

**LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE**

[2021] NZLCRO 169

Ref: LCRO 43/2021

CONCERNING

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

AND

CONCERNING

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

BETWEEN

CAT LIMITED

Applicant

AND

ZEN LAWYERS LIMITED

Respondent

DECISION

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

Introduction

[1] Mr JM, on behalf of CAT Limited, has applied for a review of a decision by the [Area] Standards Committee [X].

Background

[2] Mr JM is a director of the company CAT Ltd (CAT).

[3] The company is based in [city].

[4] In June 2017, the company suffered a flood at its business premises. The damage was substantial.

[5] CAT, through its insurance broker Company B, lodged a claim with its insurer Company A, for approximately \$60,000 to cover flood damage.

[6] Company A eventually paid out around \$40,000 in settlement of the claim.

[7] Mr JM was dissatisfied with the service his company had received from both Company B and Company A.

[8] In February 2019, Mr JM approached ZEN Lawyers NZ Limited ("ZEN")¹ for advice on the insurance issue. Mr JM attended a meeting with Mr BV (the then managing director of ZEN) and Ms PQ, a staff solicitor, on 4 February 2019.

[9] The discussion at the 4 February meeting first addressed issues relating to the flood insurance claim. Before further steps were taken on that matter, it was agreed that a careful examination of the terms of the commercial lease was required. Discussion on the issue of the flood insurance concluded with Mr JM advising the lawyers that he was experienced in reviewing commercial leases, and that he would peruse the leases himself and revert to ZEN if he considered further action was necessary.

[10] Mr JM then raised an issue concerning arrangements his company had in place for travel insurance. The company carried an annual insurance policy for travel but also had access to travel insurance cover with Company E. Travel purchased with a Company E card carried the benefit of providing the card holder with travel insurance cover.

[11] Mr JM questioned the lawyers as to how the apparent duality of insurance cover would work in practice, if occasion arose when the company had need to access its travel insurance.

[12] Late in the afternoon of 4 February 2019, Mr BV despatched two emails to Mr JM. The first, under the subject banner "travel policy", and the second under the subject banner "[Company C]".

[13] The emails, similarly worded, thanked Mr JM for his instructions and attached a letter of engagement and legal services agreements (LSA).

[14] On 7 February 2019, Mr BV prepared a memorandum for Ms PQ. That memorandum confirmed the instructions Mr BV understood he had received from CAT

¹ On occasions [ZEN] will be referenced in this decision as "the lawyers". When Mr JM filed his complaint, he identified Mr BV's firm as [ZEN] Lawyers Limited. The Standards Committee referenced the firm in its decision as ZEN Limited. In his review application, Mr JM identifies the firm as ZEN Law. The letters of engagement confirm Mr JM's firm's status as [ZEN] Lawyers Limited.

on the matter of the travel insurance and made request of Ms PQ to prepare an opinion. The memorandum recorded Mr BV's instructions to Ms PQ as follows:

1. Can you please look at this file under supervision of [MD]. As discussed with the client in the meeting, he is looking for some advice as to how to get around the double insurance clauses in the policies.
2. He pays for a premier corporate travel policy underwritten by [Company C], and you will see that this includes an "other insurance" clause but he also gets the free [Company E] Cardmember policy underwritten by [Company D]. That also has an "other insurance" clause.
3. There is some quite established case law around the operation of other insurance clauses. I think from memory if you look under "double insurance" in the ANZ Insurance Reporter, and possibly under other texts, you will see how it works. Basically, there are different types of other insurance clauses, and if each policy has the same type of clause, then it is split 50/50.
4. The client is looking for some advice about how to handle this. He doesn't want to get in a situation in the future where they make a claim and end up fighting between insurance companies over who is going to pay. This happens all the time because you end up stuck in the middle between two insurance companies who argue whether they should be paying 50/50 or not.
5. I suspect that if the policies stay the same as they are, then there is not much that can be done about it. But this must be a relatively common (albeit maybe unknown) problem, because big companies often have corporate travel policies, and everyone who pays for their travel insurance with a credit card gets these free policies. So, there must be hundreds of situations where this occurs, perhaps though people just don't realise and usually claim under their corporate policy.
6. My gut feeling is that the answer is there is going to be double insurance and the only way to get around it would be to convince [Company C] that they should remove that clause from their policy so that the client can get the benefit of the policy he pays for rather than having to rely on the freebie. Often these freebie policies aren't worth much. That would be something the broker needs to negotiate with the insurer.
7. Have a go at drafting this, and talk to [MD] about possible options. Timeframe for Opinion – end of next week at the latest.

[15] On 25 February 2019, Ms MD, a director of ZEN, emailed Mr JM attaching a legal opinion that had been prepared on the double insurance issue.

[16] On 26 March 2019, Mr JM sent an email to Mr BV expressing concern that he had never instructed ZEN to undertake work on the conflicting insurance matter.

[17] ZEN issued an account to CAT in the sum of \$2,238.75 (including GST and disbursements) for work completed.

[18] On 31 October 2019, CAT issued proceedings in the District Court for recovery of its fees.

[19] On 9 December 2019, CAT made a complaint to the New Zealand Law Society Lawyers Complaints Service (NZLS), concerning the conduct of Mr BV. The complaint also referenced ZEN as a subject of its complaint.

[20] Sadly, Mr BV passed away on [date] before the Committee had opportunity to complete its investigation.

[21] The Complaints Service amended the complaint to identify ZEN Lawyers Ltd as the subject of Mr JM's complaint.

The complaint and the Standards Committee decision

[22] Mr JM lodged his complaint with the NZLS on 9 December 2019. The substance of his complaint was that:

- (a) he had approached ZEN for advice on issues arising from an insurance claim that his company had lodged to cover flood damage to company premises; and
- (b) he was advised that ZEN did not charge potential new clients for an initial consultation; and
- (c) his discussions with ZEN concluded on the basis of an understanding that he would peruse the relevant lease documents before any decisions were made to take matters further; and
- (d) subsequent to his meeting with ZEN, he received letters of engagement which thanked him for instructions received for instructions that had not been provided; and
- (e) at the conclusion of his meeting with ZEN, there had been a brief discussion concerning possible interpretations of the conflicting clauses in the two travel insurance policies; and
- (f) Mr BV had invited Mr JM to leave him with the travel insurance documents that had been under discussion; and
- (g) it was not, and had never been, the intention of CAT to instruct ZEN to prepare an opinion on the travel insurance issue; and
- (h) CAT had not provided ZEN with instructions at the initial meeting, nor had CAT continued to provide instructions to ZEN; and

- (i) the legal opinion provided by ZEN was, in any event, valueless and unrealistic in the options it recommended as possible solutions for resolving the apparent conflict in the insurance documents.

[23] Mr BV responded to the complaint on 17 December 2019.

[24] He submitted that:

- (a) ZEN had not charged CAT for the initial meeting; and
- (b) he had not charged for his time, notwithstanding he had likely spent up to 2 hours assisting Ms PQ; and
- (c) ZEN had substantially discounted the fee charged to CAT; and
- (d) Mr JM had ample time following receipt of the letters of engagement to confirm instructions not to proceed.

[25] On 6 July 2020, Mr JM provided the Complaints Service with what he described as additional information.

[26] Mr JM explained that his discussions with ZEN regarding travel insurance issues had raised matters of minor academic interest only. He had not intended to instruct ZEN to provide him with advice. Mr JM said that he had considerable experience in instructing lawyers and was extremely mindful of the need to ensure that instructions provided to a lawyer were focused and clear. He emphasised that he had not instructed ZEN to prepare a legal opinion.

[27] On 31 August 2020, Ms MD (ZEN's managing director) provided a further response to Mr JM's complaint.

[28] Ms MD submitted that:

- (a) the complaint was misconceived; and
- (b) 3 of the ZEN lawyers who had involvement with the file considered that Mr JM had provided valid instructions; and
- (c) Affidavits sworn by Ms PQ and Ms MD confirm their understanding that Mr JM had provided instructions; and
- (d) Mr JM had ample time following receipt of the legal services agreement to confirm that he did not wish for work to proceed; and

- (e) the lawyers that had met directly with Mr JM did not consider that they needed, following the meeting with him, to confirm their instructions; and
- (f) ZEN was a busy law firm who enjoyed an abundance of work, it was not in the business of completing work in the absence of instructions to do so; and
- (g) Mr JM had provided clear instructions which were acted on; and
- (h) ZEN had substantially discounted its fee; and
- (i) the opinion provided to Mr JM was of high calibre.

[29] In an affidavit sworn in support of her response to the complaint on 1 September 2020, Ms MD deposed at paragraph [10], that she had discussed Mr JM's complaint with Mr BV, and that Mr BV had confirmed to her that he was "adamant that he told Mr JM we would need to do some research and we would provide him with a written opinion. I recall BV saying that Mr JM gave the go ahead for the work".

[30] Ms PQ also provided an affidavit in support of ZEN's response. Ms PQ confirmed in her affidavit that it was her understanding from the meeting she attended with Mr BV and Mr JM, that Mr JM had instructed ZEN.

[31] On 20 October 2020, Mr JM informed the NZLS of his intention to respond to the submissions and affidavits filed by ZEN. He advised that he would be providing his response in a format similar to that adopted by ZEN. Mr JM signalled his intention to file two affidavits.

[32] Those documents were forwarded to the NZLS on 22 October 2020. Mr JM set out in an affidavit a detailed account as to his understanding of what had been agreed at the conclusion of his meeting with Mr BV and Ms PQ. That affidavit was supported by a comprehensive submission in which Mr JM responded to the affidavits of Ms MD and Ms PQ.

[33] The Standards Committee identified the issue to be addressed, as a consideration as to whether ZEN had carried out work it had not been instructed to undertake, and if so, whether ZEN breached Rule 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[34] Rule 3 records that in providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

[35] The Standards Committee delivered its decision on 25 February 2021.

[36] The Committee determined pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) that no further action on the complaint was necessary or appropriate.

[37] In reaching that decision the Committee concluded that:

- (a) Mr JM had not established on the balance of probabilities that CAT had not instructed ZEN on the travel insurance matter; and
- (b) ZEN had acted appropriately and in accordance with its instructions and professional obligations in preparing its opinion.

Application for review

[38] Mr JM filed an application for review on 12 April 2021.

[39] In addition to the submissions that accompanied his review application, Mr JM when advising the LCRO of his agreement to the review application being heard on the papers, provided a comprehensive overview of the information that had been filed in the course of advancing his complaint, and a detailed analysis of the Committee's decision.

[40] All material filed has been considered.

[41] In summarising his argument, Mr JM submitted that:

- (a) CAT had never issued instructions to ZEN; and
- (b) CAT had not continued to issue instructions to ZEN after receiving ZEN's legal services agreements; and
- (c) ZEN had not accepted any instructions from CAT, and no agreement for Legal Services had been entered into between CAT and ZEN; and
- (d) no basis existed for ZEN to do any work for CAT and/or invoice CAT for any work; and
- (e) the legal analysis provided by CAT to ZEN was not completed on the basis of instructions received from CAT, nor did the opinion provide a viable solution to the problem CAT faced; and
- (f) the opinion was of no value to CAT.

[42] By way of outcome, Mr JM sought directions that the Standards Committee's decision be reversed.

[43] Ms MD provided a response to Mr JM's application. That response in large part reinforced the arguments she had advanced when first providing response to Mr JM's complaint. She submitted that:

- (a) Mr JM's complaint was misconceived; and
- (b) three lawyers at ZEN considered that Mr JM had provided valid instructions; and
- (c) Mr BV's memorandum, prepared contemporaneously with the receiving of instructions, was significant evidentially in confirming ZEN's position that Mr JM had provided instructions; and
- (d) Ms PQ, who was in attendance at the initial meeting, confirmed that Mr JM provided instructions to ZEN; and
- (e) Ms MD was familiar with the instructions provided; and
- (f) if it had been Mr JM's intentions not to instruct ZEN, it could reasonably have been expected of Mr JM that he would have advised ZEN accordingly on receipt of the legal services agreements; and
- (g) neither of the lawyers who had initially dealt with Mr JM considered there was a need to doublecheck Mr JM's instructions; and
- (h) as a busy practice, ZEN was not in the business of completing work in the absence of instructions to do so; and
- (i) the opinion provided to CAT was of high quality; and
- (j) the Standards Committee was entitled to place weight on the memorandum drafted by Mr BV.

[44] In summarising ZEN's position, it was Ms MD's contention that:

- (a) The Committee's decision was well reasoned and correct; and
- (b) The Committee adopted a fair and open process for dealing with the complaint.

Review on the papers

[45] This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[46] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party. On the basis of the information available, I have concluded that the review can be adequately determined in the absence of the parties.

Nature and scope of review

[47] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:²

... 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.

[48] More recently, the High Court has described a review by this Office in the following way:³

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.

² *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41] (citations omitted).

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

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

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

Discussion

[50] A number of submissions have been filed.

[51] All that can be said, has been said.

[52] Inevitably when a dispute is litigated through a process that provides continuing opportunity for parties to advance their positions, submissions have potential to become both increasingly detailed and, to a degree, repetitive.

[53] The issue is not complex. It reduces to the simple question as to whether Mr BV or ZEN acted on instructions received, or proceeded to prepare an opinion and charge a fee for the work undertaken, in circumstances where it had not been given instructions to undertake the work.

[54] The evidence primarily relied on by the complainant and the lawyers, is comprised of:

- (a) personal reflections of what transpired at the meeting of 4 February 2019 from those who were in attendance at the meeting (Mr JM/ Mr BV/Ms PQ); and
- (b) recollections of an individual (Ms MD) who had oversight for the work that was completed and discussions with the lawyer that had taken instructions; and
- (c) documentary evidence comprised of:
 - (i) a file note drafted by a lawyer who was in attendance at the February meeting; and
 - (ii) a memorandum prepared by the director who attended on Mr JM, that memorandum detailing the scope of work the partner was instructing his junior colleague to undertake;

- (iii) letters of engagement (legal services agreements); and
 - (iv) a legal opinion; and
 - (v) an invoice; and
 - (vi) correspondence from Mr JM expressing objection to the work undertaken, and the lawyer's response.
 - (vii) A further affidavit filed by Mr JM which addressed the value of the opinion that had been prepared by the ZEN lawyers.
- (d) Mr JM's assessment of the value of the work completed, this underpinned with argument that an examination of his circumstances would indicate that he would have had no reason to instruct the lawyers to undertake the work completed.

[55] Investigation into Mr JM's complaint (and the process of review), has inevitably been complicated by the tragic death of Mr BV.

[56] Mr JM identified Mr BV as the subject of his complaint when first filing his complaint. Mr JM also indicated in his initial complaint that he was advancing a complaint against ZEN Lawyers Limited.

[57] Subsequent to Mr BV's death, the NZLS was faced with the dilemma as to how a conduct complaint which would have inevitably primarily focused on the actions of a particular practitioner, could best be progressed in circumstances where the practitioner had died before the conduct investigation could be completed.

[58] How are conduct investigations to be progressed in such circumstances?

[59] The Lawyers and Conveyancers Act 2006 (the Act) provides no guidance in its disciplinary provisions (part 7), as to the effect on the inquiry process of a lawyer's death.

[60] It is clear that the concepts of complaints and own motion investigations contemplate living persons.⁴

[61] The focus of the disciplinary regime is protective, not punitive.

[62] It is difficult to see how the protective objectives of the Act would properly be engaged by making of conduct findings against a deceased practitioner but on

⁴ Section 121(1) of the Act, in defining the categories of persons capable of being complained against, all concern living persons except for incorporated firms.

occasions, depending on the circumstances of the particular case, it may be appropriate for a conduct investigation to continue. Critical to that decision would be a consideration as to whether the complaint investigation had been sufficiently advanced prior to the death of the practitioner, to have allowed opportunity for the practitioner to provide response to the complaint.

[63] Critically, the Act directs that a Review Officer must perform his or her functions and duties and exercise his or her powers in a way that is consistent with the rules of natural justice.⁵ Pivotal to this, is that opportunity be provided to a person who faces complaint, of opportunity to respond to the complaint, to speak in their own defence. It has been noted that “there are two pervasive principles of natural justice: that the parties be given adequate notice and opportunity to be heard (*audi alteram partem*) and that the decision-maker be disinterested and unbiased (*no man a judge in his own cause*).⁶

[64] It is accepted that the jurisdiction of a Standards Committee has a compensatory and remedial dimension.⁷

[65] Mr BV was the managing director of ZEN when he met with Mr JM in February 2019.

[66] Mr BV was a senior and experienced lawyer, who had garnered a reputation for having a particular expertise in insurance matters.

[67] It was Mr BV who made the decision that an opinion be prepared for Mr JM.

[68] Mr BV’s views on the complaint are known. He had opportunity to respond to accusation that he had not been provided with instructions to act. Mr BV responded directly to Mr JM when Mr JM first raised concern that Mr BV had acted without instructions. In his response, Mr BV said this:

I find it somewhat strange that you would think that you could make an appointment with a lawyer, meet, discuss the case in some detail, get initial advice, agree to us providing further advice and that it would all be free. I am sorry but my recollection of our meeting is clear, as is our legal services agreement. You expressly instructed us at the meeting to research and provide advice on the issue, and we did so after sending a LSA that set out the basis of charging... Please arrange for the invoice to be paid without delay.⁸

⁵ Lawyers and Conveyancers Act 2006, s 206(3).

⁶ See: PA Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Brookers, 2007, Wellington) at para 24.1 and also *Furnell v Whangarei High Schools Board* [1973] 2 NZLR 705 at 718 (PC) and *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 at 141 (CA).

⁷ Lawyers and Conveyancers Act 2006, s 156(1)(d)-(h).

⁸ Email from Mr BV to Mr JM (25 March 2019).

[69] Mr BV also had opportunity to provide brief response to Mr JM's complaint when responding to request from the Complaints Service in the early stage of the conduct investigation to provide further information. Mr BV advised that he had "proceeded as instructed at the meeting". He confirmed that Mr JM had been provided with the LSA, and expressed the view that if Mr JM believed that he had not provided instructions, that it would have been open to Mr JM on receipt of the LSA to respond.⁹

[70] I think it unlikely that Mr BV would, if given further opportunity to respond to the complaint, have been likely to have deviated from his initial response or to have been able to add much more of significance to it. Mr BV's position was clear. He believed that he had been specifically instructed to provide Mr JM with an opinion on the travel insurance issue, and that he had proceeded to act on those instructions.

[71] I think it probable that if Mr BV had been able to provide a continuing response to Mr JM's complaint through to the completion of the Committee's investigation, and if the Committee had concluded that work had been completed and charged for in circumstances where there had been no instructions provided to undertake the work, the Committee's response would likely have been to give consideration as to whether an unsatisfactory conduct finding should be entered against Mr BV without need to give consideration to the issue as to whether Mr BV's firm were deserving of a disciplinary response.

[72] On 13 August 2020, the NZLS advised the parties that a decision had been made to amend the complaint to record that ZEN was solely the subject of the complaint.

[73] Whilst the Committee were able to divert the focus of its conduct complaint to ZEN (as noted, the incorporated firm had been initially identified as a subject of Mr JM's complaint along with Mr BV) the shifting of attention to ZEN inevitably distanced the conduct inquiry from what could reasonably have been expected would have been the primary focus of its investigation (Mr BV).

[74] Whilst a decision to advance a conduct complaint against a lawyer in circumstances where a lawyer is deceased must be the subject of very careful consideration and any decision to progress a conduct investigation made with both an attentive regard for the procedural and natural justice issues identified above and a cautious reluctance to advance an inquiry that would likely result in futile conclusion, in my view the Committee could have elected to advance its investigation into Mr BV's conduct.

⁹ Email from Mr BV to the Lawyers Complaints Service (17 December 2019).

[75] I consider that would not have presented as an unfair approach (particularly for the late Mr BV) for the following reasons:

- (a) the conduct issue to be determined was relatively straightforward; and
- (b) Mr BV had been provided opportunity to respond to the complaint and had done so in terms which provided explanation of his views on the pivotal issue; and
- (c) two other lawyers in Mr BV's firm were able to give evidence as to their understanding of the nature of the instructions that had been provided to Mr BV; and
- (d) I could identify nothing in the articulate and comprehensive submissions that Mr JM had provided, that demanded further response from Mr BV.

[76] It is my view that it was open to the Committee to proceed its investigation of Mr BV's conduct to a conclusion.

[77] But having determined that its conduct investigation should exclude Mr BV and focus on ZEN, the issue before me on review is to consider Mr JM's argument that the Committee erred in concluding that there was no requirement for it to take further action on the complaint.

[78] Attention first turns to a consideration as to whether Mr JM's complaint was properly advanced against ZEN as an incorporated law firm.

[79] Whilst the Act specifically provides that a conduct complaint may be advanced against an incorporated firm, when complaint is brought against a firm, it is fundamental that the foundations of the conduct complaint, the identifiable elements of conduct that are said to have constituted a professional conduct breach, properly relate to the actions, responsibilities or obligations of the incorporated firm.

[80] Complaints against an incorporated firm are properly established when there is evidence of corporate failure. An example of such could include circumstances where a firm has failed to have adequate systems in place to ensure the security and confidentiality of its client's documents. Circumstances where an incorporated firm has been found to have acted in a misleading fashion when advertising its services, could properly provide basis for a complaint against the firm.

[81] If a Standards Committee elects to redirect a complaint towards an incorporated firm in circumstances where the lawyer who has been the initial focus of the complaint

has passed away, the Committee must be satisfied that the conduct complained of raises a realistic prospect of a possible corporate failure, and is not advanced simply as a substitute for the deceased lawyer.

[82] In shifting the focus of the investigation to the incorporated firm, the fundamental purpose of the conduct inquiry does not change.

[83] The investigation remains an investigation into conduct.

[84] It is clear from the Committee's determination, that its decision to take no further action on the complaint was arrived on the back of its conclusion that Mr BV's letters of engagement, and the memorandum he had prepared for Ms PQ, were significant in it reaching conclusion that Mr JM had failed to establish on the balance of probabilities that CAT had not instructed ZEN.

[85] It was essentially an examination of Mr BV's conduct that had led the Committee to conclude that it was appropriate to take no further action against ZEN.

[86] The Committee addressed ZEN's conduct by reference to r 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[87] Allegation that ZEN had commenced work without instructions to do so, was tested against an assessment as to whether ZEN had acted competently (r 3).

[88] Complaint that a lawyer has mistakenly completed work when not instructed to do so could also be measured against r 7.1, which provides that a lawyer must take reasonable steps to ensure that a client understands the nature of the retainer, must keep the client informed about the progress of the retainer, and must consult the client about the steps taken to implement the client's instructions.

[89] Rule 7.1 is directly relevant to the concerns that Mr JM raises.

[90] Each of the conduct rules identified is most commonly examined by reference to the conduct of an individual practitioner, rather than the conduct of an incorporated firm.

[91] Whilst the Standards Committee approached its investigation by a consideration of the question as to whether ZEN had been instructed to undertake work, and whether ZEN had breached r 3, it does not require a nuanced reading of its decision to discern that it was Mr BV's actions that were inevitably the focus of the Committee's attention.

[92] It was Mr BV who met with Mr JM. It was Mr BV who determined that Mr JM had provided him with instructions to act. It was Mr BV who provided directions to his colleague to draft an opinion. It was Mr BV who made request of a senior colleague to oversee the drafting of the opinion. Considering the extent of Mr BV's involvement, it is difficult to see how it could be concluded that the incorporated firm of which he was a director, could be held professionally responsible (as a firm) for the actions taken by Mr BV.

[93] The information provided by Mr JM to support his complaint, provides no evidence of any corporate failure on the part of ZEN such as would, or could, properly establish a foundation for a conduct complaint.

[94] The remedy Mr JM seeks is for the Committee's decision to be reversed.

[95] His objective is to have his liability for the fee charged extinguished.

[96] A decision to reverse the Committee decision (exercisable under s 211(1)(a) of the Act) could only be made in circumstances where the conduct complaint against ZEN was established, and it was determined that the conduct breach was sufficient to establish a finding of unsatisfactory conduct against the firm.

[97] In pursuing his complaint against both Mr BV and ZEN, Mr JM may have considered that it was appropriate that ZEN accept responsibility for the actions of one of its former directors, if it was established that CAT had suffered financial loss as a consequence of the actions of the former director.

[98] The Standards Committee's decision to take no further action on Mr JM's complaint did not deprive Mr JM of the opportunity to contest liability for payment of ZEN's fee. But that contest would more appropriately be litigated as a civil dispute, rather than through the vehicle of a professional conduct complaint.

[99] Having concluded that it would have been open to the Committee to progress its conduct inquiry against Mr BV, I have given consideration to returning the matter to the Committee with direction that it proceed an investigation into whether Mr BV had breached any professional duties or obligations owed to CAT.

[100] However, further delay will inevitably cause inconvenience to both parties. There is benefit for the parties in bringing this matter to conclusion.

[101] I am also mindful, that whilst the Committee amended the complaint to exclude Mr BV, its investigation, whilst progressed in the guise of a complaint against ZEN, inevitably paid close attention to the steps taken by Mr BV.

[102] The decision by the Committee to direct further inquiry towards the conduct of ZEN, in essence presented as a decision on the part of the Committee to take no further action against Mr BV.

[103] Viewed from that perspective, the decision is one that is properly reviewable.

[104] Accordingly, I will address the issue as to whether Mr BV had been instrumental in implementing steps to have a legal opinion prepared for CAT, in circumstances where he had not been provided clear instructions to carry out the work completed.

[105] In deciding to focus the conduct enquiry on Mr BV, I reiterate that considerable care must be exercised when a decision is made to continue with an inquiry into the conduct of a deceased practitioner.

[106] I do so in the present case, with assurance that the careful submissions filed by Mr JM, the responses provided by Mr BV, and the information provided by Mr BV's colleagues who were closely involved in the work that was done for CAT, has provided a comprehensive background which gives confidence to proceed the inquiry.

[107] In determining to examine Mr BV's conduct, I am not oblivious to the fact that the Standards Committee decision that is the subject of this review does not engage Mr BV as a party.

[108] But the circumstances of this case are fortunately relatively rare. It is, in my view, appropriate to address the issue as to whether Mr BV's conduct required a disciplinary response.

[109] At first step, it presents as unusual that a lawyer of Mr BV's seniority would embark on completing work for a client in circumstances where he had no clear instructions to do so.

[110] I have noted that Mr JM's submissions were comprehensive. They were also articulate and informed. Mr JM provides a clear and precise recollection of his meetings with Mr BV.

[111] In his concluding submissions, Mr JM suggests that Mr BV may have been motivated by self-interest, but for the most part, Mr JM avoids accusation that Mr BV had acted improperly, rather, Mr JM focuses argument on what I perceive to be his genuine and sincerely held conviction that Mr BV had completely misunderstood what had been agreed during the course of his meeting with Mr JM, and, as a consequence, had mistakenly assumed that he had been provided with instructions to act.

[112] Mr JM rejects suggestion that the letters of engagement provided firm evidence that Mr BV had been instructed to prepare an opinion.

[113] He correctly observes that the letter of instruction provided in respect of the flood insurance matter was not intended to provide confirmation of instructions to commence work, as Mr JM had made it clear that no steps were to be taken unless he gave specific instructions to do so.

[114] Mr JM did not consider that he had to provide immediate response to the letters of engagement. He noted, and I accept his evidence, that when the letters of engagement were received, he was intensely focused on addressing some technical problems that had arisen with his company's product and had little opportunity to respond to day-to-day matters.

[115] Mr JM accepts that he raised the travel insurance issue with Mr BV, but only, says Mr JM, as an interesting and minor topic of discussion. It was never his intention, he says, to formally instruct Mr BV.

[116] It is accepted by Mr JM that he brought copies of the relevant clauses from the travel insurance policies to the meeting with Mr BV. This would indicate an intention on his part to raise the issue with Mr BV. But it must be noted, that Mr JM was availing himself of an opportunity promoted by ZEN to have a free initial consultation with the lawyers. It would not present as unusual for a potential client to take the opportunity provided to raise more than a single issue.

[117] Mr JM suggests that towards the end of the meeting he was in the process of putting the documents back in his bag (this to reinforce argument that it was not his intention that Mr BV take the matter further), when Mr BV insisted that he leave the documents with him.

[118] Mr JM says that comments then made by Mr BV led him to believe that Mr BV was intending to reflect on the legal issue posed by the travel insurance issue, but that any further involvement would be limited and informal, and certainly not proceeded on the basis of him having been engaged to prepare an opinion.

[119] Mr JM complains that not only did he not instruct Mr BV to prepare an opinion, the opinion provided was of no use to him. He says that the insurance issue became irrelevant when he attained a certain age, and he was on the cusp of attaining that age when he first met with Mr BV.

[120] Mr JM provided an affidavit from an experienced insurance adviser to support his argument that the opinion prepared was of little value. Ms MD and Ms PQ consider that the advice provided was of a high calibre.

[121] It does not fall within the scope of this review to address the merits of the opinion provided.

[122] Mr BV, in providing immediate response to concerns raised by Mr JM, advised Mr JM that his recollection of their meeting was clear, and that he recalled that Mr JM had expressly instructed him to research and provide advice on the travel insurance issue. Mr BV submitted that the instructions to act were immediately recorded in the legal service agreements that had been promptly forwarded to Mr JM.

[123] Mr BV's belief that he had been instructed by Mr JM was further confirmed in his correspondence to the NZLS of 17 December 2019.

[124] Ms PQ was in attendance during Mr BV's meeting with Mr JM. She prepared a file note recording the discussions.

[125] She is able, then, to provide first-hand account as to her recollection of what transpired at the meeting.

[126] In an affidavit sworn on 1 September 2020, Ms PQ records that Mr BV had made it "very clear" to Mr JM in the course of their meeting, that research work would need to be undertaken in order to provide a view on the travel insurance issue, and that an opinion would be prepared that Mr JM would be required to pay for.

[127] Ms PQ says that when Mr JM raised objection to request for payment for the legal opinion provided, she spoke to Mr BV who confirmed to her that he was "adamant" that Mr JM had formally instructed him.

[128] Ms PQ says that it was Mr BV's practice to give careful consideration to issuing proceedings against a former client for recovery of fees. He instructed her to commence proceedings against Mr JM because of his firm conviction that Mr JM had provided him with instructions to act.

[129] Ms PQ says that she agreed with the approach taken by Mr BV, as she was present at the meeting at which Mr JM had "engaged us to act".¹⁰

¹⁰ Ms PQ's affidavit (1 September 2020) at [28].

[130] Following his meeting with Mr JM, Mr BV prepared a memorandum for Ms PQ. That memorandum instructed Ms PQ to commence work on drafting an opinion and provided her with suggestions as to how she could approach the task.

[131] Mr BV emailed the memorandum to Ms MD.

[132] In an affidavit sworn on 1 September 2020, Ms MD deposed that:

- (a) she had discussed the memorandum with Mr BV; and
- (b) she had, when Mr JM raised objection, discussed the allegation that Mr BV had not been instructed directly with Mr BV and he had confirmed to her that he had been instructed by Mr JM; and
- (c) ZEN did not take a decision to issue proceedings lightly, and did so with confidence that both Mr BV and Ms PQ were emphatic that Mr JM had instructed ZEN to carry out the work that had been done.

[133] The evidence of Ms MD and Ms PQ (in the form of sworn affidavits) cannot be lightly discounted.

[134] As noted, Ms PQ attended the meeting.

[135] It is her clear recollection that Mr JM had instructed Mr BV.

[136] Mr JM may consider that the evidence of both Ms PQ and Ms MD should be viewed from a context of them both being close and supportive colleagues of Mr BV, but as officers of the court, lawyers can be expected to be acutely mindful of their obligations to ensure that statements made in sworn affidavits are accurate and truthful to the very best of their knowledge.

[137] I do not think it probable that a senior practitioner of Ms MD's experience, or a junior practitioner in the early stages of a legal career, would compromise their professional reputations, by providing inaccurate or fabricated account of matters of which they had first-hand knowledge.

[138] I am satisfied that Mr BV considered that he had, following his meeting with Mr JM, received instructions from Mr JM to prepare an opinion on the travel insurance issues.

[139] Mr BV's position is strongly supported by the evidence of Ms MD and Ms PQ.

[140] Whilst I consider that Mr JM provides reasonable explanation for his failure to advise ZEN on receipt of the legal service agreements that it was not his intention to instruct ZEN, Mr BV's actions in promptly forwarding the agreements is consistent with his position that he considered he had been instructed.

[141] I agree with the Standards Committee, that the level of detail in the memorandum prepared for Ms PQ, supports conclusion that Mr BV had left his meeting with Mr JM with clear understanding that the travel insurance issue was a matter of importance to Mr JM.

[142] Mr JM argues that the file note prepared by Ms PQ supports his contention that Mr BV was not instructed. He notes that the file note does not specifically record that instructions were provided. He suggests that the reference made by Ms PQ at the conclusion of her file note to Mr BV making a "few phone calls" was made in reference to the travel insurance issues, and supports his contention that Mr BV had indicated that he would briefly reflect on the travel insurance issue, but with no indication of intention to take inquiries any further.

[143] Mr JM's analysis of the file note is, consistent with all of his submissions, comprehensive and thorough. He argues that absent any specific reference to him having provided instructions to Mr BV, the file note must stand as good evidence to support argument that no instructions were given.

[144] I do not consider that the comprehensive analysis of Ms PQ's file note undertaken by Mr JM supports the conclusion reached by Mr JM.

[145] File notes are important for providing record of a lawyer's meeting with their client, but I am not persuaded that the absence of specific reference in a file note to a client confirming instructions for the lawyer to act, is forceful evidence that no such instructions were provided.

[146] Mr JM's belief that no instructions were provided is directly contradicted by the evidence of the author of the file note who was in attendance at the meeting.

[147] The content of the file note reflects that the approach adopted by Ms PQ was to focus on recording Mr JM's backgrounding of the two issues that he had raised.

[148] I am reluctant to overreach in drawing conclusions from what is essentially a brief summary of issues discussed, but if the file note provides an accurate record of the time that was spent on addressing the two insurance issues, it would appear to be the case that both issues were extensively discussed.

[149] Mr JM says that he raised the travel insurance issue as a point of academic interest rather than with purpose to provide foundation for continuing instructions, but the file note would indicate that some time had been devoted to discussing the travel insurance issue.

[150] It is not an inconsequential matter for a practitioner or an incorporated firm to have a finding of unsatisfactory conduct entered against them.

[151] A complainant is obliged to support their claim with evidence to the required standard, in this case, the balance of probabilities.

[152] Mr JM carries the burden of establishing, on the balance of probabilities, that the allegations he makes are established. He must provide evidence which tips the scales towards it being more probable than not that Mr BV or ZEN had breached obligations and duties owed to him.

[153] Mr JM's evidence falls short of establishing that it was more probable than not that Mr BV had acted without instructions to do so.

[154] That said, I do not discount possibility of there being a genuine misunderstanding on Mr JM's part, as to what had been agreed following his meeting with Mr BV.

[155] It would have been expected that on receipt of Mr BV's letters of engagement, Mr JM would have immediately notified Mr BV that he did not wish for work to proceed. But, as I have noted, the explanations provided by Mr JM for his failure to respond present as both plausible and reasonable.

[156] I glean from the careful and thoughtful manner in which Mr JM presents his submissions, that he retains a genuine and honestly held view that Mr BV undertook work that he had not been instructed to complete.

[157] But I am satisfied that complaint that ZEN or Mr BV breached obligations and duties owed to Mr JM is not established.

Anonymised publication

[158] Pursuant to s 206(4) of the Act, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and bereft of anything as might lead to their identification.

Decision

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

DATED this 28TH day of OCTOBER 2021

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 JM, on behalf of CAT Limited, as the Applicant
Ms MD, on behalf of ZEN Lawyers Limited, as the Respondent
Messrs YL and ET as Related Persons
[Area] Standards Committee [X]
New Zealand Law Society