LCRO 55/2017

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	**L DA and O DA** Applicants
AND	**UE** Respondent

DECISION

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

Introduction

[1] Mr and Mrs DA have applied for a review of a decision by the [Area Standards Committee X] to take no further action in respect of their complaint concerning the conduct of the respondent, Ms UE.

[2] The complaint arose from the DAs' concern about a letter Ms UE wrote to them on behalf of their neighbours, Mr HN and Ms RH.

Background

[3] The DAs and Mr HN and Ms RH own and occupy adjoining properties at [address].

[4] The DAs were troubled by building activities carried out by or for their neighbours, their concerns included what they experienced as undue noise at unreasonable times.

[5] Mr HN and Ms RH were troubled by what they experienced as repeated harassment by the DAs.

[6] On 5 December 2016 Ms UE, a partner in [Law firm] of [City], wrote to the DAs:

> Harassment of Neighbours
>
> We act for Mr HN and Ms RH. Our clients are the owners and occupiers of the adjoining property at [Address].
>
> For the past year you have been harassing our clients, their builders and contractors. Your behaviour is harassment and is unacceptable.
>
> Your harassment of our clients and their builders and contractors must immediately cease. You must not at any time in the future harass our clients and their builders, contractors, visitors and pets.
>
> In the event that your harassment of our clients and their invitees does not immediately cease, or if at any time you harass our clients, or their builders, contractors, visitors or pets, we have been instructed to serve a Trespass Notice and to file legal proceedings for a Restraining Order under the Harassment Act 1997, without further notice to you. Such proceedings will incur costs and Court filing fees, for which you may be liable.

[7] The DAs replied on 15 December 2016. That reply:

(a) referred to unreasonable construction work;

(b) stated that their concerns had been directed to their neighbours personally, not to the builders or contractors;

(c) expressed concern that work supposed to take eight months to complete remained incomplete 14 months on;

(d) denied the existence of any basis for allegations of harassment;

(e) demanded the provision within 24 hours of "all signed, dated and witnessed affidavits by your clients, their builders, their contractors, their friends and their invitees that you have relied on to purportedly upgrade our communications with your clients to harassment of your clients".

[8] A subsequent 21 December 2016 email noted the absence of any response, despite reminder, and went on to say:

> We are now a week on from our urgent request, so it is obvious that you do not intend to respond to our letter.
>
> Your claim and direct threats outlined in your 5th December 2016 letter is a blunt instrument and is both reprehensible and unconscionable.

[9] Mr DA then referred to rr 2, 2.1, 2.2 and (in bold) 2.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) as being pertinent to the circumstances.

[10] Having received a 23 December 2016 reply from the senior partner at [Law Firm] which they did not find satisfactory (and to which I will refer below) the DAs complained to the New Zealand Law Society Complaints Service.

The complaint

[11] The DAs lodged that complaint on 2 February 2017 or thereabouts. It sought an apology and adherence by Ms UE to the rules mentioned above.

[12] The already mentioned correspondence was appended to the complaint which included, as regards Ms UE's letter, allegations that it breached the rules noted above.

The Standards Committee Decision

[13] The Standards Committee delivered its decision in February 2016.

[14] 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.

[15] In reaching that decision the Committee, as I summarise, determined that:

(a) Ms UE's duty was to protect and promote the interests of her clients, not those of the DAs';

(b) she was entitled to rely on the instructions of her clients, regardless of whether the DAs might adhere to a contrary position;

(c) she could not, per medium of the complaints process, be required to review the Instructions she had from, or the advice she gave to, her clients;

(d) she had not owed the DAs any duty of which she was in breach; and

(e) whether (as a matter of fact and law) the DAs had harassed neighbours was, if it came to that, for the courts not the Committee to determine.

Application for review

[16] The DAs filed an application for review on 2 March 2017. The outcome sought is:

(a) an apology; and

(b) the withdrawal of the "threatening" letter and a new letter written complying with r 2.3

[17] The DAs submit that:

(a) the 5 December 2016 letter was a "blunt instrument" threatening a trespass notice and proceedings for an Harassment Act restraining order;

(b) New Zealand Law Society behavioural guidelines had not been followed, instead the DAs had been met with "a full blown legal attack via a letter with no supporting evidence …"; and

(c) only when pressed afresh for a response had the lawyers responded (and even then in terms that were not to the DAs' satisfaction) to their concerns.

[18] Ms UE was invited to comment on the review application. She did not wish to do so.

Review on the papers

[19] 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.

[20] 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

[21] 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" …
>
> … 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.

[22] 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.

[23] 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

The 5 December 2016 letter

[24] Broken down into its basic elements, the letter that Ms UE wrote to the DAs on

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[1] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].
[2] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

5 December 2015:

(a) explained that her firm was acting for Mr HN and Ms RH

(b) set out what were obviously her instructions from them, namely that the DAs had been unacceptably harassing their builders, etc; and

(c) advised that their conduct (as no doubt described to her by her clients) must cease and that if it did not her instructions were to serve a trespass notice and file Harassment Act Proceedings, incurring costs for which the DAs might be liable.

Letters before action

[25] This was a “letter before action” (as communications of this kind are sometimes called) that is a commonplace of legal practice. In some jurisdictions they are a compulsory precursor to the commencement of some forms of court proceedings.

[26] Such letters give notice (which depending on the nature of the instructions may be robust) based on clients’ instructions as to the facts that unless certain things are done and/or certain activities cease, the lawyer’s instructions at the time of writing are to resort to court-based remedies.

[27] The recipients of such a letter are perfectly entitled, that is to say legally free, to respond with their own perspective of the facts. Consequential exchanges may lead to a settlement of differences between the parties themselves. That is usually preferable to the alternative of a court imposed solution which may leave neither side happy.

[28] If the “letter before action” path is not taken, and instead proceedings are instituted without notice, the parties are immediately caught up in litigation that often proves to be disproportionately costly, as well as traumatic, for all concerned. Accordingly, there is good sense in the “letter before action” process.

Rule 2.3

[29] It is true that r 2.3 restricts the use of legal processes (which may be taken to include letters like Ms UE wrote) to the pursuit of proper purposes. But that limitation must be viewed in context, not considered in a vacuum

[30] Lawyers necessarily perform much of their work in relation to contentious cases where the opposing parties' perspectives of who is in the right may differ widely, or even be in complete collision with each other.

[31] The lawyer/client relationship and the rules themselves demand that within the bounds of the law and of the rules the lawyer must "protect and promote the interests of the client to the exclusion of the interests of third parties".[3]

[32] When so doing, it is not part of the lawyer's task to presume to determine who, as between the client and a third party, has right on their side. Oftentimes there is no black and white answer to that question anyway - not even when a matter ends up before the courts.

The lawyer's role in a dispute situation

[33] Another name for a lawyer is "advocate": a word that means one who pleads the cause of another. That name serves to underscore that in situations of dispute and related contention a lawyer speaks for their client in terms of that client's point of view. And that is obviously what Ms UE did.

[34] The DAs were entitled to react to Ms UE's letter by engaging the services of a lawyer to speak for them; one who might have put their case just firmly as did Ms UE for her clients.

[35] Instead, as was equally their entitlement, they chose to respond directly. In doing so they set out as matters of fact their own account of events, one at odds with Ms UE's apparent instructions from her clients.

[36] The DAs were perfectly entitled to do that. But they had no right to demand affidavit evidence from Mr HN and Ms RH to support their lawyer's correspondence any more than those two could demand that of them as regards the facts asserted in their reply.

[37] The provision of evidence to back up allegations and counter allegations only becomes necessary when a court or tribunal is being asked to determine, on the probabilities, the actual facts of a dispute.

[38] Finally, as regards Ms UE's letter, it may have been robust but as a letter before action it did not breach the rules. Such was preferable to proceeding to serve a trespass notice and/or file proceedings without any warning.

[3] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 6

The senior partner Mr EN's letter

[39] Mr and Mrs DA are also troubled by the letter Mr EN, the senior partner of [Law Firm], wrote to them on 23 December 2016 in which he said that:

> ...
>
> 2. As lawyers, we are entitled to accept instructions from our clients and we were entitled to send the letter that was sent to you.
>
> 3. We are not required to provide you with any affidavits.
>
> …
>
> 5. You are entitled to your own legal advice and you or your lawyer are quite entitled to respond to the letter that was sent to you and any response Will be forwarded to our client.

The substance of that response accords with the position which I have set out. It provides no grounds for criticism.

[40] Essentially each party is entitled to put their case, or have their case put, in letter form without any immediate obligation to back it up evidentially so long (at least so far as lawyers are concerned) as no improper purpose is involved.

[41] None is apparent here. Having summarily set out her clients' case, Ms UE acted quite properly in adding to that her instructions about the possibility of service of a trespass notice and the commencement of remedial proceedings. In doing that she was merely giving notice, not making improper threats.

Result

[42] I see no grounds which could persuade me to depart from the Committee's decision.

Decision

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

DATED this 31ST day of October 2017

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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 and Mrs DA as the Applicants
Ms UE as the Respondent
Mr EN as an interested person
[Area Standards Committee X]
New Zealand Law Society