

**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**

**HJ**

Applicant

**AND**

**GK**

Respondent

**DECISION**

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

**Introduction**

[1] Mr HJ has applied for a review of a decision by the [Area] Standards Committee [X] (the Committee) to take no further action in respect of his complaints concerning Mr GK's conduct.

**Background**

[2] Mr GK acted for FLGM & Co (the Company). He received instructions from Mr FL and Mr GM, both of whom were directors of the Company (the Directors).

[3] Mr FL was an Authorised Financial Adviser whose advisory service was governed by the Financial Markets Authority and its rules, which included an obligation on Mr FL to keep client records. Mr FL's position was that certain forms he had completed and made notes on, some of which were stored at the Company's premises, were part of those client records.

[4] It appears that the arrangements between the company and Mr HJ included him transferring information from the forms to a computerised database.

[5] A dispute arose between Mr HJ and the Directors. Mr HJ removed forms from the Company's office. The Directors instructed Mr GK to write to Mr HJ seeking the return of the forms, and other Company property that appeared to be missing.

[6] Mr GK wrote four letters to Mr HJ between 27 August and 2 September 2013. The first letter set out the Company's position over the forms and other property. The Company believed there were between 600 and 800 forms missing. Mr GK recorded Mr FL's instructions that Mr HJ said he had "dumped" the forms because they were old, but that he had also returned 39 of the forms at Mr FL's request. Mr GK invited Mr HJ to treat his letter as a formal demand for the return of the items to the Company, saying:

As you will be aware, Mr FL is an Authorised Financial advisor, and therefore must operate his advisory service under the strict rules governed by the Financial Markets Authority. These rules provide that he is obligated to report any missing client file(s), as they may contain commercially sensitive information.

Our client views the removal of these documents from his office as a very serious matter. Our client requires all the missing documents and books to be returned, to the writer's offices, by 5pm Wednesday, 28 August 2013 (note, no extension of time shall be granted), failing which appropriate action will be taken through the relevant authorities without further notice to you.

[7] Mr HJ responded claiming ownership of the forms, and rejecting the Directors' claims.

[8] Mr GK replied on 30 August 2013, describing Mr HJ's claim to ownership as "ludicrous" and, on behalf of the Directors, rejected his explanation. Mr GK's letter refers to "stolen client forms" and "stolen information". Mr GK asked Mr HJ to contain the information and not use it, saying that "any breach of your confidentiality obligations in this regard will be treated as seriously as the unlawful removal of these forms is currently being treated". Mr GK indicated that Mr FL would not tolerate any interference with the Company website, domain name or consultancy business. Mr GK said "appropriate legal action, including referral to the appropriate authorities will be taken, should there be any transgression in this area".

[9] Mr HJ maintained his position, denying that he had stolen forms or information, or that their removal was unlawful. He rejected the implication "of proven criminality" on his part saying he found it unjustified and offensive, and characterised the dispute as "at best, a civil ownership dispute and not a basis for theft allegation".

He alleged misappropriation of Company funds by the Directors, said he considered those matters merited further investigation by the police and the FMA, and described confidentiality obligations as having been invented retrospectively. It appears Mr HJ also sent a statutory demand seeking payment of invoices for products supplied to the Company.

[10] Mr GK wrote again pointing out substantive and procedural deficiencies in relation to the statutory demand, and highlighting a dispute over the alleged debt for which demand was made. Mr GK said that the company would apply to the High Court to set aside the demand and seek costs against Mr HJ's company if he attempted to serve a further statutory demand in respect of that claim.

[11] Mr HJ maintained his position.

[12] The Company instructed Mr GK to put a without prejudice offer of settlement to Mr HJ, on the basis that Mr HJ had taken the client contact forms and would deliver them back, in return for a payment in full and final settlement of any claims arising from the parties' business arrangements.

[13] Mr HJ rejected the settlement offer on 4 September 2013 and invited a better offer.

[14] On 9 September 2013, Mr HJ made a complaint to the New Zealand Law Society (NZLS) about comments made by Mr GK in his correspondence on behalf of the Company, and on or about 11 September 2013, signed an agreement he had drafted between himself and the company. The proposed agreement included a term that the company would withdraw its allegation that he had removed the forms and confirmed he would restore public access to the company's website.

### **Complaint**

[15] Mr HJ says in his complaint that he found Mr GK's "use of unsubstantiated allegations of criminality... offensive". He confirms Mr GK did not act for him, but that he wrote accusing him of theft of confidential client information, and made "various spurious and unproven assertions". Mr HJ says Mr GK claimed he had removed other property, and imposed a deadline of 24 hours for its return "failing which appropriate action will be taken through the relevant authorities without further notice to you". Mr HJ says the latter is a threat to refer the matter to the police made in breach of r 2.7 of

the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

[16] Mr HJ says he explained that the only property he had removed was his own, but Mr FL apparently did not accept that. Mr HJ says that Mr GK threatened him again in connection with any interference with a website owned or operated by the Company, describing his claim of beneficial ownership as fatuous. Mr HJ says Mr GK's letter of 30 August 2013 warns him that "any transgression in this area will not be tolerated and will result in appropriate legal action, including referral to the appropriate authorities". Mr HJ found Mr GK's language unjustified, offensive and threatening. He refers to a breach of r 12.

[17] Mr HJ says he has demonstrated that there is no basis to the allegations of dishonesty made against him by the Company, and finds Mr GK's behaviour towards him bullying, distasteful and discourteous in the extreme. Mr HJ refers to a breach of r 13.8, which he acknowledges applies only to lawyers engaged in litigation. He says Mr GK's behaviour besmirches his reputation and is in breach of the spirit of the rule, because Mr GK has taken no appropriate steps to ensure that reasonable grounds for making the allegation exist.

[18] Mr HJ says Mr GK's behaviour is distressing to him because Mr GK has not recognised his reporting of misdeeds within the Company as protected disclosures, but has instead manufactured a dispute against his interests and in contravention of an alleged agreement over how the Company would operate.

[19] Mr HJ would like an unqualified written apology from Mr GK for his "lapses of judgement and his discourteous and threatening communications". He wants any future communication from Mr GK to accord with proper professional standards.

[20] Mr GK denies any wrongdoing.

### **Committee Decision**

[21] The Committee considered the materials with reference to rr 2.7, 12 and 13.8 as per Mr HJ's complaint. For the reasons set out in the decision, the Committee decided Mr GK had not contravened any of those rules. In particular, that the threat was not made for an improper purpose, that Mr GK had not been disrespectful to Mr HJ and had not made allegations of dishonesty without having established that there was some evidential basis for those allegations.

### **Application for review**

[22] Mr HJ's view is that Mr GK should have made inquiry beyond relying on information provided by the Directors before alleging he had stolen Company property which Mr HJ maintains was his property. He considers it can readily be inferred that Mr GK was threatening to make a complaint to the police. Mr HJ does not accept that Mr GK's correspondence contained requests; he considers Mr GK made threats which amount to blackmail. Mr HJ wants a proper examination of Mr GK's conduct by this Office, and an "unqualified written apology from Mr GK".

[23] Mr GK had nothing to add to the materials he had provided to the Committee.

### **Review on the papers**

[24] The parties have agreed to the review being dealt with on the papers. 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.

[25] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the materials filed in the course of this 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**

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

... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" ...

... the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to

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

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.

[27] More recently, the High Court has described a review by this Office in the following way:<sup>2</sup>

A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

## Discussion

[28] Mr HJ's position is that Mr GK contravened three rules, 2.7, 12 and 13.8. Those rules say:

- 2.7 A lawyer must not threaten, expressly or by implication, to make any accusation against a person or to disclose something about any person for any improper purpose.
- 12 A lawyer must, when acting in a professional capacity, conduct dealings with others, including self-represented persons, with integrity, respect, and courtesy.
- 13.8 A lawyer engaged in litigation must not attack a person's reputation without good cause in court or in documents filed in court proceedings.

### *Rule 13.8*

[29] Rule 13.8 says it applies to lawyers who are engaged in litigation. Although litigation is not defined in the Rules or in the Act, it is generally taken to refer to matters that are before a Court. For example, litigation is defined in the New Zealand Law Dictionary as a "case before the Courts in which there is a controversy between two parties".<sup>3</sup>

[30] Rule 13.8 is part of the suite of rules set out in Chapter 13, which contains rules that regulate the conduct of lawyers as officers of the court. Rule 13 says that the overriding duty of a lawyer acting in litigation is to the court concerned. Rule 13.8 prevented Mr GK from attacking Mr HJ's reputation in court or in documents filed in court proceedings.

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

<sup>3</sup> Peter Spiller Butterworths New Zealand Law Dictionary (6th ed, LexisNexis, Wellington, 2005) at 175.

[31] The dispute between Mr HJ and the directors was not before the Courts. Although the dispute may eventually have reached litigation, and Mr GK's open letters might have been put into evidence, in August and September 2013, Mr GK was not engaged in litigation, no court proceedings or other documents had been filed. On that basis, r 13.8 was not engaged.

*Rule 12*

[32] As Mr HJ acknowledges, Mr GK did not act for him. Mr GK acted for the Company on instructions from its directors, whose interests were in direct conflict with Mr HJ's. The limited obligations Mr GK owed to Mr HJ were subservient to the obligations Mr GK owed to his clients. Against that background, r 12 obliged Mr GK to conduct his dealings with Mr HJ with integrity, respect, and courtesy.

[33] Mr GK's correspondence does not disclose any lack of integrity on his part.

[34] Nonetheless, Mr HJ was offended and feels Mr GK's comments were unjustified.

[35] The Directors' instructions to Mr GK are privileged. To the extent they are known, they included the contention that Mr HJ had no right to the missing forms, and that Mr FL was obliged by the FMA rules to keep the forms safe.

[36] Mr GK had no reason to disbelieve his instructions and some reason to accept the characterisation of Mr HJ's removal of the forms and other property as unlawful, whether in a civil or a criminal sense. Where there is a conflict between ownership claims, competing claims of right can make criminal allegations of theft difficult to prove, but not necessarily baseless as Mr HJ would have it. More importantly, from Mr FL's perspective, Mr HJ's removal of the documents appears to have put Mr FL's ability to demonstrate compliance with his obligations as an Authorised Financial Advisor at risk. While the forms were not under his control, Mr FL's ability to protect information provided by others was compromised. That is quite different to Mr HJ's position. His key interest appears to have been securing his own rights and interests, and perhaps using the forms as some kind of leverage.

[37] While Mr HJ felt disrespected and considered Mr GK had been less than courteous towards him by alleging theft, Mr GK's correspondence is a generally unremarkable example of its type. It is difficult to see how Mr GK could have delivered the Company's message that Mr HJ was not entitled to the forms and was obliged to return them without causing some level of offence. Mr GK could have chosen other words, but the message was clear, not without foundation, and delivered unequivocally

in accordance with the available evidence and Mr GK's instructions. He offered Mr HJ the opportunity to remedy the situation, albeit at short notice.

[38] Mr GK's conduct did not lack respect or courtesy. The evidence does not support a finding that Mr GK contravened r 12.

*Rule 2.7*

[39] Rule 2.7 prevented Mr GK from threatening, expressly or by implication, to make any accusation against Mr HJ to disclose something about Mr HJ for any improper purpose.

[40] Mr HJ's complaint is contingent on the premise that the only inference that can be drawn is that Mr GK threatened to report the theft of forms to the police.

[41] While that is one of the available inferences, it is not the most obvious, only or even likely one.

[42] It is clear from Mr GK's correspondence that Mr FL was principally concerned about the forms being stored securely and his own ability to comply with the FMA rules around reporting the absence of certain records. With Mr HJ's departure with the forms, Mr FL's position must have been that his ability to demonstrate compliance with the FMA rules was at risk if he did not report the forms were no longer under his control. It is assumed he would have had to disclose in his report what had happened to the forms, and would want to be able to demonstrate that he had taken steps to retrieve them.

[43] Given Mr HJ's acceptance that he had removed (although not necessarily dumped) the forms, it can reasonably be assumed that any report Mr FL made would include disclosure of Mr HJ's involvement.

[44] It seems more likely that the "proper authorities" are the authorities that Mr FL was obliged to report to under the FMA rules than the police. While a report to the proper authorities may have led to a report to police, it was the confidentiality of the records and the privacy of the information in them that Mr FL was obliged to protect.

[45] It is more likely than not that the purpose of advising Mr HJ that the proper authorities would be contacted related to Mr FL's FMA reporting obligations. His obligation to report the absence of the forms so he could comply with his obligations to the FMA was a proper purpose. Even if it is assumed Mr GK's comment was a threat, it does not follow that Mr GK contravened r 2.7, because if it was a threat, the evidence



does not support a finding that the threat to accuse Mr HJ, or disclose his involvement, was made for an improper purpose.

### **Decision**

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

**DATED** this 11<sup>TH</sup> day of January 2018

**D Thresher**  
**Legal Complaints Review Officer**

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr HJ as the Applicant  
Mr GK as the Respondent  
Mr BK as a Related Person  
[Area] Standards Committee [X]  
New Zealand Law Society