

CONCERNING

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

AND

CONCERNING

a determination of [Area] Standards Committee

BETWEEN

CR

Applicant

AND

TN

Respondent

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

Introduction

[1] Mr CR has applied for review of the determination by [Area] Standards Committee that Mr CR's conduct constituted unsatisfactory conduct pursuant to s 12(c) of the Lawyers and Conveyancers Act 2006 by reason of breaches of rules 2.3, 10 and 13.2 of the Conduct and Client Care Rules.¹

[2] The Committee censured Mr CR, ordered him to pay \$2,000 to Mr TN by way of compensation for emotional stress, imposed a fine of \$2,000 and ordered him to pay \$1,000 to New Zealand Law Society by way of costs.

[3] Mr CR's primary ground for review was that the Committee "acted ultra vires of its statutory powers and in excess of its jurisdiction".²

Background and the Standards Committee Determination

[4] Mr TN and Mr CR have crossed paths over the years. Mr TN has previously lodged complaints about Mr CR, some of which were not upheld and some of which

¹ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

² [CR] submissions in support of application for review at para2 (undated).

were included in charges brought against Mr CR before the Lawyers and Conveyancers Disciplinary Tribunal.

[5] In 2007 Mr TN and Mr CR acted for opposing parties in litigation. Mr TN's client was Mr VH.

[6] Mr CR was unhappy with various matters that arose during the course of that litigation and in December 2010 he commenced proceedings personally against Mr TN and Mr VH. He pleaded five causes of action:

- maintenance/champerty;
- abuse of process (malicious civil proceedings);
- unlawful conspiracy to injure; and
- defamation and injurious falsehood.

[7] The proceedings were filed two days after [Judge] declined Mr CR's application for non-party discovery in connection with judicial review proceedings relating to the Law Society charges.

[8] Mr TN asserts that Mr CR filed the proceedings to intimidate him and Mr VH, and was an attempt by Mr CR to obtain discovery of documents in his and Mr VH's possession, having failed in his non-party discovery application.

[9] After various interlocutories, and before any substantive hearing took place, Mr CR contacted Mr TN's lawyer to suggest settlement on the basis that Mr TN (or his insurer) pay Mr CR the sum of \$8,000. That was declined, but the proceedings were settled shortly thereafter on the basis that Mr TN (or his insurer) pay Mr CR the sum of \$5,000.

[10] Mr TN lodged his complaint shortly afterwards.

[11] Mr CR asserted Mr TN "breached the terms of the settlement or the implied terms because the agreement was to settle matters once and for all".³ He submitted that the Committee lacked jurisdiction to consider the complaint because he was acting for himself and therefore not providing regulated services.

³ Letter [CR] to the New Zealand Society (Lawyers Complaints Service) (18 July 2013).

[12] Having considered the matter, the Committee determined it had jurisdiction to consider the complaint. Its reason for this was expressed in the following manner:⁴

10. Section 132(1)(a)(i) of the Act clearly provides that “*any person may complain ... about the conduct of a practitioner*”. In addition, two of the stated purposes of the Act (section 3) are to maintain public confidence in the provision of legal services and protect the consumers of legal services. The Committee does not consider that the complaints jurisdiction should be read down or limited in the manner suggested by Mr CR.

[13] At paragraph 14 of its determination, the Committee noted the following events:

- a. The High Court proceedings were commenced two days after [Judge] issued a decision dismissing an application Mr CR had made against Mr TN for non-party discovery, and some three years after any cause of action had arisen;
- b. Mr CR failed to advance the High Court proceedings in a timely way, failed to attend Court conferences and failed to comply with Court Orders as a result of which the proceedings were stayed by the Court on [Date];
- c. On [Date] the Court of Appeal issued a decision upholding disciplinary charges against Mr CR and dismissing Mr CR’s appeal;
- d. One week later, Mr CR made an offer to settle the High Court proceedings;
- e. Mr CR failed to provide the Committee with any explanation as to the timing of the steps taken in the proceedings, as outlined above.

[14] Following consideration of the matter the Committee determined Mr CR had breached rules 2.3, 10 and 13.2 of the Conduct and Client Care Rules and made the orders as set out above (at paragraphs [1]-[2]).

[15] Mr CR has applied for a review of that determination.

The Deed of Settlement with New Zealand Law Society

[16] This Office has been provided with a copy of a Deed dated [Date] which records the terms of settlement of various issues between the New Zealand Law Society and Mr CR.

[17] Clause 3.1 of the Deed provides that “... Mr CR will immediately withdraw ... all ... applications for review ... which have been brought or made by Mr CR arising out of or related to Committee investigations of his conduct ...”.

⁴ Standards Committee Determination (28 January 2014) at 10.

[18] Mr CR says that this was not meant to refer to reviews of Standards Committee determinations of complaints about him. He says it was only meant to refer to Committee decisions of complaints by him.

[19] I do not interpret clause 3.1 in that manner but as the application for review has not been withdrawn this Office must complete the review.

Review

[20] Mr CR provided comprehensive written submissions in support of his application for review and I considered the review could be completed on the material to hand. Both parties were requested to consent pursuant to s 206(2)(b) of the Act to this review being completed on the papers.⁵ Mr TN agreed but Mr CR declined.

[21] This Office has been endeavouring to schedule the hearing for this review since March 2015 and for various reasons, including Mr CR's unavailability, this was not able to be done. An applicant-only hearing was scheduled for [Date].

[22] On [Date] Mr CR requested to be allowed to copy the files.⁶ That request was declined as I had commenced preparation for the hearing and made extensive notes throughout the files. Mr CR was again requested to consent to the review being completed on the papers.⁷

[23] Mr CR did not respond to that request and the hearing proceeded on [Date].

[24] Mr CR attended and Mr TN exercised his right to attend also.

Jurisdiction

[25] Mr CR submitted that the Committee lacked jurisdiction to consider Mr TN's complaint for two reasons. Firstly, he submitted that as he was acting for himself with regard to the proceedings against Mr TN and Mr VH, he was not providing regulated services and therefore neither the Act nor the Conduct and Client Care Rules applied. Secondly, he submitted that all complaints relating to him were required to be considered by the National Standards Committee pursuant to a resolution of the New Zealand Law Society Board, and therefore no other Committee was able to address complaints concerning him.

⁵ Letter LCRO to Mr [CR] and Mr [TN] (15 October 2014).

⁶ Email [CR] to LCRO (1 November 2016). Note: Three hearings involving Mr [CR] were scheduled to be heard together and his request related to all files. It is assumed that his request related to both the Standards Committee file and this Office's file.

⁷ Letter LCRO to Mr [CR] (2 November 2016).

The Board resolution

[26] In his written submissions, Mr CR advised that "... the Law Society Board which binds all the committees ... several years ago made a decision that all complaints by [Mr CR] and against [him] be decided by the National Standards Committee".⁸ He went on to advise that he had challenged this resolution in the High Court by way of judicial review on the grounds of discrimination but that it had been upheld by the Court.

[27] He submitted that "there has been no other decision by the Board which means in effect the Otago Standards Committee was acting against the decision of its own Board when they decided the case".⁹

[28] Mr CR did not refer to this submission at the review hearing and I infer from this that he no longer advances that submission. In any event, I note that the resolution was passed "in order to ensure maximum efficiency, speed and economy in the handling of all complaints submitted to the Lawyers Complaints Service by or against ... Mr CR ..."¹⁰

[29] The full text of the resolution is set out in the judgment of [Judge] in *CR v New Zealand Law Society*¹¹ and states that it was passed for "administrative reasons" to facilitate complaints concerning Mr CR. Notwithstanding the complaint having been considered by a Committee other than the National Standards Committee, I cannot see how this in itself would make the determination of the Otago Standards Committee a nullity. I do not consider the Otago Committee lacked jurisdiction to hear and determine this complaint.

Do the Conduct and Client Care Rules apply?

[30] Mr CR began his written submissions on this issue by referring to the definition of misconduct in s 7 of the Lawyers and Conveyancers Act 2006 which defines misconduct as "(a) ... conduct of the lawyer ... that occurs at a time when he or she ... is providing regulated services ...". Mr CR says he was acting for himself and therefore not providing regulated services. That is accepted, but the Standards Committee did not make a finding of misconduct – that is a finding which only the Tribunal can make.

⁸ [CR] submissions, above note [2], at paragraph 45.

⁹ At paragraph 46.

¹⁰ See *[CR] v New Zealand Law Society* [2012] NZHC [X] at [XX]. Mr [CR] did not provide this Office with a copy of the resolution.

¹¹ At [128].

[31] The Standards Committee made findings of unsatisfactory conduct pursuant to s 12(c) of the Act and by reason of breaches of the Conduct and Client Care Rules. The only part of the Committee's determination which addresses jurisdiction is paragraph 10 set out in paragraph [12] above. That does not address the issue raised by Mr CR.

[32] I do not agree with Mr CR's submission and at the hearing referred to a decision issued by me in [Date].¹² The proposal advanced by Mr CR was fully argued in that review and I include here the paragraphs in that decision which address that proposal.

...

[19] Whilst the definition of unsatisfactory conduct in sections 12(a) and (b) require that the conduct occur at a time when a lawyer is providing regulated services, the definition in section 12(c) does not contain such a requirement. However, it is Mr CR's contention, that section 12 (c) also requires that the conduct in question occurs at a time the lawyer is providing regulated services. If that is the case, then a lawyer's conduct cannot constitute unsatisfactory conduct by reason of a breach of the Conduct and Client Care Rules if the lawyer is not providing regulated services.

...

[21] There are two issues which arise from this. Firstly, does section 12(c) require that the conduct of the lawyer occur at a time when the lawyer is providing regulated services, ...

[22] Section 12(c) defines unsatisfactory conduct as being "conduct consisting of a breach of this Act, or of any regulations or practice rules made under this Act that apply to a lawyer or incorporated law firm, or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 7)."

[23] Sections 12(a) and (b) of the Act apply to "conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services..." There is no such requirement in section 12(c).

[24] Mr CR argues that nevertheless, the section only applies in the same circumstances i.e where a lawyer is providing regulated services. He points to the empowering provision in the Act (section 94) under which the various sets of Rules are made and particularly section 94(e) pursuant to which the Conduct and Client Care Rules are issued. Section 94(e) refers to "standards of professional conduct and client care" which he argues implicitly means that they are to apply only when a lawyer is providing regulated services.

[25] He also refers to section 3 of the Act which sets out the purposes of the Act, one of which is to protect the consumers of legal services and to maintain confidence in the provision of legal services. A lawyer must necessarily be providing regulated services before consumers will require protection.

¹² EA v ABO LCRO 237/2010 (29 September 2011).

[26] Mr CR argues that section 7 (which defines “misconduct”) relates specifically to conduct of a lawyer unconnected with the provision of regulated services and argues that the disciplinary processes of the Act should not intrude into the private lives of lawyers unless it reaches the degree of egregiousness such as to indicate that the person is not a fit and proper person to engage in practice as a lawyer.

...

[28] Unlike earlier decisions, this case directly raises the question as to whether a lawyer’s conduct can be found to be unsatisfactory conduct if it is found to be in breach of any of the Conduct and Client Care Rules, notwithstanding that the lawyer is not providing regulated services.

[29] The wording of section 12(c) differs from that of sections 12(a) and (b) and I am mindful of the many judicial strictures against incorporating words into legislation which are not present. I refer, for example, to the Privy Council decision in *Reid v Reid* [1982] 1 NZLR 147, 150 where it was stated: - “Their Lordships have in mind what was said by Lord Mersey in *Thompson v Gould & Co* [1910] AC 409,420: “It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do.”

[30] It would be wrong to incorporate into section 12(c) a requirement that a lawyer must be providing regulated services before that subsection applies. There can be no suggestion that the difference between ss 12(a) and (b), and s12(c) has arisen through oversight or that it is necessary to read these words in to provide meaning to the subsection. The wording of the subsection is clear, and it differs from the wording of the previous subsections.

[31] On that basis, a lawyer may be exposed to a finding of unsatisfactory conduct if his or her conduct is in breach of the Act, or any of the Rules or Regulations, even if he or she is not providing regulated services. Each of the Rules are clear as to the circumstances in which it applies. In some cases there cannot be a requirement that the conduct in question take place while providing regulated services. For example, Rule 2.8 requires a lawyer to report instances of misconduct. The application of this Rule cannot be restricted to circumstances where a lawyer is providing regulated services. Other Rules are specifically prefaced with words indicating that the lawyer must be providing regulated services before the Rule is to apply – see for example Rule 3 which commences with the words “in providing regulated services to a client...”. It is important therefore to examine each Rule to determine the circumstances in which it is to apply.

[32] There can only be a finding of unsatisfactory conduct if a specific Rule has been breached. A review of the Rules reveals that this does not permit a Standards Committee to investigate and punish lawyers for conduct outside their professional lives as has been suggested. As noted above, each of the Rules give a clear indication as to the circumstances in which it is to apply, and there is no general “fit and proper” test included in the Rules. The Rules are directed to specific instances of conduct, in contrast to the general “fit and proper” test required by section 7.

[33] A finding that conduct has breached a specific Rule is a matter which is suited to the summary jurisdiction of the Standards Committee (and the LCRO) whereas the “fit and proper” test is something which quite properly deserves to be examined by the New Zealand Lawyers and Conveyancers Tribunal. The consequences of a breach of either section 7 or section 12 (c) are also of course quite different.

[34] In summary, section 12(c) is not restricted to circumstances in which a lawyer is providing regulated services. The words of the section do not provide that and each of the Rules in question will determine the circumstances in which it is to apply.

[35] For these reasons, it was open to the Committee to find that Mr EA's conduct constituted unsatisfactory conduct by reason of a breach of Rule 11.1.

[33] At the review hearing, Mr CR referred to a decision of this Office which he said supported his submission that the Conduct and Client Care Rules are only applicable to a lawyer who is providing regulated services.¹³ In that decision, Mr Molloy was clearly not providing regulated services. He was not even doing legal work – he was writing academic articles.

[34] That case differs from Mr CR's case in that Mr CR was clearly carrying out legal work. However, I accept he was not providing regulated services as he was not providing "legal services" as defined in s 2 of the Act, which requires the lawyer to be "carrying out legal work for any other person". Mr CR was carrying out legal work for himself.

[35] However, that is not an end to the matter. Following decision in *EA v ABO*, the fact that Mr CR was not carrying out legal work for another person does not mean that he was not in breach of the Conduct and Client Care Rules. The application of each rule must be considered according to its terms.

[36] The Standards Committee found Mr CR was in breach of rules 2.3, 10 and 13.2. The full text of each rule is set out in the Standards Committee determination.

Rule 2.3

[37] Rule 2.3 requires a lawyer to use "legal processes for proper purposes". There is no restriction on the application of this rule to circumstances where a lawyer is providing regulated services, and the overriding obligation on a lawyer to "uphold the rule of law"¹⁴ is equally applicable in all circumstances.

[38] The Committee considered Mr CR to be in breach of rule 2.3 because he was "using the High Court proceedings for improper purposes related to the disciplinary charges against [him]".¹⁵ The evidence is circumstantial and based on the events set out in paragraph 14 of the Standards Committee determination (set out in paragraph [13] above).

¹³ *JK v Molloy* LCRO 155/2013 (14 April 2016).

¹⁴ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 2(Title).

¹⁵ Standards Committee determination 28 January 2014 paragraph [15].

[39] In his complaint Mr TN says that Mr CR filed proceedings “to intimidate Mr VH and [him] in [their] respective capacities as deponents of affidavits which were filed by NZLS to support the disciplinary charges”.¹⁶

[40] He further says that “the CR claim was for the purpose of attempting to obtain an order of discovery which would give him access to [his] file relating to the VH complaint”.¹⁷

[41] Mr CR disputes these allegations. He says he had a legitimate claim against Mr TN and his client and alleges that the legitimacy of his claim is supported by the fact that it was settled with a payment from Mr TN’s insurers. Mr TN says that “the fact that he, five days after the Court of Appeal decision, offered to accept \$8,000 and then subsequently accepted \$5,000 from [him] and [his] insurers is evidence that CR claims were related to the disciplinary charges and were also completely devoid of any merit and should never have been filed in the High Court”.¹⁸

[42] Mr TN pre-empted any suggestion that settlement of the claim amounted to an admission of liability by noting that “the answer to that is simply that the payment is an acknowledgement by [him] that Mr CR knows how to abuse the processes of the High Court which inherently result in significantly more than \$5,000 in terms of wasted and unrecoverable costs and time”.¹⁹

[43] The standard of proof in disciplinary matters is on a balance of probabilities.²⁰ To reach that standard on circumstantial evidence such as is presented here is difficult. The “improper purposes” attributed to Mr CR for issuing the proceedings are that Mr CR intended to intimidate Mr TN and Mr VH and to obtain discovery of Mr TN’s file, Mr CR having failed in his non-party discovery application.

[44] Mr TN and his client had provided affidavit evidence in support of the disciplinary challenges laid by the Lawyers Complaints Service against Mr CR before the Tribunal. Mr TN draws a connection between the issue of [Judge]’s judgment declining non-party discovery, and failure of the appeal, to the filing by Mr CR of the proceedings.

¹⁶ Email Mr [TN] to the Lawyers Complaints Service (4 July 2013) at 13a.

¹⁷ At 13b.

¹⁸ At 13d.

¹⁹ At 13d.

²⁰ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55.

[45] Although Mr TN's suspicions are understandable, it is just not possible to be satisfied to the requisite degree of the ulterior motives attributed to Mr CR for filing the proceedings.

[46] The finding of unsatisfactory conduct on this basis is reversed.

Rules 10 and 13.2

[47] Rule 10 requires a lawyer to "promote and maintain proper standards of professionalism in the lawyer's dealings". There is no restriction on the applicability of that Rule to circumstances where the lawyer is providing regulated services.

[48] Rule 13.2 requires a lawyer "not [to] act in a way that undermines the processes of the court or the dignity of the judiciary". The Rule applies whether or not a lawyer is providing regulated services.

[49] Mr CR personally commenced proceedings against Mr TN and Mr VH. They were not proceedings on behalf of a client.

[50] Mr CR had complained previously about Mr TN and Mr TN and Mr VH had made complaints about Mr CR. These complaints formed part of the charges laid against Mr CR before the Tribunal. The complaints about Mr CR related to his conduct when acting for a client with whom Mr VH had become embroiled in litigation.

[51] These exchanges had seemingly caused significant antipathy between Mr TN and Mr CR. It was a serious step for Mr CR to commence proceedings personally against Mr TN and Mr VH. He alleged maintenance/champerty, abuse of process, unlawful conspiracy to injure, defamation and ensures injurious falsehood. He sought damages, special damages, aggravated damages and exemplary damages as well as indemnity costs.

[52] Proceedings by one lawyer against another should not be commenced lightly. That is not to say that they should be commenced at all, but if a lawyer considers matters are serious enough to commence proceedings they should be pursued diligently. In any proceedings, a lawyer should follow directions of the Court and this is particularly so where a lawyer is personally involved.

[53] Mr CR did not comply with the Court's directions on several matters. Mr TN obtained security for costs but Mr CR did not comply with the terms of these security judgments.

[54] Mr TN advises that Mr CR also:²¹

- “failed to comply with the Court’s direction of [Date] that he file a memorandum in advance of a case management conference ...
- failed to comply with the Court’s further orders (made on [Date]) in respect to the filing of a memorandum for the October conference;
- failed to appear at the [Date] conference resulting in the Court making an order pursuant to Rule 7.48 staying the ... claim...”.

[55] In his statement of claim, Mr CR sought significant damages which included aggravated and exemplary damages. Before the matter proceeded to a substantive hearing Mr CR contacted Mr TN’s lawyer and offered to settle for \$8,000. This would indicate Mr CR was not confident about the likelihood of success and evokes a suspicion that the claims pleaded had been exaggerated and lacked substance.

[56] The Committee considered the various failures by Mr CR to comply with the court orders. As an officer of the court, this was particularly egregious. I also consider that the commencement of the proceedings against another lawyer, and then not pursuing the same with any same degree of conviction, in itself is unprofessional and undermines the processes of the Court in that it would appear that the court process had been used for ulterior purposes, if nothing more than to exact some sort of revenge against Mr TN and Mr VH, to cause them concern and to require them to address the proceedings and the various interlocutories that arose.

[57] For these reasons, I agree with the Standards Committee’s finding of unsatisfactory conduct by reason of breaches of rules 10 and 13.2. However, the finding of breach of rule 2.3 is reversed, because an “appearance” of having ulterior motives is not sufficient to support a finding of a breach of that rule.

Orders

[58] The Standards Committee censured Mr CR, ordered him to pay the sum of \$2,000 by way of compensation, imposed a fine of \$2,000 and to pay the sum of \$1,000 to NZLS by way of costs.

[59] Although I have reversed the finding of unsatisfactory conduct for breach of rule 2.3, I considered the breaches of rules 10 and 13.2 are somewhat more egregious

²¹ Email Mr [TN] to the Lawyers Complaints Service, aabove note 18, at 13c.

than recorded by the Standards Committee. In the end, it is Mr CR's overall conduct that attracts sanction rather than the number of rules breached.

[60] In the circumstances, I consider the penalties imposed by the Standards Committee are appropriate to the findings confirmed on review and consequently confirm the penalties imposed by the Committee.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the findings of unsatisfactory conduct against Mr CR for breach of rule 2.3 of the Conduct and Client Care Rules is reversed. In all other respects the determination of the Standards Committee is confirmed.

Costs

Pursuant to s 210(1) of the Lawyers and Conveyancers Act 2006 and the Costs Orders Guideline issued by this Office, Mr CR is ordered to pay the sum of \$1,600 to the New Zealand Law Society by way of costs by no later than [Date].

DATED this 23rd day of November 2016

O Vaughan
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 CR as the Applicant
Mr TN as the Respondent
[Area] Standards Committee
The New Zealand Law Society
The Secretary for Justice