

LCRO 42/2013

CONCERNING

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

AND

CONCERNING

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

BETWEEN

TN

Applicant

AND

LR

Respondent

DECISION

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

Introduction

[1] This is an application for review of a decision of the [City] Standards Committee [X], which considered a complaint by Mr TN against Mr LR. The Committee resolved to take no further action on the complaint pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act). Mr TN seeks a review of that decision.

Background

[2] Mr TN is a professional liquidator who, together with his business partner, was managing the liquidation of a high profile company. Mr LR was acting for a company whose proof of debt had been rejected by the liquidators. Mr LR applied to the High Court to reinstate his client's proof of debt and to remove the liquidators (the High Court application). Mr NR QC was instructed by Mr LR to argue the High Court application.

[3] Before the High Court application was dealt with, a person (Z) connected with the company for whom Mr LR was acting met with Mr TN to discuss the liquidation. Unbeknown to Mr TN, Z recorded their discussion. Z then provided an affidavit in support of the High Court application. The liquidators, including Mr TN, opposed that application and asked the High Court to rule Z's affidavit inadmissible. Heath J dealt with those matters.

[4] Towards the end of the hearing before Heath J, Mr NR informed the Court that the meeting between Z and Mr TN had been recorded and transcribed, a fact of which both Mr TN and his lawyers had been unaware. This information concerned Heath J and in his judgment he commented adversely about the failure to disclose the position, observing that it would have been "easy for the transcript to have been exhibited (to A's affidavit)...".¹

[5] Heath J ruled Z's affidavit inadmissible and reversed the liquidators' decision to reject the proof of debt. Various other consequential orders were made dealing with outstanding matters.

[6] Mr TN complained to the Lawyers Complaints Service (LCS) about Mr LR, alleging breaches of three rules contained in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), as follows:

- Rule 11.1 – misleading and deceptive conduct
- Rule 13.1 – duty of fidelity to the Court
- Rule 13.8 – reputation of other parties

[7] In his complaint Mr TN provided detailed summary of the dispute between the parties. He advised that he was unaware that Z was digitally recording their discussion and only became aware of it during the hearing before Heath J. He submitted that the failure to disclose the existence of the recording and not annexing it to Z's affidavit amounted to a breach of rule 11.1.

[8] The non-disclosure of the recording and transcript was also the basis of the complaint under rule 13.1. The complaint under rule 13.8 was based on the suggestion

¹ *Manifest Capital Management Pty Ltd v Lawrence* HC Auckland CIV-2010-404-7741, 20 December 2011 at [78].

made by Mr NR QC in Court that Mr TN's conduct, as evidenced from his recorded discussion with Z, amounted to blackmail.

[9] Responding to the complaint, Mr LR rejected suggestion he had breached the Conduct Rules. In support of his position, he provided correspondence from Mr NR QC together with an opinion from Mr LG QC.

[10] Responding to allegations of misleading conduct, Mr LR advised that he was under express instructions not to disclose the recording, adding that there was no obligation that overrode those discussions. Mr NR QC was also of the view that there was no requirement to disclose the recording.

[11] Mr LR rejected suggestion that he had misled the Court, arguing that there was no obligation to disclose the recording to the Court, arguing that there was party autonomy in selecting what goes into evidence, and that the fact that the evidence comprised an audio recording made no difference to that principle.

[12] Mr LR denied that there had been an attempt to entice Mr TN into committing a contempt of Court. He emphasised that Mr NR disclosed the existence of the recording and transcript when Mr TN's counsel advised the Court that Z's evidence was disputed.

[13] Addressing the alleged attack on Mr TN's reputation, Mr LR noted that it was Mr NR who had conducted the cross examination and presented the argument, not him. Mr LR also claimed that there appeared to be good foundation for the allegation made against Mr TN.

[14] The letter from Mr NR and the opinion obtained from Mr LG were provided to Mr TN who took the opportunity to respond. Mr LR in his final letter to the LCS summed up his position as follows:

I am a lawyer. I am obliged to follow my client's instructions unless I have a contrary overriding legal obligation or ethical duty. I followed my client's instructions in not providing Mr TN's solicitors with the recording or advising them that it existed. I had no duty to Mr TN that overrode those instructions. There is nothing unusual in this position.

[15] The matter then went before the Committee. Two members of that Committee declared an interest and withdrew resulting in the Committee no longer having a

quorum. Consideration of the complaint was postponed for one month. The Committee that decided the matter was comprised of five lawyers and one lay member.

The Standards Committee decision

[16] The Standards Committee distilled the issues to be addressed as follows:

- Was Mr LR's conduct misleading and deceptive?
- Did Mr LR mislead the Court?
- Did Mr LR attack Mr TN's reputation without good cause?

[17] The Committee, after considering the parties' submissions, determined that it should take no further action on Mr TN's complaint.

Application for review

[18] Mr TN has sought a review of the Committee's decision. He questions the independence of the membership of the Committee. He was concerned about the time taken to deal with his complaint. He had formed the view that there were clearly professional conflicts within the Committee, as two members of the initial Committee convened to consider the complaint had removed themselves from the panel.

[19] Lawyer members of Standards Committees are drawn from across the profession. It is commonplace for a Committee, when convened, to have a number of complaints on their agenda to consider and on occasions a Committee member may become alerted to the fact that they have a personal or professional connection with the practitioner who is the subject of the complaint. In those circumstances, the Committee member may disqualify themselves from considering the complaint to avoid any suggestion of potential bias or conflict of interest.

[20] The fact that one or more of the Committee members so disqualify themselves by withdrawing is not evidence of professional conflicts within the Committee, rather, it ensures that the principles of natural justice are being properly recognised and followed and independent judgement is brought to the matters. There is no basis for Mr TN to contend that those principles were not applied when the Committee considered his complaint.

[21] Mr TN maintains his position that Mr LR “tried to entrap” him. He highlights his lengthy career and established reputation, and expresses concern at the potential risk he saw to that reputation of being exposed to what he describes as “ambush in a public hearing”. He considers that Heath J’s ruling that Z’s affidavit was inadmissible supports his argument of untoward behaviour by Mr LR.

[22] Mr TN argues that Mr LR’s employers’ decision to obtain an opinion from Queen’s Counsel reflected an attempt to construct an argument in response to the allegations of professional misconduct.

[23] Mr TN concludes by noting that this is the first complaint that he has made against a lawyer, and emphasising that he took legal advice before doing so.

[24] Mr LR’s response to the application for review essentially repeats his rejection of the complaints. He challenges the relevance of some of the comments made by Mr TN in support of his application for review.

Hearing on the papers

[25] Both Mr TN and Mr LR have consented to this review being undertaken on the papers pursuant to s 206 of the Act. This process allows a Legal Complaints Review Officer (LCRO) to conduct the 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.

Role of the LCRO on Review

[26] In *Deliu v Hong and the LCRO* Winkelmann J provided helpful guidance on the nature and scope of an LCRO review. She described the review framework in the Act as creating “a very particular statutory process”.²

[27] Her Honour noted that 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. Nevertheless, where the review is of the exercise of a discretion, it is

² *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39].

appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.³

Analysis

[28] Members of the legal profession are expected to strictly comply with the Act and the Rules in their dealings with the Court, their clients and their colleagues. In this case Mr TN has helpfully identified the three rules that he submits have been broken by Mr LR. Those rules forbid misleading and deceptive conduct, misleading or deceiving the Court and attacking a person's reputation without good cause.

[29] Each party's position is set out in considerable detail in the material before me, comprising the Committee's file and the documents that have been provided as part of this review. I have carefully considered all of that material.

[30] At the heart of Mr TN's complaint is concern that he was the victim of a deliberate ploy to conceal that a conversation he had engaged in had been surreptitiously taped and a transcript of that conversation made. It is the perceived element of subterfuge in the dealings that prompts Mr TN's complaint. It is his view that the lawyers engaged in the process, particularly Mr LR, in failing to disclose the existence of the tape, were complicit in the deception.

[31] Mr TN's sense of discomfort at having his conversation surreptitiously recorded is understandable, and his concern about the process is reinforced by the High Court decision which directly addressed the failure to disclose. On learning of the existence of the audiotape and transcript, the Judge directed that they be immediately made available to the solicitors for the liquidators and directed that Mr TN be provided with opportunity to file an affidavit in response.

[32] In considering the issue as to whether the affidavit should be admitted, and in reaching a decision to refuse its admission, the Judge noted that:

- (a) When examined critically, there was much scope for doubt about the nature and extent of Z's assertions of what was said.
- (b) He was concerned about matters that had been omitted from Z's affidavit.

³ At [41].

- (c) He was concerned that Z did not disclose his covert recording of the meeting or the consequent preparation of a transcript.
- (d) The contents of the affidavit were unlikely to provide sufficient information to ascertain the true nature of Mr TN's comments.

[33] It is from that context that Mr TN pursued complaint that Mr LR had breached his professional obligations by failing to ensure that the affidavit was dealt with in more transparent fashion.

First Complaint – failure to disclose- Rule 11.1

[34] Allegation that Mr LR had been misleading and deceptive in his conduct was addressed by Mr TN in his initial complaint, as being argument that Mr LR had breached rule 11.1 of the Rules.

[35] Rule 11.1 provides that a lawyer must not engage in conduct that is misleading or deceptive or likely to mislead or deceive anyone on any aspect of the lawyer's practice.

[36] The scope of rule 11.1 was considered by the authors of *Professional Responsibility in New Zealand* where it was noted that:⁴

This rule is concerned with misleading or deceptive conduct in relation to the lawyer's practice. It concerns matters such as the lawyer's practising certificate status, expertise in particular areas of the law, the existence of an association, affiliation or endorsement, or fee charging practices. The rule is not directed at misleading and deceptive conduct in the lawyer's advocacy work. That matter is more directly addressed by r 13.1 concerning lawyer's duty of fidelity to the court.

[37] A breach of r 11.1 is not established.

Misleading the Court- Rule 13.1

[38] A lawyer's primary obligation is as an officer of the court.

⁴ *Professional Responsibility in New Zealand* Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 at [410, 510.5].

[39] Rule 13.1 provides that the overriding duty of a lawyer acting in litigation is to the court concerned. Subject to this, the lawyer has a duty to act in the best interests of his or her client without regard for the personal interests of the lawyer.

[40] Counsel must conduct themselves in court so as to meet their obligations as officers of the Court, and their ethical obligations to their profession.⁵

[41] Counsel's obligations to the Court were considered in *Rondel v Worsley* where it was noted that:⁶

Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or standards of his profession require him to produce.

[42] Senior counsel was instructed to take over the conduct of the litigation. Mr TN submits that this did not absolve Mr LR of his responsibility to ensure that the Court was advised of the existence of the audio recording and transcript. He goes further. He submits that Mr LR, with full knowledge of the existence of the information that was not disclosed, endeavoured to persuade Mr TN to provide response to Z's affidavit, in the hope that Mr TN's response would present as inconsistent with the taped record of the conversation. Argument is advanced by Mr TN that Mr LR was motivated by the desire to "mislead [Mr TN] into a situation of contempt of Court".⁷

[43] In essence, Mr TN is alleging that Mr LR was endeavouring to entrap him.

[44] As noted, in responding to the complaint Mr LR provided a view from senior counsel instructed, Mr NR, and a formal opinion from Mr LG QC.

[45] Mr TN argues that Mr LR's firm's decision to seek an opinion from Mr LG suggests that the firm had concerns regarding Mr LR's conduct. The construction placed on that decision is speculative. No conclusions can be drawn as to the practitioner's view as to the merits or otherwise of the complaint from the practitioner's decision to obtain an opinion. Complaint that a practitioner has misled the Court is a matter of considerable seriousness, and a practitioner is entitled to seek professional advice on a conduct complaint, and indeed it may be prudent to do so.

⁵ At [410, 550.5].

⁶ *Rondel v Worsley* [1961] 1 AC 191 (HL) at 227-228.

⁷ Letter TN to LCS (3 February 2012) at [3.1(c)].

[46] Mr TN advises that before deciding to pursue his complaint, he had taken advice from a prominent Queen's Counsel who had recommended that he make complaint to the Law Society. Mr TN emphasises that the opinion sought from his QC was provided on a formal basis. The advice sought was paid for, and not advice he stresses, provided in the nature of a "fireside chat". Mr TN did not provide to this Office or to the Committee, evidence of any formal opinion provided by his QC. That opinion may not have been provided in written form.

[47] Mr NR considered that Mr LR had no obligation to disclose the fact of the recording to Mr TN's solicitors. In arriving at that view, he placed reliance on the following:

- (a) Mr LR's instructions were to not disclose the recording.
- (b) There is no restriction upon a participant to a conversation recording the conversation without disclosing the fact of the recording to the other party to the conversation.
- (c) No discovery had been sought, or ordered by the Court.
- (d) Whilst his personal preference would have been to have exhibited a certified transcript of the recording to the Court, no useful purpose would have been achieved by doing so when there was no challenge to Z's account of the conversation.
- (e) He regarded the circumstances in which the recording had been made as analogous to a party making detailed record of a telephone conversation.
- (f) He was satisfied that particular care had been taken to craft an affidavit which accurately recorded the conversation.
- (g) He did not consider that there was any obligation upon Mr LR to provide a copy of the transcript, or the recording, given that no issue had been taken to Z's account of the conversation.

[48] Mr LG QC provides a similar view. He submits that:⁸

⁸ Letter LG QC to LCS (15 June 2012) at [13].

- (a) There is no obligation on a lawyer to present all evidence to support factual assertions.
- (b) No discovery order had been made.
- (c) The factual assertions contained in the affidavit had not been challenged.
- (d) This was not a case where Mr LR had material in his possession adverse to his client's case which had not been disclosed.
- (e) Mr LR's client's instructions were specifically that the existence of the tape should not be disclosed, absent a need to do so. Adherence to his client's instructions prevented disclosure, unless a dispute arose.
- (f) Mr NR as senior counsel, had overall responsibility for the litigation and the conduct of it.
- (g) Mr TN's complaint was driven by a misguided belief that there was a requirement for full disclosure of all material, when there was no obligation to do so.
- (h) There was nothing misleading or deceptive in not disclosing the existence of the tape and transcript.

[49] Ease of access to mobile phones has made it increasingly easy to record meetings and conversations.

[50] Covertly recording a conversation is conduct which many may consider unacceptable.

[51] The focus of this review however, is not on the conduct of Z in making the recording, but on whether any disciplinary consequences arise for Mr LR as a consequence of the existence of the recording not being disclosed.

[52] That inquiry must necessarily focus on Mr LR's professional obligations, and a consideration in the circumstances of this case, as to whether those obligations were breached.

[53] I agree with Mr NR that there is no general restriction on a party taping a conversation, although doing so may raise privacy issues, and if the conversation becomes part of a court process, engage, as was the case in this instance, issues of admissibility.

[54] An initial issue to consider is whether Mr LR is appropriately the subject of the complaint, bearing in mind that senior counsel was instructed to take over the conduct of the court proceedings.

[55] Mr TN argues that Mr NR over late in the piece, and that Mr LR was responsible for organising the affidavit and instrumental in endeavouring to persuade Mr TN to provide a response to the affidavit.

[56] Mr NR took instructions to act in the proceedings approximately two weeks before the matter was to be heard in the High Court. Mr NR says that the issue as to whether the existence of the recording needed to be disclosed was carefully traversed with Mr LR. Mr NR had formed a view that neither he nor Mr LR were under any obligation to disclose its existence.

[57] Whilst I do not consider that Mr NR's involvement, and the degree of responsibility assumed by him, removes Mr LR from the scope of the conduct inquiry, Mr LR's conduct must be considered within the context of senior counsel being instructed to assume responsibility for managing the court proceedings, and an appreciation of the reliance that Mr LR would place on advice provided by senior counsel.

[58] In reaching conclusion that Mr LR had not breached any of his professional obligations, the Committee agreed with Mr LG's analysis, particularly his argument that as the assertions made in the affidavit were not disputed and no discovery had been directed, Mr LR was under no obligation to ensure that the affidavit disclosed the existence of the audiotape.

[59] I agree with that assertion. However bare explanation as to the extent of a parties' obligations to disclose its evidence will likely not provide satisfactory explanation for Mr TN, who protests the fact that evidence obtained surreptitiously was not properly described as having been so obtained.

[60] Irrespective of principles that may apply in respect to the production of evidence, the fact that Mr TN's conversation was recorded without his knowledge does introduce to the argument an element that does not normally accompany admissibility arguments. It is not common practice for affidavits to be put before the High Court detailing the deponent's recollection of a conversation, in circumstances where the deponent has covertly taped the conversation, and failed to disclose that fact to the court or the other party.

[61] The question is whether Mr LR, in facilitating his client's instructions, breached his duty to the Court.

[62] Whilst there is a duty on lawyers to be frank with the Court, this obligation coexists with the duty to the client, and on occasions this can lead to a degree of tension. It has been noted that "a lawyer has a duty to the Court, but is constrained from disclosing information confidential to the client", and that there are "few instances where a lawyer is compelled to act in the Court's interest to the detriment of the client".⁹

[63] That being said, a lawyer must never act in a way that is calculated to obstruct or deceive the Court.

[64] I do not consider that Mr LR's role in the preparation of the affidavit that caused Mr TN such offence, and his role in presenting that affidavit to the Court, constituted conduct which could properly be described as obstructive or misleading.

[65] Both Mr NR and Mr LR emphasise that the affidavit provided to the Court was carefully constructed, and that the affidavit captured the relevant parts of the recording. Mr LR says that he took particular care to ensure that the affidavit was an accurate record of his client's instructions.

[66] I agree that Mr LR as a matter of evidence was under no obligation to refer to the audiotape; however his strongest defence in my view to allegation that he was not forthcoming with the Court is the reliance he was required to place on his client's instructions.

⁹ Duncan Webb, Kathryn Dalziel and Kenny Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at 361.

[67] Subject to the lawyer's overriding duty to the court, a lawyer must obtain and follow a client's instructions on significant decisions in respect of the conduct of the litigation.¹⁰

[68] Mr LR was specifically instructed to not disclose the existence of the audiotape. He was required to follow those instructions. In doing so, he was not engaging in behaviour which compromised his duty of honesty to the court, or misleading or deceiving the court. He considered that the affidavit provided accurate account. The affidavit was the sworn evidence of his client. It reflected his client's recollection of the conversation he had had with Mr TN. Mr TN had opportunity to challenge the affidavit.

[69] A lawyer must not act contrary to a client's instructions. On occasions that may require a lawyer to follow a path that the lawyer considers is not in the client's best interests. In *R v McLoughlin* a barrister elected not to call alibi evidence in the face of his client's instructions to do so. The Court of Appeal observed:¹¹

The reason, it appears, was that counsel thought the proposed evidence unreliable and that it would be improper for him and detrimental to the applicant for it to be called. It is not for this Court to question counsel's judgement about that, or to comment upon the evidence ourselves. But the plain unvarnished fact is that counsel most certainly had no right to disregard his [the applicant's] instructions. Following any advice he thought it proper to give his client, his duty was either to act on the instructions he then received or to withdraw from the case.

[70] Whilst I do not consider that any disciplinary issues arise as a consequence of Mr LR's conduct, managing evidence which has been obtained by means of a surreptitiously obtained recording does present as problematical for lawyers. The method by which the evidence is obtained may taint the process at commencement, and has potential to compromise the opportunity for fair process to the other party.

[71] Mr NR indicated that his personal preference would have been to have exhibited a certified transcript of the recording. I agree that approach would have been preferable. It avoids possibility of allegation that information is being deliberately withheld with intent to ambush the other party, and distances the lawyer from prospect of accusation that they, as well as their client, should have been more forthcoming with the court.

¹⁰ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 13.3.

¹¹ *R v McLoughlin* [1985] 1 NZLR 106 (CA) at 107.

[72] Whilst the disclosure of the tape and transcript only became an issue at the point where objection was taken to the affidavit, the Presiding Judge noted his concern that Z had failed to disclose that his conversation had been covertly recorded and observed that it would have been an easy matter to have attached the transcript to the affidavit. That provides clear indication as to how the Court considered the matter could have been best handled.

[73] Whilst I do not consider that any conduct rules have been breached, or that any conduct issues otherwise arise, it would in my view, be a preferable approach for practitioners, subject of course to their client's instructions, when faced with the circumstances that Mr LR encountered, to ensure that any information put before the court in affidavit form which purports to stand as evidence of a conversation recorded without the consent of the other party, signals to the court the existence of the taped record of the conversation. That approach presents as consistent with the objective of ensuring a "no surprises" approach in the conducting of litigation, an approach which is promoted and encouraged by the Courts.

Did Mr LR attack Mr TN's reputation? - Rule 13.8

[74] This complaint relates to argument that Mr TN's reputation was attacked arising from the suggestion by Mr NR that his conduct amounted to blackmail.¹²

[75] I do not consider it necessary to address this complaint by undertaking analysis as to whether the comments complained of were made with reasonable foundation.

[76] The complaint is properly addressed by noting that the comments were made in the course of the litigation not by Mr LR, but by Mr NR.

[77] Mr LR was junior counsel at the hearing and did not present any of the argument, or conduct any of the cross examination. He confirms that "Mr NR made the submission that Mr TN's conduct may amount to blackmail".¹³

[78] For a practitioner to be found to have breached a conduct rule it is fundamental that the action complained about was carried out by that practitioner.

¹² Above n 8, at [3.3(b)].

¹³ Letter Heard to LCS (21 March 2012) at [30].

[79] On a final point, I record that I have not overlooked Mr TN's complaint (not raised initially but referred in later correspondence to the Complaints Service) that Mr LR had provided a copy of Z's affidavit to the Complaints Services when the High Court had imposed restrictions on its release. That issue was not considered by the Committee, nor raised by Mr TN on review. I do not consider that any disciplinary issues arise from the decision to provide the affidavit to the Complaints Service.

Conclusion

[80] The application for review is not upheld.

Decision

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

DATED this 14th day of April 2016

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 TN as the Applicant
Mr LR as the Respondent
Mr [XX] as a Related Person
[City] Standards Committee [X]
New Zealand Law Society