertaking issue.

[17] The Committee dealt with those five issues as follows:

(a) The threat

The Committee was of "the view that it was most likely that Mr PF's complaint was simply a retaliation towards Ms K's complaint against him". The Committee noted that the offending words in Ms GG's email to Mr T's former lawyer, were Ms K's words. Ms GG ought to have made that clear in her email, and the decision to simply copy her client's words was "unfortunate" but did not amount to a breach of professional standards.[3]

(b) The personal service issue

The Committee noted the difficulties Ms GG had in endeavouring to serve the dissolution of marriage proceedings on Mr T. Given his absence from New Zealand, and the fact that (although a barrister) Mr PF did not have an

[2] In the Application for Review lodged with this Office, Mr PF raised the issue of whether Ms GG had provided terms of engagement. However, this was abandoned by him at the hearing of his application for review.
[3] Standards Committee determination, 23 December 2014 at [11]–[12].

instructing solicitor, the Committee concluded that "it is difficult to see who, other than Mr PF, the documents could have been served on". It concluded that Ms GG had acted appropriately in the circumstances.[4]

(c) *The r 14.13 breach*

The Committee noted that Ms GG "may have committed a technical breach of rule 14.13 to the extent that the address appearing on the documentation should have been [her instructing solicitor's and not her own]".[5] The Committee observed that it was common for barristers to include their own contact details as well as those of their instructing solicitors on documents filed in Court, and noted that "Ms GG should take care in this regard in future".[6] However, no further action was required.

(d) *The second respondents issue*

The Committee noted Ms GG's explanation that she refused to accept service on behalf of the trustees until she confirmed whether she would continue to act for them, and held that she "was entitled [to do so]".[7]

(e) *The discovery undertaking issue*

The Committee held that Ms GG's efforts to complete discovery "were frustrated by delays on the part of [the trustee's lawyers]".[8] It concluded that she had acted appropriately.

Application for review

[18] Mr PF filed an application for review on 13 February 2015. He submits:

a) The threat

(i) It is immaterial that Ms GG copied her client's words into the email to Mr T's former lawyer. The threat conveyed was to tailor evidence in a criminal prosecution.

(ii) The threat was a breach of s 4 of the Act and of the Rules.

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[4] At [24].
[5] At [29].
[6] At [30].
[7] At [38].
[8] At [42].

b) *The personal service issue*

(i) Ms GG ought to have endeavoured to serve Mr PF by email and/or by post, and not by personal service at his home on a cold dark winter's evening.

c) *The r 14.13 breach*

(i) Documents filed by Ms GG do not identify the name of the law firm of which her instructing solicitor was a principal.

(ii) Ms GG complained that Mr PF preferred to have documents served on him, rather than his instructing solicitor. In putting her own contact details on documents filed in court, "Ms GG should not be able to adopt a practice to which she objects another practitioner adopting".

d) *The second respondents issue*

(i) Having filed a Notice of Defence on behalf of the trustees as second respondents, Ms GG was obliged to accept service of documents on their behalf until a new address for service had been filed.

e) *The discovery undertaking*

(i) Ms GG provided the Court with an undertaking as to discovery. She failed to fulfil that undertaking. At the date of Mr PF's application for review, the undertaking had still not been complied with.

Nature and scope of review

[19] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[9]

> … 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

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

> 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.

[20] More recently, the High Court has described a review by this Office in the following way:[10]

> 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.

[21] 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 the available material afresh, including the Committee's decision; and

(b) provide an independent opinion based on those materials.

Statutory delegation and hearing in person

[22] As the Officer with responsibility for deciding this application for review, I appointed Mr Robert Hesketh as my statutory delegate to assist me in that task.[11] As part of that delegation, on 29 November 2017 at Auckland, Mr Hesketh conducted a hearing at which both Mr PF and Ms GG appeared in person.

[23] The process by which a Review Officer may delegate functions and powers to a duly appointed delegate was explained to the parties by Mr Hesketh. They indicated that they understood that process and took no issue with it.

[24] Mr Hesketh has reported to me about that hearing and we have conferred about the complaint, the application for review and my decision. There are no additional issues or questions in my mind that necessitate any further submissions from either party.

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[10] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].
[11] Lawyers and Conveyancers Act 2006, sch 3, cl 6.

Analysis

Preliminary

[25] In his application for review Mr PF raises concern that "the Committee received a response from Ms GG, which was not conveyed to [him]. This is in breach of natural justice". That issue was not advanced by him at the hearing before Mr Hesketh.

[26] I note from the Committee's file in relation to Mr PF's complaint against Ms GG, that she only provided one response to that complaint, this being her letter to the Complaints Service dated 31 July 2014.

[27] The Committee's file includes an email from the Complaints Service to Mr PF, also dated 31 July 2014, to which was attached Ms GG's response to his complaint. There is no record on the Committee's file of that email having been rejected by Mr PF's server and from that I conclude that it was received by him. It is less clear whether he opened and read the email (and attached response) by Ms GG. His reference in his application for review to not having received Ms GG's response tends to suggest that he did not.

[28] However, I am not satisfied that the Committee (or the Complaints Service) has "breach[ed] natural justice" as alleged by Mr PF in his application for review. Ms GG's response was sent to him as would be expected.

[29] Further, as indicated above at [21], my function includes considering all material afresh and providing an independent opinion on that material. Such an approach will overcome any lingering concerns that Mr PF may have about the Committee's processes.

[30] As indicated above, at the hearing before Mr Hesketh, Mr PF confirmed that his application for review was confined to five issues. I will deal with each in turn.

The threat

[31] The alleged threat was contained in Ms GG's email to Mr T's former lawyer, dated 11 April 2011. It is convenient to set the text of that email out again, adding relevant emphasis:

> I have received instructions from [Ms K] that she will settle on the following basis.

> This is her final offer which she requires to be signed off tomorrow before 4pm:
>
> *[Settlement terms conditions set out numbered 1 – 3]*
>
> *4. I will do what I can with regard to his criminal charges.*
>
> *If [Mr T] does not agree, I will pursue his conviction to the greatest extent possible and will not consider withdrawing the protection order or furniture order. Furthermore, I will file confidentiality charges against persons who were/are under my employment barring them from testifying against me in court. I will also seek to recoup all fees for any further litigation.*
>
> Please advise his response to this as soon as possible.
>
> Ms GG

[32] Ms GG has submitted that apart from the opening two paragraphs which are her own words, the emphasised portion of the email was her client's written instructions to her which she copied into the email.

[33] In its decision, the Committee did not identify what statutory or rule based provision was engaged by this issue of complaint. In determining to take no further action on it, the Committee simply said that Ms GG's conduct did not amount to a breach of professional standards.

[34] In his application for review, Mr PF framed the issue of complaint as being "a clear breach" of s 4 of the Act, as well as the rules.

[35] Section 4 of the Act reads:

> **Fundamental obligations of lawyers**
>
> Every lawyer who provides regulated services must, in the course of his or her practice, comply with the following fundamental obligations:
>
> (a) the obligation to uphold the rule of law and to facilitate the administration of justice in New Zealand:
> (b) the obligation to be independent in providing regulated services to his or her clients:
> (c) the obligation to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients:
> (d) the obligation to protect, subject to his or her overriding duties as an officer of the High Court and to his or her duties under any enactment, the interests of his or her clients.

[36] By describing Ms GG's email as a threat amounting to an attempt to pervert the course of justice, Mr PF is clearly referring to s 4(a), which imposes the duty to uphold the rule of law.

[37] However, in my view s 4(c) also has application. In sending an email in which her client endeavours to negotiate a criminal prosecution, Ms GG has compromised

her client's interests by exposing her client to risk of investigation for the offence of blackmail under s 237 of the Crimes Act 1961.

[38] I express no view whatsoever about whether such an offence would be made out. However, the way in which the email is expressed raises real concern about precisely how Ms K would approach the criminal prosecution then faced by Mr T and potentially invites investigation about that.

[39] In my view, this conduct would be regarded by lawyers of good standing as being unacceptable, contrary to s 12(b) of the Act.

[40] This issue of complaint also engages r 2.3, which reads:

> A lawyer must use legal processes only for proper purposes. A lawyer must not use, or knowingly assist in using, the law or legal processes for the purpose of causing unnecessary embarrassment, distress, or inconvenience to another person's reputation, interests or occupation.

[41] Ms GG submits that the email was sent, in effect, as a last-ditch attempt to try and settle what had been a difficult relationship property dispute. It came at the end of "a flurry of email activity" exchanges between her and Mr T's then lawyer, which in turn had followed an all-day mediation before a very experienced family law mediator (now a Family Court Judge).

[42] Ms GG also makes the point that Mr T's former lawyer did not raise any concerns about the email and that it only became an issue after her client had complained to the Complaints Service about Mr PF's conduct.

[43] From the text of the email it is clear that Ms GG did copy her client's text into the email. The offending part is written in the first person and describes events that only Ms K could control or instigate.

[44] The Committee considered that "Ms GG should have made clear [to the other lawyer] the fact that the words were not her own and were in fact those of her client".[12] This suggests that, had Ms GG done so, it would have mitigated her conduct.

[45] However, in the context of a conduct inquiry involving r 2.3, the author of the offending words is irrelevant. This is evident from the wording of r 2.3 itself: the culpable conduct is "[using] or *knowingly [assisting] in using*...legal processes" (emphasis added).

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[12] Standards Committee determination, above n 3, at [12].

[46] The conduct is not authorship; it is conveying the words to another person and thereby condoning, if not actually promoting, what has been said. The fact that the words may have been drafted by a lawyer's client, does not mitigate the lawyer's conduct in conveying them and intending them to be acted upon. The client's words become the lawyer's words.

[47] Mr PF accepts that Ms GG "would not have had a deliberate intention to convey a threat" and that her action in sending the email with the offending text was "negligent", and not in the category of misconduct; rather, unsatisfactory conduct.

[48] In examining what is meant by the words "proper purpose", albeit in the context of r 2.10, in *SC v JT* this Office held:[13]

> [77] In my view, there will be circumstances in which it is not improper for a practitioner to signal that a complaint may be filed, if a colleague fails to comply with a reasonable request.
>
> [78] In my view an improper purpose in threatening to make a complaint will arise when, in making the threat, a lawyer makes a connection between the threat and an unrelated strategic advantage that the lawyer is trying to accomplish.
>
> [79] A proper purpose would include instances where a lawyer makes a threat to complain about a colleague, but does so without purpose or intent to secure advantage. For example, a request to respond to long unanswered correspondence, coupled with a threat to complain if response is not received by a particular date, is unlikely to be a threat made for an improper purpose. No transactional advantage is being sought – merely a response to correspondence. It is a threat to complain about conduct for no other reason than the conduct potentially merits it.

[49] The offending words in Ms GG's email clearly amount to a threat to use legal processes. A criminal prosecution, being a legal process, would be pursued and other legal processes initiated if Mr T did not agree to Ms K's terms to settle their relationship property dispute.

[50] If he agreed with the terms, Ms K "[would] do what [she could] with regard to his criminal charges"; in other words, she would endeavour to have them dropped or dismissed.

[51] The use legal of legal processes was equally clearly for an improper purpose. Applying *SC v JT*, there was "a connection between the threat [to use legal processes] and an unrelated strategic advantage that the lawyer is trying to accomplish". The strategic advantage was settlement on Ms K's terms.

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[13] *SC v JT* LCRO 382/2013 (30 June 2017) at [77]–[79].

[52] It goes without saying that this email would have caused unnecessary embarrassment, distress, or inconvenience to Mr T's reputation, interests or occupation.

[53] In short, Ms GG should have carefully advised her client against expressing her terms for settlement terms in that way. She should have explained the potential dangers of doing so, both for her client and for herself. And, most certainly, she ought not to have sent the email containing her client's offending words. A lawyer is not obliged to follow each and every one of their client's instructions, when those instructions involve the lawyer him or herself breaching their ethical and professional obligations.

[54] For the reasons given above, I disagree with the Committee's characterisation of this conduct as "unfortunate" and not a breach of professional standards.

The personal service issue

[55] The proceedings in question were Ms K's application to have her marriage to Mr T dissolved. This was separate from the ongoing relationship property proceedings.

[56] Ms GG had been unable to personally serve the proceedings on Mr T overseas. On 3 May 2013, a Family Court Judge made an order for substituted service on Mr T's counsel. Ms GG and Mr PF exchanged emails about this. Mr PF indicated he could be served by delivery to his post office box, with "courtesy copies" by email.

[57] Ms GG was concerned about whether service to a post office box would be possible, as a signed receipt was required. She decided to take a belt and braces approach and serve Mr PF both at his post office box, and personally.

[58] To effect personal service, Ms GG instructed the process server that she customarily engaged, and instructed them to serve the proceedings on Mr PF personally. She did not instruct them to serve the proceedings in any particular manner; only that he be served personally.

[59] Mr PF acknowledged that he had agreed to be served with the proceedings. He did not expect to be served personally, at home, without warning. Aggravating this was that service occurred at night and during winter. He characterises this as a breach by Ms GG of r 10.1, in that she did not treat him with respect and courtesy.

[60] It is important to note that the documents being served were fresh proceedings in a separate matter. They were not part of an exchange of documents in existing proceedings, for which protocols as to service had been established and were being followed. In that regard, in relation to the relationship property proceedings it may have been agreed and accepted by counsel that service upon one another could be by way of post office box or email.

[61] Mr PF's letterhead did not provide a physical address, such as his Chambers. It appears that he did not have an instructing solicitor on whom service could be effected at their offices.

[62] Service of proceedings requires proof of that service before a Judge will hear and determine the proceedings. This is fundamental, across all jurisdictions. Proof of service must be compelling. Delivery to a post office box is not generally considered suitable for service of proceedings. It may be for subsequent documents, once the party served has given that formal indication.

[63] Ms GG was right to be concerned that service of the proceedings to Mr PF's post office box, although suggested by him in correspondence, might not satisfy the Court's stringent requirement to be satisfied that the proceedings have been brought to the other party's attention. She was right to adopt a belt and braces approach, and arrange for personal service on Mr PF as well. Clearly a Judge agreed, as an order was made directing that he be personally served.

[64] I accept that Ms GG did not direct her process server to serve Mr PF in a particular way. Doubtless the process server considered that the most effective way to serve a practising barrister would be after hours. Service on a person at their home is far from unusual.

[65] The Committee considered that Ms GG had acted appropriately in the circumstances, noting that as Mr PF did not have an instructing solicitor, it was difficult to see who else could have been served with the proceedings. It seems that the Committee was not aware that a Judge had directed service on Mr PF.

[66] Nevertheless, I agree with the Committee's conclusion and I cannot see any conduct issues arising with this issue of complaint.

The rule 14.13 breach

[67] Rule 14.13 provided where relevant:

> A barrister sole should not normally file documents in the court, or in the course of proceedings, which show his or her rooms or chambers as the address for service. There may, however, be exceptional circumstances where it is practicable and necessary to do so.

[68] With the relaxation of the barrister's intervention rule on 1 July 2015, rule 14.13 was replaced by rule 14.15.3 which provides:

> A barrister sole's rooms or chambers may be shown as an address for service along with the offices of the instructing lawyer.

[69] However, the conduct complained about here occurred under the old rule. The particular breach alleged is that Ms GG provided the name but not the address for service of her instructing solicitor. Further, that she should not have recorded her own address as the address for service.

[70] Mr PF submitted that he was prejudiced by the absence of an address for service for Ms GG's instructing solicitor, as he had to look up the name of the firm so that he could write to them. He did however concede that aspect of the conduct complaint was "at the lower end but not minor".

[71] Mr PF took much stronger exception to Ms GG's conduct in not providing the name of the firm which had instructed her; she only provided the name of the solicitor in that firm. The solicitor's name was different to the name of the firm.

[72] Moreover, Mr PF took exception to the documents recording that the instructing solicitor had "filed" them, whereas in fact Ms GG had physically attended to that.

[73] He described these various matters as "lying by omission and commission" and that it amounted to "misleading the Court".

[74] For her part, Ms GG submitted that the instructing solicitor was the sole principal in the law firm. She said that there was nothing "mysterious" about the solicitor, the solicitor's firm or the firm's relationship with her. She received regular instructions from that firm, and had always formatted her court documents in the same way — i.e. providing her own address for service. Her experience at the Family Court bar was that this was common and acceptable.

[75] The Committee noted that it was not uncommon for a barrister to note their address together with that of their instructing solicitor, as being addresses for service. It counselled Ms GG "to take care in this regard in the future" and exercised its

discretion not to take any further action, on that basis that it would be unnecessary or inappropriate to do so.

[76] The historical rationale for restricting a barrister from using their Chambers as an address for service when there was an instructing solicitor involved, was to avoid arguments about service and thereby ensure that the barrister remained independent and did not have to give evidence about whether they had been served. It also reflected the historical practice of all correspondence being sent and received by the instructing solicitor.

[77] The new rule has relaxed that somewhat, although in circumstances where there is an instructing solicitor, the requirement remains for their address for service to appear on documents.

[78] I agree that Ms GG committed a technical breach of the now old r 14.13. It would also have amounted to a breach of the new r 14.15, to the extent that the address for service of Ms GG's instructing solicitor was missing.

[79] I note that there does not appear to have been any criticism by a Judge throughout these proceedings, of the way in which Ms GG set out her documents. Nor, it would appear, did Mr T's first lawyer raise any concerns about it.

[80] I note also that Mr PF did not raise this directly with Ms GG during the course of the proceedings. It was raised by him for the first time when he responded to Ms K's complaint against him and at the same time made his complaint against Ms GG.

[81] In the spirit of collegiality, I would expect lawyers to raise between themselves what are essentially technical issues and to sort them out informally if possible. Raising a complaint should be a last resort with matters such as this.

[82] Mr PF's description of the way in which Ms GG referred to her instructing solicitor — by name alone rather than by firm — is excessive and unfortunate. He describes it as "lying" and "misleading the court". In this category, he also says that it was plainly wrong for Ms GG's documents to refer to her instructing solicitor as having filed them, when that task was in fact carried out by Ms GG (or her Office).

[83] As to the filing issue, the reference to "filing" on documents does not refer to the physical act of lodging them with the Court. It refers to the party who is responsible for the document. It would create an absurdity to say otherwise. A lawyer from

Auckland acting in proceedings filed in Wellington would not be expected to physically lodge the documents in the Court at Wellington.

[84] It appears to me that Mr PF's strong exception to the way in which Ms GG formatted and filed her documents arose because one of Ms K's grounds of complaint against him related to whether he had an instructing solicitor.

[85] It is disingenuous for Mr PF to label Ms GG's technical breaches as amounting to misleading the court and to suggest that she has misled the Court by implying that her instructing solicitor has physically lodged the documents with the Court.

[86] In the circumstances, I am not prepared to interfere with the Committee's exercise of its discretion not to take any further action on this issue of complaint.

The second respondents issue

[87] When first instructed, Ms GG formally notified the Court and Mr T's lawyer that she was acting for both Ms K and the trustees of the family trust, named as second respondent in the proceedings.

[88] However, behind the scenes there were discussions between Ms GG and the trustees as to whether she ought to continue to act for them. The issue was whether the trustees required separate representation from Ms K.

[89] Despite those discussions, the formal record continued to show that Ms GG was acting for the trustees.

[90] Whilst those discussions were taking place, Mr PF endeavoured to serve documents on Ms GG in relation to the trustees. She declined to accept service on the basis that her ongoing representation of them was uncertain, saying that she was not instructed to accept service.

[91] The period of time during which Ms GG declined to accept service, was one month. Mr PF indicated that Ms GG's instructing solicitor also refused to accept service.

[92] The Committee said that "Ms GG was entitled not to accept service on behalf of [the trustees] until such time as [they] had confirmed that [they] still wanted her to act".[14]

[14] Standards Committee decision at [38].

[93] I disagree. Ms GG was formally on the record as acting for the trustees. Rule 87 of the Family Courts Rules 2002 provides that a fresh address for service must filed and served when there is a change of representation. The implication is that until there is a change of representation, any existing address for service remains effective.

[94] The Court and other parties in proceedings are entitled to rely upon what has been filed as reflecting the up to date position.

[95] Accordingly, Ms GG was obliged to continue to accept service on behalf of the trustees.

[96] To her credit, at the hearing before Mr Hesketh Ms GG recognised that as counsel on the record she was obliged to accept service.[15]

[97] This particular conduct falls short of a lawyer's duty to facilitate the administration of justice. It is by no means a serious breach of that duty, given that the issue was resolved within four weeks. Mr PF has not pointed to any prejudice to his client as a result of this uncertainty, but I accept that it would have presented as frustrating.

The discovery undertaking

[98] At a directions conference before a Judge on 24 February 2014, issues of discovery against the trustees were discussed and orders made for the trustees to discover certain material to Mr PF's client.

[99] At that time, the documents were in the possession of the law firm that ordinarily acted for the trustees — this differed from the firm that had instructed Ms GG to act for Ms K and the trustees in the relationship property proceedings.

[100] Ms GG contacted that law firm on several occasions pressing the lawyer to make the documents available to her instructing solicitor, so that discovery could be completed. The law firm was dilatory, but gave as a reason that work was being done to complete particular trust matters.

[101] In July 2014, the documents were delivered by the lawyers to Ms GG's instructing solicitor and from there to Mr PF.

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[15] Strictly, under the then prevailing rule (r 14.13) the obligation to accept service was her instructing solicitor's: see discussion at [67]–[86].

[102] Mr PF characterises this as a breach by Ms GG of an undertaking to the Court, to provide discovery.

[103] Ms GG denies that she gave the Court an undertaking to provide discovery. She says that this is not her practice to give undertakings on behalf of her clients. She would customarily tell a Judge, for example, that she will attend to discovery, or that she is endeavouring to obtain the material from her client so that discovery can be attended to.

[104] On this occasion, Ms GG said that she wrote to the trust's lawyers immediately after the directions conference, asking for the documents in question to be delivered to her instructing solicitor.

[105] Mr PF wrote to Ms GG after the directions conference to follow-up on discovery. Ms GG in turn wrote further to the trust's lawyers on at least two occasions urging them to provide the documents; one letter said that it was "imperative to provide the documents urgently".

[106] I accept that Ms GG did not give an undertaking that she would discover the trust's documents to Mr PF. It would unusual for a lawyer to undertake to provide documents that they do not have.

[107] I also accept that the delay in providing them was caused by the trust's lawyers, and that Ms GG diligently endeavoured to put pressure on those lawyers to complete the required work and forward the documents.

[108] Mr PF did not return to the Court and raise the issue of delay with a Judge, as might be expected when there are issues of delay with discovery. It is the Court's role to supervise discovery and to intervene when problems arise.

[109] The discovery issue was raised by Mr PF as part of his complaint against Ms GG in March 2014. As indicated, the documents were delivered by the trust's lawyers to Ms GG's instructing solicitor, in July 2014.

[110] I agree with the Committee's conclusion that Ms GG acted appropriately in relation to the trustees' discovery obligations and that the delays were beyond her immediate control.

Conclusion

[111] In relation to the five issues of complaint, all of which were taken no further by the Committee, I have found breaches by Ms GG in relation to:

(a) The threat.

(b) The r 14.13 breach.

(c) The second respondents issue.

[112] The Committee also found a breach of r 14.13, but exercised its discretion to take that matter no further on the basis that it was unnecessary or inappropriate. I entirely agree with that approach, for the reasons I have given above at [67]–[86].

[113] Having found breaches in relation to the threat and the second respondents issue, I now turn to consider whether to make a finding of unsatisfactory conduct against Ms GG.

[114] Although it is open to me to make an unsatisfactory conduct finding under s 12 (b) and (c) of the Act, I do not propose to do so, for a number of reasons.

[115] A breach of the Act, if established, does not automatically attract a disciplinary sanction. In *Burgess v Tait* the Court observed that:[16]

> The ability to take no further action on a complaint can be exercised legitimately in a wide range of circumstances, including those which would justify taking no action under s 138(1) and (2). It is not confined to circumstances where there is no basis for the complaint at all.

[116] That position was affirmed in *Chapman v The Legal Complaints Review Officer* where the Court noted that:[17]

> … it appears to me that the LCRO may have assumed that her finding of unsatisfactory conduct inevitably led to the setting aside of the Committee's decision to take no further action under s 138. No point has been taken on this but any such assumption would be incorrect. The discretion which s 138 confers subsists throughout.

[117] In *Stewart v LCRO*, the Court observed:[18]

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[16] *Burgess v Tait* [2014] NZHC 2408 at [82].
[17] *Chapman v The Legal Complaints Review Officer* [2015] NZHC 1500 at [47].
[18] Stewart v Legal Complaints Review Officer [2016] NZHC 916, [2016] NZAR 900 at [58].

> That the Rules are minimum standards takes the interpretive exercise only so far. The rules are a mix of guiding principles, commentary and prescription. If many are to be workable a "good faith" approach will be required "due to the vague manner in which they are expressed".

[118] Further, in *Wilson v Legal Complaints Review Officer*,[19] the High Court emphasised the importance of the Rules being applied as sensibly and fairly as possible.

[119] In conducting a review, the LCRO may exercise any of the powers that could have been exercised by the Standards Committee in the proceedings in which the decision was made or the powers were exercised or could have been exercised.[20]

[120] Included in those powers, is the ability to exercise a discretion to take no action, or no further action on the complaint.[21] That discretion may be exercised in circumstances where the Review Officer, having regard to all the circumstances of the case, determines that any further action is unnecessary or inappropriate.[22]

[121] The threat is the more serious of the two breaches.

[122] However, it was not raised as an issue of complaint until March 2014, and in response to the complaint that had been made against Mr PF by Ms K. Had the threat been as significant to Mr PF's client as he maintains, I would have expected prompt complaint by either Mr T or Mr PF. To leave it until he is the subject of complaint, mitigates the seriousness. Indeed, at the hearing before Mr Hesketh, Mr PF volunteered that he accepted that Ms GG had not intended to make a threat.

[123] Seven years have now almost elapsed since the offending email was sent by Ms GG. To her credit, Ms GG has said that she would not act in this way again.

[124] I do not condone Ms GG's email to Mr T's former lawyer. But in the particular circumstances of this case, I am not prepared to hold Ms GG to account by the imposition of a conduct finding.

[125] Similarly, Ms GG's refusal to accept service over a four-week period, was wrong. Mr PF could have dealt with that by means of a memorandum to the Court and it is likely that a Judge would swiftly have reminded Ms GG of her obligation to accept service. This could have been accomplished quickly.

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[19] *Wilson v Legal Complaints Review Officer* [2016] NZHC 2288 at [43].
[20] Lawyers and Conveyancers Act 2006, s 211(1)(b).
[21] Section 138
[22] Section 138(2).

[126] Resorting to complaint as the first option, was excessive. I do not consider that Ms GG's breach warrants the imposition of a conduct finding.

Costs

[127] Mr PF has had mixed success with his application for review. I have disagreed with the Committee's conclusions about two of his issues of complaint. Ultimately, I have exercised my discretion not to impose conduct findings against Ms GG.

[128] For those reasons, I do not propose to make any order as to costs.

Decision

[129] Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is reversed as follows:

(a) Reversed as to the finding that Ms GG did not breach rule 2.3 of the Rules; however, no conduct finding is made.

(b) Reversed as to the finding that Ms GG was entitled to refuse to accept service of documents on behalf of the trustees; however, no conduct finding is made.

DATED this 31st day of January 2018

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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 PF as the Applicant
Ms GG as the Respondent
[Area] Standards Committee [X]
New Zealand Law Society