

CONCERNING

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

AND

CONCERNING

a determination of the Standards Committee

BETWEEN

AN

Applicant

AND

TC

Respondent

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

DECISION

Introduction

[1] Mr TC and Mr AN are lawyers. Each was acting for his own client in negotiating and finalising a relationship property agreement. Comments made by Mr TC in emails, and an allegation that he deliberately delayed preparing a relationship property agreement, form the basis of Mr AN's complaint to the New Zealand Law Society (NZLS). The complaint was determined pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) on the basis that the Standards Committee considered Mr TC's conduct, while "not appropriate" did not reach a threshold where further action was necessary and/or appropriate. Mr AN has applied for a review of that decision.

Facts

[2] The Committee's decision sets out the subject matter of Mr AN's complaint and refers to the relevant exchange of emails, starting with a prompt from Mr AN on behalf of his client, Ms BP, on 15 May 2013. Mr AN sent his email shortly after Ms BP and Mr

TC's client, Mr CR, had signed a memorandum recording their agreements regarding some aspects of their property (the memorandum). The memorandum included provision for Mr TC to draft a relationship property agreement for the purposes of s 21(a) of the Property Relationships Act 1976 (PRA).

[3] After his 15 May email, Mr AN continued applying pressure on Mr TC to generate a draft agreement until, on 23 May 2013, he emailed Mr TC saying:

Hello Mr TC

Sorry, as I clearly advised you earlier, you have run out of time.

I still need time to check and approve the section 21A Agreement, and on the basis of earlier documentation you have provided for other clients, I could not imagine that it would have been drafted appropriately or fairly, protecting both parties' interests in these circumstances.

I suggest that you forward me the draft and I will check it over on my return and get back to you ASAP in the week commencing 8 July next.

[4] Mr TC's response was:

Your gratuitous comment, while true to form, is most unhelpful.

Do you not have anyone else in your office to deal with these matters in your absence.

[5] Mr TC's emails over the weeks that followed included the following comments: "surprising way to run a law practice AN",¹ "get someone else to attend on this matter...it would be purely your self interest that would get in the way of that",² "much of your requirements could be described as pedantic, some show a lack of knowledge of the law and others are just plain inappropriate (to say the least)",³ "...in terms of your professional obligations you needed to make arrangements for these matters to be handled in your absence!".⁴

[6] It appears that sometime between 7 and 11 June 2013 Ms BP instructed another lawyer. Knowing that other counsel was instructed, and that Mr AN was going overseas, Mr TC emailed Mr AN after 5pm on 11 June 2013. His email included the comment "you appear to be unable to focus on the matters at hand and perhaps you should stay out of it for both our clients sake".⁵

¹ Email TC to AN (23 May 2013, 12.07pm).

² Email TC to AN (23 May 2013, 4.03pm).

³ Email TC to AN (7 June 2013).

⁴ Email TC to AN (11 June 2013, 10.53am).

⁵ Email TC to AN (11 June 2013, 6.56pm).

[7] Mr AN's reply followed at 10.45am, by which time he was in Europe. He referred to Mr TC's correspondence and said he considered it amounted to "conduct unbecoming a lawyer". Mr AN communicated his offer to accept an apology from Mr TC if he delivered it within 24 hours.⁶

[8] Mr TC's correspondence then shifted from professional to personal as signalled by the heading to his next email in which he said, among other things that he had brought Mr AN's complaint to the attention of NZLS.⁷ An email Mr TC sent to his local Law Society branch and his subsequent evidence indicate he did not make a formal complaint.

[9] Mr AN, noting no apology had been forthcoming, confirmed he intended to lay a formal complaint to the NZLS, and on his return to New Zealand, did so.

Standards Committee process

[10] On receiving Mr AN's complaint, the Lawyers Complaints Service (LCS) spoke to Mr TC by phone and recorded that conversation in a file note dated 18 November 2013 which says "I will send him a copy of the complaint. Discussed that he became a bit intemperate towards the end, he understands awaits the decision".

[11] The LCS then sent Mr TC a copy of Mr AN's complaint under cover of an email dated 18 November 2013.

[12] There is no record of any response from Mr TC, or any invitation to make a written one. There is no evidence on the Committee's file to indicate that any comments Mr TC may have made over the phone were passed on to the Committee before it met on 25 November 2013.

[13] The Committee referred to Mr AN's complaint that by his conduct, Mr TC had failed to maintain proper standards of professionalism and failed to treat Mr AN with respect and courtesy. It noted the allegation that Mr TC appeared to have delayed preparing the agreement in the context of Mr AN's impending absence from his practice, and concluded there was no evidence of delay. It noted Mr TC's response to an email from Mr AN that his "gratuitous comment was unhelpful", described his enquiry as to "whether someone else in the office could deal with the matter" as quite reasonable, and noted, but did not evaluate, his comment to Mr AN "surprising way you run a law practice AN".

⁶ Email AN to TC (11 June 2013, 10.45pm). As Mr AN says he sent that email from [overseas] the email should record him sending it at 10.45am.

⁷ Email TC to AN (12 June 2013, 9.19am).

[14] The Committee described as regrettable Mr TC's comment "that some of the requirements of Mr AN could be described as pedantic, some show a lack of knowledge of the law and others are just plain inappropriate (to say the least)". It also alluded to him having brought his concerns to the attention of the local NZLS branch, and his suggestion that he might lay a formal complaint against Mr AN without making any comment on that threat. Mr TC's replies to Mr AN were described as "not helpful" and doing "nothing to enhance the reputation of the profession".

[15] The decision also contains detailed criticisms of Mr AN, his correspondence to Mr TC, his manner of practice, having prioritised his personal interests over those of his client, and saying that he lacked personal insight and the ability to reflect. The Committee was critical of his strategy and the contribution the Committee considered he had made to a breakdown in the lawyers' professional relationship.

[16] The Committee described it as "unfortunate and disappointing" that both "lawyers were acting in a way that could be described as slanging each other off", and that "the conduct of both parties, giving rise to this complaint does little to enhance the reputation of the profession". It described the nature of both parties' emails as "inappropriate" and referred to negotiations over the content of the agreement being "not unusual", suggesting the Committee considered both lawyers had lost their sense of perspective.

[17] The Committee considered the High Court's comments in *Deliu v Hong*⁸ regarding NZLS' lack of intervention between two practitioners who "traded verbal blows", and found that the conduct in that case was more serious than that with which the Committee was concerned, although it too involved a "spat between practitioners".

[18] The Committee also recorded that it had considered referring the parties for mediation, but "in circumstances where it was of the view that the conduct of Mr TC did not warrant further action, decided that he was entitled to such a finding". The Committee then recorded its decision that Mr TC's conduct "did not reach a threshold where any further action was necessary and/or appropriate", and that "while the communications of Mr TC were not appropriate, the conduct of the complainant Mr AN was equally as concerning".

⁸ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209.

[19] The Committee went on to make “Additional Comment” at paragraph [25] saying:

This complaint raises serious issues about the ongoing relationship and interaction of two colleagues. It is the intention of the Committee to ask the Law Society to address this. Mr TC and Mr AN can expect to hear from the Law Society about convening a meeting to address the professional matters arising from this complaint.

[20] Mr AN objects to the decision and applied for a review.

Review application

[21] Mr AN's concerns on review centre on his allegation that Mr TC deliberately delayed preparing a draft relationship property agreement, on the NZLS' process which he believes did not allow him to challenge comments he believes Mr TC made about him to the LCS by phone, and on the Committee's comments that were adverse to him.

[22] Mr AN considers comments in the decision about his conduct are unreasonable, unfair and not supported by the evidence. He believes the phone conversation, of which he says he had no knowledge until after he had received the decision, set the tone for the decision, the focus of which should be on Mr TC's conduct.

Review hearing

[23] Mr AN, Mr TC and his support person attended a review hearing in [city] on 22 July 2015.

Role of LCRO on review

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

Scope of review

[25] The LCRO has broad powers to conduct 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. The statutory power of review is much broader than an appeal, and gives the LCRO discretion as to the approach to be taken on any particular review and the extent of the investigations necessary to conduct that review.

Review issue

[26] The issue to be determined on review is whether there is good reason to depart from the Committee's decision that further action on Mr AN's complaint that Mr TC did not treat him with respect and courtesy was unnecessary and inappropriate. For the reasons discussed below, the Committee's decision is reversed, a finding of unsatisfactory conduct is made against Mr TC, and a censure imposed under s 156(1) of the Act.

Discussion*Procedural Issue*

[27] The procedural issue that Mr AN identified is that he was not given the opportunity to address comments made over the phone by Mr TC. He believes those comments affected the integrity of the Committee's decision making process. He is also concerned that insufficiency of information may have resulted in the LCRO being misled on review, and considers this Office should require both practitioners to produce their files.

[28] The Standards Committee process is subject to the mandatory terms of reg 9 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 which required the LCS to notify Mr TC and advise him of his right to make a written submission to the Committee. There is no evidence of the LCS advising Mr TC he had that right.

[29] The LCS suggested to Mr AN that his complaint may be able to be addressed through the NZLS early resolution service. Mr AN declined, apparently on the basis that he wanted a decision from NZLS to address Mr TC's "conduct into the future".

[30] The LCS advised Mr TC that the complaint had been received, and that he would be provided with a copy. The response that he "awaits the [Committee's] decision" is recorded in the LCS file note dated 25 November 2013. There is no evidence of whether Mr TC was advised of his right to send a written response. There is also no record in the course of this review of him expressing any concern in that regard.

[31] Assuming Mr TC was aware of his right to reply, it was up to him whether he chose to exercise it. If he was not aware he had the right to reply, he has now taken the opportunity to respond in full to Mr AN's complaint in the course of this review.⁹

[32] Mr AN carefully set out the detail of his concerns about the Committee's decision in his review application. He describes his client's position that Mr TC contributed to delay, explains his own motivations and conduct, and critiques the Committee's knowledge and relevant expertise. From start to finish, he does not accept that his conduct was of concern at all, and rejects absolutely the Committee's characterisation of his early email telling Mr TC he "had run out of time" as "clearly inflammatory".

[33] Mr AN replied to Mr TC's comments on 27 March 2014, and expressed the view that the LCRO should obtain both practitioners' files before determining the review, a suggestion he has repeated in the course of this review.¹⁰ He also indicated his recollection that all communications between him and Mr TC were by email with no direct telephone communication that he could recall, so there "should be no dispute as to what happened, who said what to whom, and at what time".

[34] I do not consider it necessary to request both practitioners' files for three reasons. First, the firm focus on review is on Mr TC's conduct. Second, the decision wrongly focuses on conduct by Mr AN, which was not the subject of complaint, and therefore could not be the subject of a finding by the Committee or on review. Third, the complaint and review processes have produced sufficient evidence, including "what happened, who said what to whom, and at what time" for a determination in relation to Mr TC's conduct to be made on review.

[35] To some extent, Mr TC's reasons for his conduct are irrelevant to a finding of whether his conduct was, objectively, unsatisfactory. Much of the background provides context that is relevant to the orders made under s 156 as a result of this review.

Delay

[36] There is no reliable evidence to support a finding that Mr TC deliberately delayed matters, and evidence to support the proposition that he acted with reasonable expedition in all the circumstances apparently to his client's satisfaction. Mr TC had an

⁹ Letter TC to LCRO (21 February 2014); Review hearing (22 June 2015).

¹⁰ Letter AN to LCRO (1 April 2014), (15 April 2014), (20 August 2014); Review hearing (22 June 2015).

obligation to his client Mr CR to provide regulated services to him in a timely manner consistent with the terms of the retainer.¹¹

[37] While Ms BP had agreed with Mr CR that Mr TC was to draft the agreement, Mr TC's obligation to act in a timely manner was not owed to Ms BP. She was represented by Mr AN. On her behalf, he had communicated additional terms to those agreed between Ms BP and Mr CR in the memorandum. The terms of Mr TC's retainer had to adapt to that change in circumstances. There is no evidence that Mr TC's client had any concerns about delay, or that he was dissatisfied with the regulated services Mr TC provided to him after Ms BP, through Mr AN, proposed changes to the agreements they had recorded in the memorandum.

[38] The evidence also does not support a finding of impropriety relating to the timing Mr TC's drafting may have had on Mr AN's plans to be absent from his practice. Any obligation he might possibly have had to assist Mr AN with his holiday plans was subordinate to the various professional obligations he owed to Mr CR.

[39] Mr AN provided sufficient evidence with his complaint for the Committee to have made the finding that Mr TC "did promptly attend to the matter".¹² I have been unable to identify any good reason in the course of this review that commends a departure from that aspect of the decision. I do not consider it necessary to review Mr TC's file or to make enquiries of Mr CR to confirm that view. In the circumstances of this review, the Committee's decision that further action in respect of Mr AN's allegation of delay is unnecessary and inappropriate is therefore confirmed.

Mr TC's Correspondence

[40] The other question for the Standards Committee was whether Mr TC's comments in his emails fell below a proper professional standard, and if they did, the degree to which they did so. In considering this point, the Committee misdirected itself by its focus on Mr AN's conduct. The proper course was for the Committee to focus on Mr TC's conduct, and evaluate that against the relevant professional standards set out in rule 10.1 and s 12 of the Act say:

10.1 A lawyer must treat other lawyers with respect and courtesy.

12. Unsatisfactory conduct defined in relation to lawyers and incorporated law firms

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

¹¹ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 3.

¹² Standards Committee determination (29 November 2013) at [7].

- (a) conduct of the lawyer... that occurs at a time when he... is providing regulated services and is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; or
- (b) conduct of the lawyer... that occurs at a time when he... is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including—
 - (i) conduct unbecoming a lawyer or an incorporated law firm; or
 - (ii) unprofessional conduct; or
- (c) conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the lawyer...

[41] The nature of a finding of unsatisfactory conduct was discussed in LCRO 23/2012 (in the context of a fee complaint) with reference to an article by former LCRO Duncan Webb,¹³ in the following terms:¹⁴

... many lawyers perceive that a finding of unsatisfactory conduct carries with it an unacceptable stigma ...

... [unsatisfactory conduct includes] conduct that is not so egregious as to amount to misconduct but is still deserving as being marked out as falling below the standard of behaviour that clients and the public are entitled to expect. It is a professional lapse.

[42] Those comments are focussed on standards of behaviour clients and the public, rather than colleagues, are entitled to expect pursuant to s 12(a) and (b) of the Act. Mr AN's complaint relates to specific failures by Mr TC to treat him with respect and courtesy, which is an obligation imposed on lawyers by rule 10.1 of the Conduct and Client Care Rules which are practice rules referred to in s 12(c). With respect to a finding of unsatisfactory conduct under s 12(c) based on a breach of the rules, the LCRO said:¹⁵

It is important to note that a breach of the rules will be unsatisfactory regardless of significance. While there is a power under s 137 to dismiss a complaint that is trivial (or frivolous, vexatious or not made in good faith), the starting place must be that any breach of rules is a matter for concern.

and that:¹⁶

Unsatisfactory conduct is clearly a professional standard. Professional consequences flow from a breach of that standard...

¹³ Duncan Webb "Unsatisfactory Conduct' under the Lawyers and Conveyancers Act 2006" *LawTalk* (29 September 2008) at 18-19.

¹⁴ LCRO 23/2012 at [33]-[34].

¹⁵ At [35].

¹⁶ At [36]-[37].

... the [Lawyers and Conveyancers Act] makes it quite clear that a finding of unsatisfactory conduct may be made on the basis of... an implied unintentional (and minor) contravention of one of the new rules or regulations (s 12(c)).

and, with reference to the particular language, “unsatisfactory conduct” said:¹⁷

To mark out conduct as unsatisfactory is hardly a damning condemnation. To state the obvious, lawyers’ conduct can either be satisfactory or not. It is suggested that the choice of the only faintly damning description of ‘unsatisfactory’ indicates that a finding of unsatisfactory conduct is not intended to be an indicator of any kind of egregious conduct, but is rather an indication that the practitioner in question “must try harder”.

... the term “unsatisfactory conduct” covers a range of conduct from the mere slip or oversight that is less than satisfactory, to conduct on the border of misconduct that is deserving of serious sanction.

[43] Mr TC acknowledges that he impugned Mr AN’s competence, and that doing so was inappropriate. What Mr TC does not appear to appreciate, however, is the extent to which his treatment of Mr AN lacked respect and courtesy.

[44] Mr TC criticised the way in which Mr AN runs his practice. Mr AN practices alone and is not accountable to Mr TC for how he runs his practice. Mr TC’s comments showed a lack of respect for Mr AN’s choice of mode of practice.

[45] Mr TC accused Mr AN of serious professional failings including prioritising his own personal interests over those of his client, and not acting in accordance with his client’s instructions. He then encouraged Mr AN to terminate his retainer with his client because, on Mr TC’s view, his independence was compromised. Those comments were discourteous to Mr AN and disrespectful of his professionalism.

[46] Mr TC’s correspondence then shifted from professional to personal,¹⁸ and included a threat to make a complaint “as regards this matter” and Mr AN’s “behaviour generally”. His particular concern appears to have related to Mr AN having refused to facilitate “another lawyer attending on this matter” while he was away for six weeks. Mr TC’s treatment of Mr AN did not respect the special nature of the relationship between Mr AN and his client, and coincidentally overlooks Ms BP’s right to choose her own lawyer for her own reasons.

[47] It is also relevant to consider Mr TC’s threat to lay a formal complaint to NZLS, which the Committee did not address. Rule 2.10 imposes a professional obligation on lawyers with respect to threatened and actual complaints in the following way “A lawyer

¹⁷ At [38]-[39].

¹⁸ Email TC to AN (12 June 2013, 9.19am).

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

[48] The obvious and proper purpose of laying a complaint is to bring unsatisfactory conduct and misconduct to the attention of NZLS as professional regulator. The primary purpose of Mr TC’s complaint, however, appears to have been to pressure Mr AN into modifying his behaviour to better accommodate Mr TC’s client on this occasion, and Mr TC, his clients and the profession more generally.

[49] In this case Mr AN’s primary obligation was to his client, Ms BP. He was professionally obliged to prioritise her interests over those of Mr TC and his client. Mr TC does not appear to recognise how his beliefs about the way in which Mr AN conducted himself and his practice may have been inconsistent with Mr AN meeting his professional obligations to his client.

[50] Viewed in that way, Mr TC’s threat of complaint may not have been for a proper purpose, and may have contravened the standard set by rule 2.10.

[51] As Mr TC did not lay a complaint, with the benefit of reflection over the past two years, and despite the reservations he expressed at the review hearing, he may have reached the conclusion that he does not have reasonable grounds to suspect that Mr AN had been guilty of unsatisfactory conduct or misconduct. However, I do not discount the possibility that, at the time, Mr TC may have believed he had proper grounds for complaint about Mr AN’s conduct. For that reason I am not satisfied that there is a sufficient evidential basis on which to find Mr TC contravened rule 2.10.

[52] As mentioned at the review hearing, Mr TC should certainly not take any of my comments as a recommendation that he should now lay any such complaint. He would need to carefully consider his professional responsibilities before taking such a step.

[53] On the analysis of his email correspondence set out above, Mr TC treated Mr AN with a lack of respect and courtesy. Mr AN’s complaint cannot be characterised as trivial, frivolous, vexatious or lacking in good faith. Mr TC’s correspondence over a period of weeks is a matter for concern. The emails evidence a series of professional lapses and minor contraventions of rule 10.1 by Mr TC. The series of emails cannot be characterised as a mere slip or oversight. I conclude that Mr TC’s conduct in contravention of rule 10.1 was not satisfactory.

[54] The question then is whether professional consequences, in the form of a finding of unsatisfactory conduct should follow. In considering the conduct that is the

subject of Mr AN's complaint, it is worth noting that not every professional lapse warrants a finding of unsatisfactory conduct. The District Court referred to a two stage test in *Perera v Medical Practitioners Disciplinary Tribunal* saying:¹⁹

In summary, the test for whether a disciplinary finding is merited is a two-staged test based on first, an objective assessment of whether the practitioner departed from acceptable professional standards and secondly, whether the departure was significant enough to attract sanction for the purposes of protecting the public. However, even at the second stage it is not for the Disciplinary Tribunal or the Court to become engaged in a consideration of, or take into account subjective consideration of the personal circumstances or knowledge of the particular practitioner. The purpose of the disciplinary procedure is the protection of the public by the maintenance of professional standards. That object could not be met if in every case the Tribunal and the Court was required to take into account subjective considerations relating to the practitioner.

[55] Mr TC accepts that his most serious conduct relates to his comment that Mr AN's requirements to amend the agreement showed "a lack of knowledge of the law". Mr TC does not provide any support for that allegation, and has apologised for making it. It is therefore unlikely that it was a considered criticism at the time. Mr TC agrees that, with respect to that email, he could have done better, and must try harder. Although that was as far as his acknowledgement of wrongdoing went, there are other examples in his correspondence over weeks that cannot reasonably be dismissed as mere slip or oversight. Mr TC says his comments were responses to provocation. That is not a valid justification.

[56] Mr TC's frustration at his client having to await Mr AN's return from holiday is evident from the correspondence, as is the sense of irritation at having to draft and redraft the agreement at Mr AN's request, apparently on with Ms BP's instructions. I do not discount the possibility that Mr TC may at times have been relaying his client's frustrations. However, what appears to have been the biggest single irritant to Mr TC in this case is Mr AN's strategy, which started from the proposition that Mr TC and his client were delaying matters, and moved to ad hominem criticism of Mr TC and his work. Mr TC could have simply ignored those comments, but instead he reacted and continued to react.

[57] The time pressure based on Mr AN taking leave is to some extent irrelevant. It was Ms BP and Mr CR who appear to have initially expressed an inclination to have matters swiftly progressed. In the absence of any evidence of a complaint by Ms BP, she must be taken to have been satisfied at the time to await Mr AN's return. The fact that Ms BP ultimately instructed alternate counsel cannot safely be attributed to

¹⁹ *Perera v Medical Practitioners Disciplinary Tribunal* DC Whangarei MA94/02, 10 June 2004 at [51].

Mr TC's preference on the matter as his email of 11 June 2013 suggests. It was her choice.

[58] Frustration and irritation are recurring themes in the practice of the law, particularly when clients are involved in contentious matters akin to this dispute over relationship property. It is unfortunate that Mr TC appears to have shared his client's irritation and frustration, and it was unprofessional of him to have vented that in his email correspondence with Mr AN.

[59] Although communication by email has the benefit of speed, one of its disadvantages in a professional context is that it can result in less reflective communication. While that might explain a single oversight or lapse, it cannot account for a course of correspondence occurring over several weeks in which Mr TC levelled relatively wide ranging personal and professional criticisms against Mr AN that repeatedly fell below the standards of respect and courtesy expected by rule 10.1

[60] Mr TC's comments may have been driven, at least initially, by his client's instructions. However, acting on a client's instructions cannot save a lawyer from an adverse conduct finding arising from a breach of professional standards. Mr TC's apparent inability to see the possible benefits in accepting Mr AN's offer of dealing with matters promptly on the basis of an apology was ill-judged.

[61] Having heard from Mr TC at the review hearing I am not confident that he has learned from his experience of the disciplinary process, or that he understands the impropriety of the views he expressed about Mr AN and his conduct. He is, however, aware of the expectation that professional communication between lawyers involves a careful exercise of professional judgement.

[62] Bearing in mind the emphasis on the disciplinary regime is protecting the public interest, I have considered all of the emails between the lawyers provided in the course of this review, which I note Mr TC and Mr AN copied to their respective clients. The emails are broadly consistent with instructions given by two parties who had not reached agreement over the identification and division of their relationship property.

[63] In that context, I doubt there is any damage to the public interest more broadly arising from the clients having seen those emails. In her email of 13 July 2013 Ms BP expresses her uncomplimentary views of Mr TC's conduct. Her email does not suggest that her perception of lawyers in general has been diminished. On that basis my view differs little from the Committee's that Mr TC's conduct, as one of the lawyers involved, "does little to enhance the reputation of the profession". I note, however, that as the

complaint was not against Mr AN, the Committee's focus should have been firmly on Mr TC's conduct, not on that of both lawyers. Mr AN's conduct was not the subject of the complaint, nor is it the focus of this review. That approach is consistent with that commended by the High Court in *Deliu v Hong*.²⁰

[64] Having carefully considered the tone and content of Mr TC's emails I consider the Committee was wrong to conclude that further action was not necessary or appropriate. His treatment of Mr AN over a period of weeks lacked respect and courtesy in contravention of rule 10.1. The decision is therefore reversed pursuant to s 211(1)(a) of the Act. Pursuant to s 211(1)(b) and 152(2)(b)(i) Mr AN's complaint is determined on the basis that there has been unsatisfactory conduct on the part of Mr TC, by his contraventions of rule 10.1, pursuant to s 12(c) of the Act.

Orders – s 156(1)

[65] Section 156(1) sets out the orders that can be made after a committee or a LCRO has made a determination under s 152(2)(b). Noting that not all orders under s 156(1) are penalty orders, that the breaches were relatively minor, the question is whether any orders are appropriate.

[66] The Court of Appeal discussed penalty in the context of professional discipline in *Wislang v Medical Council*²¹ noting that the function of a penalty was to punish the practitioner, to deter other practitioners, and to reflect the public's and the profession's condemnation or opprobrium of a practitioner's conduct. As the LCRO noted in *Workington v Sheffield* "[i]t is important to mark out the conduct as unacceptable and [to] deter other practitioners from failing to pay due regard to their professional obligations in this manner".²²

[67] The parties had the opportunity to make submissions on matters that may be relevant to penalty at the review hearing, in the course of which Mr TC accepted that impugning Mr AN's competence was inappropriate, and apologised. I have considered whether it is appropriate to order Mr TC to apologise more broadly, pursuant to s 156(1)(c). The absence of an order should not prevent Mr TC from taking the initiative if he considers that appropriate, but I am not satisfied that an apology given under compulsion would be meaningfully given. As no purpose would be served by anything less than a genuine apology, no such order is made.

²⁰ Above n 8, at [46]-[50].

²¹ *Wislang v Medical Council of New Zealand* [2002] NZAR 573 (CA).

²² *Workington v Sheffield* LCRO 55/2009 at [65].

[68] The imposition of a censure is a penalty. It serves the purposes of punishing the practitioner, deterring other practitioners, and reflects condemnation and opprobrium of the practitioner's conduct. The imposition of a censure on Mr TC fulfils those functions and is appropriate to the circumstances. A censure is therefore imposed pursuant to s 156(1)(b) of the Act.

[69] Taking into account all of the circumstances, I do not consider it is necessary to impose a fine, or to make any orders including as to costs.

Paragraph 25

[70] Given the Committee had already decided that further action was not necessary or appropriate, paragraph [25] was not part of the decision. It is unrelated to the propriety of Mr TC's conduct, and to the exercise of my functions under the Act. It is therefore beyond the scope of this review, and the LCRO's powers under the Act.

Decision

[71] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision is confirmed insofar as Mr TC did not delay matters, and is otherwise reversed.

[72] Pursuant to ss 211(1)(b), 152(2)(b)(i) and 12(c) of the Lawyers and Conveyancers Act Mr AN's complaint is determined on the basis that Mr TC's conduct contravened the standard required by rule 10.1, and falls within the definition of unsatisfactory conduct.

[73] Pursuant to ss 211(1)(b) and 156(1)(b) of the Lawyers and Conveyancers Act Mr TC is censured.

DATED this 4th day of August 2015

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:

Mr AN as the Applicant

Mr TC as the Respondent
Ms DS as a Related Person
The Standards Committee
The New Zealand Law Society