

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

DL

Applicant

AND

[City] STANDARDS COMMITTEE [X]

Respondent

DECISION

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

Introduction

[1] Mr DL has applied for a review of a decision by the City Standards Committee X which determined there had been unsatisfactory conduct on his part pursuant to definitions in s 12 of the Lawyers and Conveyancers Act 2006 (the Act).

Background

[2] The details of the background are set out in the Committee's decision. The Committee's concerns arose from Mr DL having stepped in to assist Ms UV who had previously been represented, via an instructing solicitor Ms RS, by Mr MP. Mr MP was suspended from practise as a lawyer, but continued to provide regulated services.

[3] The Committee's view, following its own motion inquiry commenced pursuant to s 130(c) of the Act, was that Mr DL had been less than forthright in disclosing what he knew of Mr MP's involvement in the provision of regulated services to the

Committee, and had knowingly allowed Mr MP to provide regulated services while he was suspended.

[4] Based on its determinations, the Committee made orders pursuant to s 156 of the Act censuring Mr DL and ordering him to pay to New Zealand Law Society (NZLS) a fine of \$10,000 and costs of \$1,000.

[5] Mr DL objected to the Committee's determination, and applied for a review.

Application for review

[6] Mr DL's application for review proceeds on three grounds, that:

- (a) The Committee commenced its inquiry in a manner that breached the principles of natural justice.
- (b) There is no factual or legal basis for either determination.
- (c) The fine is grossly excessive having regard to all the circumstances.

[7] Mr DL describes his involvement in Ms UV's matter from 9 October 2014, in advance of a High Court trial that was due to commence on 20 October 2014. Mr DL minimises his own involvement, and emphasises the involvement of others, in particular Ms RS and Mr MP.

[8] On 9 October 2014 Mr DL says Mr MP advised him that he could not continue as Ms UV's barrister because he had been suspended earlier that year. Mr DL says until then he had been unaware of Mr MP's suspension.

[9] Mr DL says he agreed to act, and was instructed by Ms RS. She corresponded with him and Mr MP in relation to Ms UV's matter, as did the registrar of the court. In addition, Mr DL says he received draft opening submissions for Ms UV's matter directly from Mr MP on 16 October 2014, with a note that they were Mr MP's opening submissions for the matter, and that he would telephone Mr DL to discuss them. Mr MP then sent an amended copy of the same document to Mr DL later that day and said he would discuss them with him at a meeting that day at 2.15 pm, although Mr DL says that meeting did not eventuate.

[10] Mr DL says that Ms RS controlled the pleadings, and, essentially contends that he was no more than a mouthpiece. He says Ms RS relied on Mr MP to amend the pleadings, and to comply with the court timetable. Mr DL says he limited his retainer to matters for which he was practically able to take responsibility.

[11] Mr DL says it is not correct for the Committee to have recorded that he conducted proceedings for Mr MP, when Ms RS was instructing solicitor. He says he did not knowingly employ Mr MP, or permit him to act as a clerk or otherwise, in breach of s 7 of the Act. Mr DL says it was simply not his function or authority to have any dealings with Mr MP in relation to input with any document created in the proceeding, and he exercised no such function or authority. Mr DL is not sure what more he could have done to exclude Mr MP's involvement.

[12] Mr DL says he was generally too far removed from the preparatory work that had been, or was being, done in advance of him appearing as counsel at the trial for him to know precisely which regulated services Mr MP and Ms RS or anyone else had provided, or when. He says he was not being evasive or deliberately misleading the Committee, when he said he did not know what Mr MP's role was. Given the breadth of the question he was asked by the Committee, "who drafted the documents", he says he answered genuinely.

[13] On Mr DL's behalf, counsel submits that the fine is grossly excessive. Counsel refers to Mr DL's years of service to the profession during his lengthy legal career, and a very minor blemish on his disciplinary history involving an unrelated fee complaint.

Review Hearing

[14] Mr DL attended a review hearing with his lawyer, Mr GA, on 16 May 2017. The Committee was not represented and indicated it would abide the decision of this Office.

Nature and Scope of Review

[15] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:¹

... 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" ...

¹ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

... 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.

[16] More recently, the High Court has described a review by this Office in the following way:²

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.

[17] 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.

Analysis

Failing to prevent Mr MP from providing regulated services while suspended

[18] Submissions on Mr DL's part that emphasise there was no breach of s 7(2)(b) are misplaced. The Committee did not find that Mr DL had breached s 7(2)(b). Section 7(2)(b) was used by the Committee as a reference point to indicate a particular type of misconduct. From there, the Committee reasoned by analogy that Mr DL's conduct was of a type that should be deterred, and was unsatisfactory. It decided Mr DL had contravened s 12(b) because Mr DL was counsel for Ms UV, knew that Mr MP was suspended, knew that he was or may well have been providing regulated services, and, for whatever reasons, acquiesced to Mr MP's involvement.

[19] It is implicit in the Committee's reasoning that lawyers should be extremely wary of suspended lawyers being involved in any way in providing services that are

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

reserved to lawyers by the Act. Lawyers should take care to avoid the appearance of complicity in improper conduct by others.

[20] Mr DL is deemed to have known a number of things that are regulated by the Act. For example, that it is misconduct to permit a person to act as a clerk or otherwise in relation to the provision of regulated services if that person is suspended from practice. Mr DL acknowledged that he did not appreciate the implications of a lawyer being suspended from practise.³

[21] Mr DL is deemed to have known that a barrister or solicitor who has had his or her practising certificate suspended, is not licensed to provide regulated services. Having been suspended from practice, Mr MP was required by s 39(5) of the Act to deposit his current practising certificate (if any) with NZLS until his period of suspension was over. He could not practise without putting himself at risk pursuant to the offence provisions of the Act,⁴ and by his acquiescence to Mr MP's continued involvement in Ms UV's matter, Mr DL put himself at risk of the appearance of complicity.

[22] Mr MP's suspension placed him outside the privileged arena of the Act, which recognises the status of the legal profession in a number of ways, in particular by ring fencing the provision of regulated services, and reserving the privilege of providing such services to lawyers and incorporated law firms who are authorised under the Act to practise.

[23] The case against Mr DL is essentially that he should have done all that he could to eliminate any further involvement, or appearance of involvement, in Ms UV's matter on the part of Mr MP. It is not relevant whether Mr DL knew the detail of Mr MP's previous involvement at the time he took instructions. What matters is that he knew Mr MP was still involved in Ms UV at some level. Once Mr MP was suspended he could no longer act for a client or have an instructing solicitor. Mr DL could have insisted on Mr MP providing a comprehensive briefing note, as a condition of taking over the file. If the handover of Ms UV's matter had been properly managed, Mr MP should have been relieved of any and all further involvement.

[24] There is clear evidence that Mr DL was engaged in correspondence with Mr MP in the lead up to the trial. Mr DL's name appears on emails sent by Ms RS, copied to Mr MP, and directly from Mr MP. Documents for filing by Ms RS as instructing solicitor were being amended, but not on the basis of anything Mr DL had to contribute.

³ Evidence of DL at review hearing.

⁴ Lawyers and Conveyancers Act 2006, ss 21, 24 and 26.

Mr DL acknowledges that as counsel he generally would be responsible for drafting, settling and revising court documents, perhaps in conjunction with his instructing solicitor. There was no place for Mr MP in that equation.

[25] Mr DL cannot say he did not know that Mr MP was giving legal advice in relation to the direction and management of Ms UV's proceedings in the lead up to trial, or that Mr MP drafted, settled and revised the pleadings. Mr DL says Mr MP conceived of, and drafted, a late amendment to the pleadings,⁵ even though that is an area of work reserved to lawyers that falls within the definition of legal work under the Act. Mr DL said he refused to do that work because he was not familiar enough with the background. While that is undoubtedly true, it left Ms RS (and Mr MP) in the unfortunate position of having to shore up Ms UV's case, in the course of the High Court hearing. It is unlikely that only Mr MP could have done that work, particularly if he had provided a comprehensive briefing note, before Mr DL accepted responsibility for the file.

[26] Mr DL's failure to take steps to prevent Mr MP from having any further involvement in the provision of regulated services to Ms UV is unsatisfactory. It is not sufficient for him to attribute all of the professional responsibility to Ms RS. If Mr DL could not fulfil his professional obligations, and fulfil his duties under the Act, rules and regulations, he could have refused to act. He did not. By acting, Mr DL placed himself at professional risk, which eventuated in the form of a finding of unsatisfactory conduct. Mr DL's conduct was unacceptable. He could and should have actively taken steps to end Mr MP's involvement, and not acquiesced to his continued involvement.

[27] In all the circumstances, Mr DL's conduct falls within the definition of unsatisfactory conduct in s 12(b) of the Act.

Misleading the Committee

[28] The Committee considered that Mr DL was "unforthcoming in the extreme" and "at best, misleading"⁶ in the course of the Committee's inquiry into Mr MP's conduct.

[29] The Committee's point was that it could not fulfil its statutory function of inquiry without the fullest cooperation from Mr DL.

⁵ Affidavit of DL, 28 July 2016 at [2.23] and evidence of DL at review hearing.

⁶ Standards Committee decision at [15].

[30] Mr DL takes issue with the way the Committee framed its inquiry of him, saying that led to him making comment without an adequate frame of reference.

[31] When it came to the Committee's inquiry, the Committee's question to Mr DL was as open as it could reasonably have been. Mr DL's position is that it was too open, and if he had had more context he could and would have been more helpful, as indeed he was later in the Committee's inquiry process.

[32] Mr DL's response to the Committee suggests he gave little or no consideration to what he did know of the work Mr MP had done. While the constraints on Mr DL's ability to do the work, and Mr MP's continued involvement, may have been understandable in a practical sense, the statutory restrictions on the provision of regulated services cannot be overlooked, particularly by lawyers. As Mr DL says, he did not appreciate the ramifications of Mr MP's suspension. Mr DL cannot avoid responsibility by contending he did not appreciate the gravity of an inquiry from a Standards Committee, or by relying on an inadequate knowledge of the Act.

[33] Although it seems unlikely that Mr DL would have deliberately misled the Committee, there was clear evidence that Mr DL knew Mr MP was suspended and that he had remained deeply involved in the lead up to and during the trial, Mr DL disserved himself by not taking active steps to find out more, and to cooperate promptly and fully to assist the Committee in its inquiry from the outset.

[34] On that basis, I agree with the Committee that Mr DL's conduct would be regarded by lawyers of good standing as being unacceptable. That is conduct that falls within the definition of unsatisfactory conduct in s 12(b) of the Act.

Orders – s 156

[35] Although no issue is taken with the censure or costs order, it is submitted for Mr DL that the fine of \$10,000, which equates to two thirds of the maximum available under the Act, is "grossly excessive".⁷

[36] Not all of the orders that can be made pursuant to s 156 are in the nature of a penalty. A fine is. The functions of penalty were discussed in *Wislang v Medical Council of New Zealand*, which says they include:⁸

- (a) punishment;

⁷ Submissions in support of application for review at [7].

⁸ *Wislang v Medical Council of New Zealand* [2002] NZCA 39, [2002] NZAE 573.

- (b) deterrence;
- (c) reflection of professional and public opprobrium.

[37] A fine touches on all three functions: punishment, deterrence and opprobrium. Acquiescing to and thereby allowing the appearance of complicity in a suspended lawyer's breach of a suspension order is a serious matter.

[38] Mr DL says he gave the situation disclosed to him by Mr MP little consideration at the time. He gave no thought to refusing instructions. His first concern was for Ms UV, who had been through a long and expensive High Court process.

[39] Although he now regrets having been so helpful, Mr DL had the tools at his disposal to avoid the situation he now finds himself in. He could and should have taken steps to apprise himself of the implications of suspension. He could and should have asked Mr MP to provide him with a comprehensive briefing note, as a condition of taking over the file. He could and should have been more forceful in excluding Mr MP. He could and should have cooperated immediately and fully with the Committee's inquiry. Instead, Mr DL knew Mr MP was not completely divested of all his professional responsibilities in relation to Ms UV's matter, then did not tell the Committee what he knew.

[40] After carefully considering all of the material available on review, including Mr DL's evidence and Mr GA's submissions at the review hearing, I agree with the Committee that Mr DL's conduct, while not deliberate, is seriously unsatisfactory.

[41] While Mr DL is to be commended for his years of service, those carry little weight in relation to penalty in a disciplinary context.

[42] Although a fine of \$10,000 is high, it is not so unreasonable in all the circumstances as to warrant modification by this Office. The fine of \$10,000 is confirmed.

[43] The censure and costs orders are also confirmed.

Costs on review

[44] Section 210 of the Act and the Legal Complaints Review Officer (LCRO) Costs Orders Guidelines provide a LCRO with discretion to order costs on review. Mr DL has been unsuccessful in his application for review. The guideline amount in

circumstances where the review is straightforward and there has been a hearing in person, as Mr DL requested, is \$1,200.

[45] Mr DL is ordered to pay costs of \$1,200 on review.

Decision

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

[47] Pursuant to s 210 of the Lawyers and Conveyancers Act 2006 Mr DL is ordered to pay costs on review of \$1,200 to the New Zealand Law Society within 30 days of the date of this decision.

DATED this 18th day of May 2017

D A 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 DL as the Applicant
Mr GA as Counsel for the Applicant
City Standards Committee X as the Respondent
The New Zealand Law Society