

**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

**BETWEEN**

**UV**

Applicant

**AND**

**EL**

Respondent

**DECISION**

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

**Introduction**

[1] Mr UV has applied for a review of a decision to take no further action on his complaint about Mr EL by the [Area] Standards Committee.

**Background**

[2] Mr EL is a barrister sole. He represented Ms L in an attempt to recover \$2,420.97, plus interest, from Ms Y. Ms Y is Mr UV's daughter.

[3] On 14 October 2015, Mr EL wrote to Ms Y telling her he had received instructions from Ms L, and referred to her as his client. Mr EL made no mention of whether he had been instructed by a solicitor. Mr EL acknowledged, but did not accept, a settlement offer made by Ms Y, and confirmed Ms L was willing to engage in mediation in an attempt to resolve the differences that had arisen between the parties.

[4] Mr UV wrote to Mr EL on 6 November 2015 indicating that from his perspective, and that of Ms Y, the matter was concluded.

[5] On 6 November 2015 Mr EL wrote again, this time to Mr UV, proposing settlement for a reduced amount, forgoing interest, and again offering to attempt to resolve the position between Ms Y and Ms L by mediation.

[6] Mr UV laid a complaint in December 2015 with the New Zealand Law Society Lawyers Complaints Service (the Complaints Service).

### **Complaint**

[7] Mr UV expressed concern about Mr EL, as a barrister sole, not having an instructing solicitor. He was also critical of the tenor of Mr EL's correspondence, which he describes as "quite adversarial" and not in the spirit of mediation. Mr UV considers Mr EL should be censured, reminded of his status as a barrister sole, and should apologise in person to Mr UV and Ms Y.

[8] The complaint was directed to the Complaints Service's early intervention process in January 2016, and Mr EL was advised of its receipt. Mr EL did not take the opportunity to respond.

[9] On 3 February 2016, the Committee determined Mr UV's complaint on the basis that further action on it was not necessary or desirable because Mr EL had not breached his duty to be courteous towards Mr UV and Ms Y, and had not acted in breach of rule 14.4 of the Lawyers' Conduct and Client Care Rules<sup>1</sup> (the rules), which requires a barrister sole to only accept instructions from an instructing solicitor.

### **Review application**

[10] Mr UV applied for a review on the grounds that the Committee had declined his complaint on an insufficient evidential basis. Mr UV wants Mr EL to allay his suspicion that he took instructions directly from Ms L without an instructing solicitor. He refers to his expectation that the Committee would have required Mr EL to provide evidence that he was instructed by a solicitor, and who that solicitor was. He repeated his concern that Mr EL was unnecessarily aggressive in his correspondence and that his comments were inflammatory.

[11] Mr UV considers this Office should direct the Committee to make personal contact with complainants. He considers the Committee should apologise to him for failing to respond within the timeframe specified on the Law Society website, and

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

deliver a process and a decision that is not “so clinical and impersonal”. Mr UV would like a refund of the \$50 fee he paid for filing his application for review.

[12] Mr EL replied on 6 April 2016 confirming that he had acted for Ms L and that she was a member of the New Zealand Association of Hairdressers (the Association). Mr EL says he received advice from the [City] District Law Society to the effect that as long as he had an instructing solicitor for work he did for members of the Association, he would not contravene the intervention rule. He says a [City] law firm was his instructing solicitor in respect of instructions he received from members of the Association.

[13] Mr EL provided correspondence that had preceded his involvement on Ms L’s behalf, and describes the correspondence he sent on her instructions as firm and decisive, but not discourteous or otherwise in breach of professional standards.

### **Nature and scope of review**

[14] 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>2</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.

[15] More recently, the High Court has described a review by this Office in the following way:<sup>3</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

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<sup>2</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

<sup>3</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[16] 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 relevant materials afresh, including the Committee's decision; and
- (b) Provide an independent opinion based on those materials.

## **Discussion**

### *Committee process*

[17] Mr UV said he found the Committee process and decision clinical and impersonal. He believes there should have been some personal contact between him and the Committee.

[18] There is no statutory requirement for Committees to have personal contact with complainants. The Act provides for complaints to be disposed of in a timely way and allows Committees discretion over how each complaint is dealt with. The Act presumes Committees will conduct hearings on the papers.

[19] It took the Committee two months to deliver its decision. Although Mr UV considers that was too long, and was longer than indicated by the Complaints Service in its materials, two months is an unobjectionable timeframe, particularly given the time of year included the Christmas break.

[20] There is no basis on which the Committee could be ordered to apologise to Mr UV. There is no basis on which to criticise the Committee for having written a decision that reads as clinical or impersonal. Nor is there any reason for the \$50 filing fee Mr UV paid for this review to be refunded.

### *Instructing solicitor*

[21] As Mr EL did not act for Mr UV or Ms Y, he owed them only very limited obligations. Although Mr EL owed professional obligations primarily to Ms L, rule 12 obliged him to conduct his dealings with third parties, such as Mr UV and Ms Y, with integrity, respect and courtesy, and rule 14.4 says that subject to rule 14.5, a barrister

sole must not accept instructions to act for another person other than from an instructing lawyer.

[22] One exception provided by rule 14.5.2(h) is that a barrister sole may accept instructions from a person who is not an instructing lawyer if the barrister sole is instructed to act or is acting in any civil matter which is not a proceeding before the District Court.

[23] Ms L instructed Mr EL to act in a civil matter which was not a proceeding before the District Court. Furthermore, Mr EL had a Wellington firm acting as instructing solicitor. In the circumstances, he cannot be said to have contravened the intervention rule. Although for different reasons, I agree with the Committee's view that further action in respect of this aspect of Mr UV's complaint is not necessary or appropriate. That aspect of the decision is confirmed.

*Respect and courtesy*

[24] The nub of Mr UV's complaint is that Mr EL's conduct did not meet the requisite professional standards of respect and courtesy as rule 12 requires.

[25] It is in the nature of advocacy in an adversarial setting that lawyers are called upon by clients to deliver unpalatable messages, but those messages must be delivered with courtesy and respect. I have read the correspondence with Mr UV's concerns about respect and courtesy in mind.

[26] The matters Ms Y found objectionable related to evidential issues that are likely to have been explored if the matter had gone before a Court. Ms Y found Mr EL's correspondence disrespectful and discourteous, and Mr UV says the tone of the correspondence continued the pattern of bullying set by Ms L.

[27] Objectively read, there is nothing in Mr EL's correspondence that gives rise to concern that Mr EL's conduct fell below a proper professional standard of respect and courtesy. Mr EL's correspondence was, as he describes it: firm and decisive.

[28] That aspect of Mr UV's complaint lacks a firm evidential basis. There is no evidence of any other conduct on Mr EL's part that calls for a disciplinary response. In the circumstances, further action with respect to Mr UV's complaint is not necessary or appropriate.

**Decision**

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

**DATED** this 28<sup>TH</sup> day of July 2017

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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:

Mr UV as the Applicant  
Mr EL as the Respondent  
[Area] Standards Committee  
New Zealand Law Society