

CONCERNING

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

AND

CONCERNING

a determination of the [X] Standards Committee

BETWEEN

MR AD AND MRS AD

Applicants

AND

MR ZU

Respondent

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

DECISION

Introduction

[1] Mr and Mrs AD (the ADs) instructed Mr ZU in early April 2010 to act for them in respect of a failed farming joint venture (the joint venture) and consequent High Court proceeding commenced by the GQ. The GQ had been the ADs' partners in the joint venture, which had incurred significant losses between 2001 and 2004. Mr ZU provided advice and representation, and interim bills, some of which were paid. Ultimately the ADs had a settlement meeting with the GQ that resulted in the ADs and the GQ signing a Deed of Settlement dated 8 March 2011 (the Deed), with assistance from Mr ZU and the GQ' lawyer.

[2] Almost immediately the ADs repented the settlement and contacted Mr ZU the next day, saying he had not given them proper advice, had acted unprofessionally and had not acted in their best interests.

[3] Mr ZU advised the ADs to seek alternate legal advice, which they did. With the help of their new lawyer the ADs negotiated a variation to the Deed amending it so that the ADs could sell stock later in the season for a better price. This enabled the ADs to apply the additional sale proceeds to their settlement with the GQ.

[4] Mr ZU rendered his last invoice in late March 2011. The ADs say they could not afford to pay Mr ZU's fees before their settlement meeting with the GQ, then felt so let down by Mr ZU after the settlement meeting that they considered his fees were unwarranted.

[5] In early December 2011 Mr ZU's firm served proceedings on the ADs seeking to recover the unpaid fees.

[6] On 15 December 2011 the ADs laid their complaint to the Law Society setting out a number of complaints about Mr ZU's performance, seeking an order reducing his fees, and compensation for the costs of securing a variation to the Deed.

Standards Committee Decision

[7] Both parties declined the Committee's offer to resolve the complaint by negotiation, so the Committee sought further information, considered the various aspects of the ADs' complaint and made a decision on 19 December 2012 pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) that further action was unnecessary or inappropriate.

[8] The decision summarises the history of the joint venture that led to the ADs' involvement in the High Court proceeding, and lists the ADs' complaints against Mr ZU. The ADs' complaint included alleged failures by Mr ZU in not familiarising himself with information that was relevant to their case; not applying for legal aid; not listening to or following the ADs' instructions; in collusion with the GQ' lawyer, pressurising the ADs into settlement without allowing them to reflect on the terms they were agreeing to, but could not afford to perform; and drinking and socialising with the GQ and their lawyer before the ADs had signed the Deed.

[9] The decision records that the ADs went on to instruct another lawyer to negotiate the variation to the Deed, for which the ADs had to pay. The ADs said the variation would have been unnecessary if Mr ZU had allowed the ADs' farming advisor, who the ADs say understood the critical timing issues, to come to the meeting. The ADs say that Mr ZU did not recognise the significance of the timing of payments under the Deed because he had not properly understood their instructions. Mr ZU says he had no instructions on the issue of timing.

[10] The decision says the Committee considered the complaints and all the information provided, and decided that the evidence did not establish unsatisfactory conduct by Mr ZU in respect of any of the ADs' allegations against him. In the circumstances the Committee concluded that any further action would be inappropriate, and resolved to take no further action pursuant to section 138(2) of the Act.

[11] The ADs were dissatisfied with the decision, and applied for a review.

Grounds for Review

[12] In summary, the grounds for the ADs' review are that the Committee was biased in favour of Mr ZU, was wrong to accept Mr ZU's version of events over theirs, and that the decision is incorrect as a result. The ADs point to a number of factual findings that relate to their dispute with the GQ that they say the Committee has wrongly recorded, failed to recognise, or misunderstood. The ADs also say that the Committee's approach to Mr ZU's failures was inappropriate, with particular reference to:

- a. failing to obtain legal aid for the ADs;
- b. not securing or permitting a High Court Judge to preside over the negotiations that resulted in the ADs signing the Deed;
- c. inadequately preparing for the settlement meeting;
- d. not allowing the ADs time to reflect on the agreements they had reached in principle, before pressuring them into signing the Deed, which committed them to timeframes they could not meet;
- e. drinking and socialising with the GQ and their lawyer; and
- f. refusing to negotiate over the ADs' outstanding fees.

[13] On review the ADs repeated their requests for compensation for the losses they incurred in instructing another lawyer to negotiate a variation to the Deed, and an order that Mr ZU's fees be reduced.

Review Issues

[14] The ADs' complaint that the Committee was biased against them, and in favour of Mr ZU, is based on the findings of fact the Committee made. I have carefully considered the information provided, and although I accept that the Committee made findings that the ADs disagree with, I can find no evidence of bias on the part of the Committee. In the circumstances that aspect of the ADs' complaint will receive no further attention on review.

[15] The issue on this review is whether it was reasonable for the Committee to exercise its discretion to take no further action in respect of the other aspects of the ADs' complaints pursuant to section 138(2) of the Act.

Review Hearing

[16] A review hearing was scheduled for Thursday 17 October 2013 in [Y]. The ADs attended and participated in the review hearing. Mr ZU was not required to attend, but Mr HS attended on his behalf as counsel to respond to any preliminary procedural matters. As no procedural matters arose, Mr HS left, and the hearing proceeded in the absence of both him and Mr ZU.

Role of the LCRO on Review

[17] The role of the Legal Complaints Review Officer (LCRO) on review is to reach her own view of the evidence before her. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting her own judgement for that of the Standards Committee, without good reason.

Discussion

[18] Although the ADs challenge the factual accuracy of the decision in a number of respects, many of the factual matters relate to the GQ' proceeding against the ADs. The ADs' point is that the Committee's findings on those factual matters should make a difference to the outcome of this review. The difficulty with that proposition is that the ADs' have settled their dispute with the GQ, and any factual disputes between them are not the subject of this review. The subject of this review is Mr ZU's conduct in connection with his advice to, and representation of, the ADs, and it is those matters that will now be addressed.

Legal Aid

[19] The ADs complained that they instructed Mr ZU to lodge an application for legal aid on their behalf. The ADs' view is that aid should have been available to help them pay their legal costs when they were experiencing cashflow difficulties.

[20] Mr ZU says he discussed with the ADs the prospect of them making an application for legal aid, and advised them early on that they had too many assets to qualify for a grant of aid.

[21] The decision¹ records that the Committee considered emails between Mr AD and Mr ZU that addressed legal aid², finding that Mr AD had asked about legal aid, and Mr ZU had responded advising the ADs that they would not qualify because they owned too much property. The Committee was satisfied with Mr ZU's conduct in this regard.

¹ Standard Committee Decision dated 19 December 2012 at [43].

² Emails ADs to ZU and ZU to the ADs (2 March 2011).

[22] From his correspondence, it appears Mr AD may misapprehend the nature and availability of Legal Aid. Civil Legal Aid may be granted to enable a party that has a reasonable prospect of a successful outcome in litigation to proceed with their claim or defence. If an applicant's proceeding appears to have little prospect of success, and the applicant has assets, it is far less likely that aid will be granted, although only the Legal Services Agency can make that decision.

[23] While only the Legal Services Agency can make a decision on Legal Aid, it is open to lawyers to form a view, and advise, on the prospects that an application may be successful. Even if Mr ZU had been wrong, in the circumstances, no professional conduct issue arises from that exercise of his professional judgement.

[24] Having considered all of the relevant circumstances, I can find no good reason to interfere with this aspect of the decision.

Lack of a Judge

[25] The ADs are critical of the Committee's finding that Mr ZU's failure to ensure that a High Court Judge presided over their negotiations with the GQ did not result in any prejudice to the ADs.

[26] Mr ZU says that he discussed the prospect of securing a High Court Judge for the settlement meeting with the GQ' lawyer, and that they jointly filed a consent memorandum, but received no response from the court. The parties decided to proceed, and with the assistance of their lawyers, negotiated settlement terms.

[27] The decision refers to emails between Mr ZU and the GQ' lawyer on 8 February 2011 discussing the remoteness of the prospect that a High Court Judge might attend a settlement conference at short notice.³ The Committee noted that the parties had agreed to proceed with their settlement meeting without involving a Judge or any other facilitator.⁴ The decision records the ADs had been aware no Judge or mediator would be present before they had agreed to attend the settlement meeting on Mr ZU's recommendation. The Committee found that recommendation was reasonable in the circumstances, and that the settlement meeting was "in accord with frequent practice". The Committee's view was that the ADs could have rejected Mr ZU's advice to proceed with the settlement meeting, but chose to accept it. The Committee decided to take no further action and stated "Mr ZU's actions or omissions in this respect do not fall short of the required standard of competence and diligence".⁵

³ Above n1 at [21].

⁴ Above n1 at [26].

⁵ Above n1 at [42].

[28] The exchange of emails between Mr ZU and Mr AD shows that, as at 11 February 2011, both parties had been intending to proceed by way of a judicial settlement conference. It is evident from that exchange of emails that Mr AD was becoming increasingly anxious about settlement, and that he was at odds with Mr ZU over strategy, as well as having concerns about the ADs' mounting costs.

[29] With respect to who should attend the settlement meeting, in his email to Mr ZU on 27 February 2011 Mr AD said:

We really do need to have the Judge their other wise the GQ's will just try and walk all over us just like in the past, is there any other way we can get the Judge to be there ?

[30] I accept that Mr AD had a strong preference for proceeding with a Judge, but there is no suggestion in the email correspondence sent at the time that Mr AD had refused to proceed without a Judge, or insisted that a Judge be present.

[31] It is worth repeating that the ADs were the defendants in the proceeding. Although they had been advised earlier that they could commence proceedings against the GQ to bring matters to a head, they had chosen not to. The information provided indicates that the ADs' assessment was that their best interests would be served by delaying resolution.

[32] The ADs were clearly unwilling participants in the formal dispute, but that dispute could only have been resolved by a decision being made by a High Court Judge, or by the ADs reaching agreement with the GQ. If they had not settled, they ran the risk that the matter would have proceeded to trial. That would inevitably have carried a far greater cost and risk for the ADs, emotionally and financially.

[33] Mr ZU could not have compelled the ADs to proceed with settlement negotiations in the absence of a Judge; he could only have persuaded them. As the Committee observed, the ADs always had the option of withdrawing their instructions if they did not like Mr ZU's advice.

[34] In all the circumstances, no professional conduct issue arises for Mr ZU with this aspect of the ADs' complaint, and there is no good reason to interfere with this aspect of the decision.

Preparation for Settlement Negotiation

[35] The ADs say Mr ZU did not properly prepare for the settlement meeting so he could not take proper care of their interests. Mr AD says he disclosed to Mr ZU before

the settlement meeting that the ADs owed money to GR.⁶ The ADs also point to Mr ZU's comment in an email⁷ to them that he sent shortly before the settlement conference giving a view based on his "ruffle" through the documents he had before him. The ADs say that comment highlights a lack of diligence in Mr ZU's preparation for the settlement meeting that he could not have properly analysed and understood the detail of their position based on a "ruffle" through their documents, and that their concerns were borne out by his performance at the settlement meeting.

[36] Mr ZU says he prepared to the best of his ability, and that his difficulties in preparing were compounded by the lack of financial and other information about the joint venture. Mr ZU says there was little documentation on which to base settlement discussions, which made it difficult for him to advise the ADs on the reasonableness of any settlement offer. He says that the ADs eventually agreed to settle on the basis of his recommendation that the terms of settlement were so favourable to the ADs that the detail of the financial information became redundant.

[37] It is apparent from Mr ZU's correspondence and the documents he prepared that he clearly understood the ADs' position, and was keenly aware of the weaknesses in it. The robust exchange of correspondence between Mr AD and Mr ZU leading to the settlement meeting indicates their relationship was good, although Mr AD was clearly feeling the strain of the situation. His emails to Mr ZU show that Mr AD had his own view of the merits of the case, and a firm view of the position the ADs were in.

[38] Mr ZU articulated his concerns about the ADs' position in his email to Mr AD dated 3 March 2011. He highlighted uncertainties and risks for the ADs, and urged Mr AD to be realistic in his settlement expectations. The view Mr ZU expressed to Mr AD was that the ADs' only chance of negotiating a successful outcome was on the basis of what he describes as a "Mexico defence", by which the ADs had to convince the GQ that the ADs were completely committed to fighting the GQ, so that even if the GQ were successful at trial, the ADs would have no assets left for the GQ to recover.

[39] Mr ZU also referred to the statement of defence and counterclaim he prepared for the ADs, which he says clearly indicate he had come to grips with the information provided. Furthermore, Mr ZU's view is that in the context of all the information he was provided with before and during the settlement meeting, the agreement documented in the Deed represents the best possible outcome for the ADs.

⁶ Emails AD to ZU (2 March 2011).

⁷ Email on behalf of ZU to the ADs (2 March 2011).

[40] The Committee considered the question of Mr ZU's preparedness, including the broader context behind his "ruffle" through the documents,⁸ and other aspects of his conduct of the proceeding and the ADs' instructions.⁹ The Committee noted the statement of defence and counterclaim that Mr ZU had drafted, and a detailed report he had provided dated 10 December 2010. The Committee's view was that those documents:¹⁰

establish Mr ZU did have a good grasp of the facts so that he was able to make an analysis of the strength of the ADs' case and to conduct the negotiations on their behalf.

The Committee found there was no evidence to support the ADs' allegations that Mr ZU had not familiarised himself with the ADs' "financial and other documentary information"¹¹ or that Mr ZU was not properly prepared for the settlement meeting.

[41] The information provided includes two letters Mr ZU sent to the ADs in 2010, dated 27 May and 10 December. The two letters set out the facts as he understood them to be on the basis of information he had received, and the law as it applied to the facts as he understood them to be.

[42] It is plain from the detailed statement of defence and counterclaim that Mr ZU filed for the ADs that he had a detailed understanding of the matters that he considered would be relevant to resolving the proceeding, and the difficulties associated with bringing the disputes to an end.

[43] Mr AD's correspondence leading up to the settlement meeting shows that he was finding it difficult to maintain his sense of objectivity about the GQ and the dispute with them. It is also possible that Mr AD had convinced himself that he genuinely would fight the GQ until the ADs had nothing left to lose.

[44] Mr ZU's correspondence records his efforts to persuade Mr AD to act in the ADs' best interests, particularly in the lead-up to the settlement meeting, in the face of Mr AD's apparent reluctance to follow Mr ZU's advice. Bearing in mind the ADs' position at the time, Mr ZU's advice leading up to the settlement meeting was a robust and objective attempt to point out to Mr AD that he was not helping himself, and his behaviour would compound the ADs already difficult situation.

[45] At the heart of the ADs' difficulties in resolving their disputes with the GQ is the lack of certainty for both parties as to the factual and legal position between them.

⁸ Above n1 at [23] and [24].

⁹ Above n1 at [40] and [41].

¹⁰ Above n1 at [41].

¹¹ Above n1 at [37.1].

From his letter of 27 May 2010, it is evident that Mr ZU was very forthright with the ADs about the difficulties of litigation in the face of such a high level of uncertainty.

[46] Mr ZU could only act on the instructions his clients gave him, and advise them on the possible consequences of missing information. His time records show he took several hours preparing for and attending the settlement meeting and eight hours negotiating settlement at the meeting.

[47] The ADs said they spent time alone together after they had reached agreement in principle with the GQ, and that they were terribly upset and crying while they waited for the Deed to be drafted and finalised. The ADs said that Mr ZU shuttled between the room they were in, and the boardroom where the GQ were waiting with their lawyer. The ADs do not say they mentioned to Mr ZU the timing of the sale of stock either when agreement in principle was being discussed with the GQ, or while the ADs were waiting for the draft Deed to be finalised, although they had time to speak with their farm advisor by phone, or arrange for Mr ZU to speak with him after they had reached agreement in principle, but before they signed the Deed.

[48] From what Mr AD told me at the hearing, the timing of the sale of the stock would mean the ADs would have received a better price. He did not say that at the settlement meeting the ADs' instructions to Mr ZU had been that they could not afford to settle if the stock were sold earlier. With no emphasis on the significance of the timing of the stock sale, Mr ZU could not be criticised for a failure to appreciate the importance that the timing of stock sales might have, even if those were his instructions, which he denies.

[49] Having considered the available information, it appears that Mr ZU was as prepared for the settlement meeting as he was able to be, and acted in accordance with his instructions at the time.

[50] There is no good reason to interfere with this aspect of the decision.

Pressure to Settle

[51] The ADs criticise Mr ZU for convincing them to sign the Deed without allowing them time to reflect on the agreements they had reached. The ADs say there was no good reason for them to rush into signing the Deed, and that if they had had the time to reflect on the terms of the Deed before they signed it they could have avoided the cost of instructing another lawyer to negotiate a variation to the Deed so that they could comply with its terms.

[52] Mr ZU denies pressuring the ADs into settling, although he confirms that he “certainly advised them they should settle!”¹². Mr ZU also said that “Mrs AD was very keen to settle on the basis suggested”, and that the “outcome meant they wouldn’t be bankrupted”, and they would be “free to start again”. Importantly Mr ZU’s professional judgement was that settlement “on what [they] knew of the facts [was] a far better outcome than [Mr AD] could achieve by litigation and that litigation involved uncertainty, stress and certain legal costs”. Mr ZU also says he “pointed out the deal was so good [he] did not want the GQ to leave the premises without having signed the agreement”.

[53] In circumstances where Mr and Mrs AD were not united in their instructions to Mr ZU, it is relevant to consider the obligations on Mr ZU imposed by Rule 5¹³, which says “a lawyer must be independent and free from compromising influences or loyalties when providing services to his or her clients”.

[54] Rule 5 is further informed by Rules 5.1, 5.2 and 5.3 which relate to the “independent judgement and advice” a lawyer must provide, and say:

The relationship between lawyer and client is one of confidence and trust that must never be abused.

The professional judgement of a lawyer must at all times be exercised within the bounds of the law and the professional obligations of the lawyer solely for the benefit of the client.

A lawyer must at all times exercise independent professional judgement on a client's behalf. A lawyer must give objective advice to the client based on the lawyer's understanding of the law.

[55] The question is whether Mr ZU was independent and free from compromising influences or loyalties when he provided legal services to Mr and Mrs AD. In considering Mr ZU’s professional obligations, it is relevant to look at his professional relationship with the ADs, and their relationships with one another, to ascertain whether there was any conflict between the interests of Mr and Mrs AD such that Mr ZU could not meet his professional obligations to either of them.

[56] The decision records Mr AD’s evidence that he phoned Mr ZU the day after signing the Deed to express “his concerns about the flawed settlement”¹⁴, and the further contact Mr AD says he had with Mr ZU complaining about the quality of Mr ZU’s representation. The decision also records Mr ZU’s evidence that he emailed

¹² Letter ZU to Law Society (26 January 2012).

¹³ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

¹⁴ Above n1 at [28].

responses to Mr AD defending the settlement and urging the ADs to obtain other legal advice,¹⁵ and setting out his view that the Deed represented the best outcome the ADs could have obtained from the settlement meeting. The decision also records that the ADs sought other legal advice and negotiated what the Committee considered were minor variations to the Deed.¹⁶

[57] Mr ZU's job was to help the ADs navigate their way through the legal process. There were limits to what Mr ZU could achieve for the ADs; the facts were the facts and Mr ZU could not change those. The most he could do was try to negotiate the best outcome he could for the ADs. It is apparent from the information provided that the dispute with the GQ was complex, and there were gaps in the evidence. The information that had been provided to Mr ZU was enough for him to issue firm warnings to the ADs in order to manage their expectations before they went into the settlement meeting.

[58] At the review hearing Mr AD was adamant that Mr ZU had convinced him to agree to the terms recorded in the Deed against his better judgement. He said that both he and Mrs AD had been in tears, that Mr ZU would have seen they were visibly upset as the settlement negotiations proceeded, and that he should have realised they were unhappy with the terms of settlement.

[59] Mr AD provided a copy of a letter from his GP dated 18 June 2012 in which the Doctor reports meeting with the ADs immediately after they had signed the Deed at the settlement meeting, and says their situation had reached crisis. The doctor says he had concerns over the ADs' health, and describes conversations he had had with Mr AD about the dispute with the GQ. The doctor says the ADs told him their concerns, including losing their home and being destitute, and the doctor described them as both being "distraught and tearful and suffering the consequences of protracted stress feeling betrayed by their lawyer and the legal process".

[60] The doctor's letter is entirely consistent with the ADs' description of how they felt after the settlement meeting. The ADs say they knew they were likely to face losses from the joint venture, but one of the reasons they had not commenced proceedings against the GQ was that they simply did not know what the financial position of the joint venture was. Rather than risk being worse off in the short, and perhaps the longer, term, they decided to leave it to the GQ to take steps if they wanted to.

[61] However, once the GQ commenced proceedings, the ADs' ability to control the process and the outcome was severely limited. Mr AD said that he had received

¹⁵ Above n1 at [28] and [29].

¹⁶ Above n1 at [30].

advice after settlement that there had been no need to sign the Deed that day, and that the parties could have signed an agreement in principle. Mr AD says if Mr ZU had not forced the ADs to sign the Deed, the ADs could have revisited an agreement in principle and secured a better outcome around the timing issues, without having to amend the Deed with another deed.

[62] It is significant, however, that at the review hearing Mrs AD said her clear instructions to Mr ZU at the settlement meeting were that she wanted to settle there and then. She said she was desperate to protect her family's home and as far as she was concerned, settlement on the basis set out in the Deed was the only way she could see to avoid bankruptcy and ensure her family kept their home. It was apparent at the review hearing that Mrs AD's concerns about the ADs' predicament were very real to her, and that she genuinely believed that if she and her husband did not take the opportunity to settle with the GQ at the settlement meeting, they stood to lose everything they had worked so hard for.

[63] It was also apparent from Mrs AD's comments at the review hearing that she and her husband were not in complete agreement when they settled with the GQ. I have absolutely no doubt that the ADs were distraught after all they had been through. It is obvious that both Mr and Mrs AD were under considerable pressure to settle the proceeding from a number of different sources: their failing relationship with the GQ; the relentlessness of being defendants in a High Court proceeding; the cost and risk associated with not settling; knowing they stood to lose so much; an uncertain future; being worn down by the consequences of a failed business venture. While the list is long, I consider it is highly likely that Mrs AD's concerns were also a significant factor in Mr AD agreeing to sign the Deed.

[64] As mentioned above, the question is whether Mr ZU was independent and free from compromising influences or loyalties when he provided legal services to the ADs. Alternatively, were the ADs' interests in conflict to the extent that Mr ZU could not meet his professional obligations to either of them.

[65] It is clear from the correspondence leading to the settlement meeting that the ADs had a high level of confidence in Mr ZU, and they trusted him. There is no evidence that Mr ZU abused the confidence and trust the ADs reposed in him. Mr ZU exercised his professional judgement solely for the benefit of Mr and Mrs AD. I have found no evidence of any failure by Mr ZU to exercise his independent professional judgement on behalf of Mr and Mrs AD, and I am satisfied that Mr ZU gave objective advice based on his understanding of the law to the ADs.

[66] I also have no doubt that Mr ZU used his powers of persuasion to encourage Mr AD to settle the proceeding. I am also satisfied that Mr ZU believed that settlement in the terms agreed was in the best interests of both Mr and Mrs AD.

[67] It can be a difficult task for a lawyer to objectively assess the best interests of a client. That task may well be complicated by a lawyer acting for two clients with shared legal obligations and exposure to risk. A lawyer's professional judgement can be sorely taxed when such clients' assessments of risk, and willingness to settle, are at odds. The lawyer's assessment of their clients' best interests must be made on the basis of all of the information the lawyer has available at the time about both clients.

[68] The ADs are husband and wife. They were also jointly named as first and second defendants in the GQ' proceeding. Although only Mr AD was a director of a company that may have had some liability under the proceeding, both of the ADs had been shareholders. They also admitted to being in a business partnership together as second defendants, which in turn meant that they shared the business risks and benefits arising from partnership. In a situation where Mr AD was reluctant to settle but Mrs AD was desperate to settle, Mr ZU could have declined to act further for either or both of them. That would have meant the ADs also had a partnership dispute between them, and would have exacerbated their difficulties, not least of which would have been the potentially significant further costs they would have had to face instructing at least one new lawyer, and possibly two, to act for them in the GQ' proceeding.

[69] Mr ZU managed to settle the proceeding on clear instructions from Mrs AD. I am satisfied that at the time he signed the Deed, Mr AD joined with his wife in instructing Mr ZU to settle on the terms set out in the Deed, although he later changed his mind and may well have persuaded Mrs AD to change hers.

[70] I accept the ADs faced inconvenience and cost in having to renegotiate the Deed. However, the inconvenience and cost of having to instruct a new lawyer or lawyers to become familiar with and continue the proceeding would have been far greater than the cost of varying the Deed. The Deed provided certainty and an end to the High Court proceeding.

[71] It appears from their complaint, and their comments at the review hearing, that the ADs may still not fully appreciate the significance of the risk they faced in not signing the Deed at the time of the settlement meeting. Having reached the point of agreeing settlement on terms he judged to be very favourable to the ADs, I have no doubt that Mr ZU would have given very firm advice, particularly to Mr AD, to sign the Deed. There is no evidence of any conflict between the interests of Mr and Mrs AD

that would have triggered Mr ZU's obligation to refer one or other of them elsewhere for independent legal advice.

[72] In all the circumstances, I am satisfied that Mr ZU was independent and free from compromising influences or loyalties when providing services to the ADs.

[73] I am satisfied that in all the circumstances Mr ZU exercised his professional judgement solely for the benefit of the ADs, and did not exert inappropriate pressure on either of the ADs to settle.

[74] Looking at all of the information provided, the Committee's decision to take no further action in respect of this aspect of the ADs' complaint was reasonable and is confirmed.

Drinking and socialising

[75] The ADs complained that Mr AD had seen Mr ZU with opposing counsel and the GQ during the negotiations, socialising and drinking whisky and beer.¹⁷ The ADs suggested Mr ZU was celebrating with the GQ and their lawyer having settled the matter, and suggested the drinking and socialising was evidence of Mr ZU colluding with the GQ, to the detriment of the ADs. The ADs elaborated further on this aspect of their complaint in correspondence with the NZLS, escalating their concerns about the amount of alcohol they believed Mr ZU had consumed, and its effects on his ability to conclude settlement for them.

[76] Mr ZU said he had not taken a drink during the negotiations, but that after the parties had reached agreement in principle he offered the GQ and their lawyer a drink while they waited for amendments to the Deed to be typed up. Mr ZU said he had joined the GQ and their lawyer, and had drunk one beer, while the ADs waited in a separate office. Mr ZU says that he and the GQ' lawyers were well acquainted and had worked closely together some years before. Importantly, with the benefit of hindsight, Mr ZU said he would not do the same again.¹⁸

[77] The Standards Committee received a letter from the GQ' lawyer saying that the ADs' claim that Mr ZU was drunk was "at odds" with his recollections and that of the GQ. The GQ' lawyer's recollection was that, after the final terms of the settlement were agreed, to the best of his and the GQ' recollection "we all had one drink", and that Mr ZU "did not appear intoxicated in any way".¹⁹

¹⁷ Complaint by the ADs to Standards Committee dated 15 December 2011.

¹⁸ Letter ZU to Law Society (26 January 2012).

¹⁹ Letter GS to ZU (21 August 2012).

[78] Mr ZU denied the ADs' "amplified allegations regarding alcohol", and asserted that "only a very small quantity of alcohol was consumed",²⁰ confirming he had one beer.

[79] The decision records the Committee's consideration of this aspect of the ADs' complaint in detail, referring to the evidence provided by the ADs, Mr ZU and the GQ' lawyer, the relevant professional standards in the Act and the RCCC, and legal authorities. The Committee found that Mr ZU had drunk one beer, analysed how that conduct might fall below the relevant standards set out in s 12 of the Act, or whether it breached the Rules, in particular Rule 3.1 and found Mr ZU's conduct did not fall below the relevant professional standard.

[80] Standards of professional conduct are regulated by s 12 of the Act, which relevantly says:²¹

In this Act, **unsatisfactory conduct**, in relation to a lawyer or an incorporated law firm, means—

- (a) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; or
- (b) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including—
 - (i) conduct unbecoming a lawyer or an incorporated law firm; or
 - (ii) unprofessional conduct; or
- (c) conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the 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)...

[81] Rule 3.1 says "a lawyer must at all times treat a client with respect and courtesy..."²²

[82] As noted above, Mr ZU acknowledged early on that his conduct had been unwise. The Committee agreed, finding that Mr ZU's conduct was an error of judgement, but that he did not intend to cause offence to the ADs. The Committee

²⁰ Letter from ZU to Law Society (22 August 2012).

²¹ Lawyers and Conveyancers Act 2006.

²² Above n13.

considered the legal authorities, including whether the conduct was “significant enough to attract sanction”²³, and noted a decision of this Office that confirms that a Committee may exercise its discretion to take no further action “notwithstanding that the practitioners conduct may have fallen below what is expected”.²⁴

[83] The Committee considered that Mr ZU’s conduct was a “one-off thoughtless action and no more than that”, with no “element of direct or intentional action towards Mr and Mrs AD”, and that it “had no bearing on the value and efficacy of the legal services being provided to the ADs”.²⁵ In all the circumstances the Committee decided that further action on this aspect of the ADs’ complaint was inappropriate in view of the Committee’s findings.

[84] The Committee’s findings are supported by the evidence and its reasoning is clearly set out. One of the Committee’s functions is to decide which facts it prefers when facts are in dispute. As the ADs say, they were not present while alcohol was being consumed. Mrs ADs’ observation that there were two empty beer bottles and one $\frac{3}{4}$ full by the GQ’ lawyer’s laptop is not evidence of the amount of alcohol Mr ZU consumed. The ADs cannot contradict Mr ZU’s account of how much he drank.

[85] Mr ZU’s evidence is supported by the recollections of the GQ and their lawyer. In the circumstances, it was reasonable for the Committee to accept Mr ZU’s account of how much he drank, and of his appearance and manner.

[86] Mr ZU accepted that his conduct had been unwise. Other than the drinking and socialising aspect of the ADs’ complaint, the evidence is that Mr ZU provided a professional service based on the material he had available at the time. As a consequence, the ADs were able to avoid the cost and uncertainty of litigation and possible bankruptcy, and to secure their home. The importance of securing those outcomes should not be understated.

[87] The evidence does not support a finding that Mr ZU’s professional conduct was unsatisfactory because he had drunk alcohol or that he was unable to meet his professional obligations to the ADs.

[88] Looking at all of the information provided, the decision to take no further action in respect of this aspect of the ADs’ complaint was reasonable and is confirmed.

Refusal to Negotiate Over Fees

²³ Above n1 at [70].

²⁴ Above n1 at [77].

²⁵ Above n1 at [78].

[89] The ADs object to Mr ZU's refusal to negotiate with them over their outstanding fees, and to his comment that the ADs' complaint was no more than a ruse to avoid paying Mr ZU's fees.

[90] I acknowledge the ADs' objection to those comments, and their frustration at Mr ZU's refusal to negotiate with them over their outstanding fees. However, having agreed on the terms of the retainer at the outset, Mr ZU had no further obligation to negotiate over his fees.

[91] No professional conduct issue arises from any failure by Mr ZU to negotiate over fees. The decision is therefore also confirmed in this respect.

Fees

[92] Although their complaint was about conduct, rather than fees, the ADs' said Mr ZU's fee "seems excessive considering the amount of preparation or lack of"²⁶ he had done for the ADs' settlement meeting. On review, the ADs sought a reduction in fees, and compensation for their costs in securing a variation to the Deed.

[93] Mr ZU says his fees were fair and reasonable, and the ADs should pay them.

[94] It will be apparent from the discussion above that I am satisfied that Mr ZU spent an appropriate amount of time in preparing for the settlement meeting, and that the result for the ADs was not objectively unsatisfactory. I note also that the decision records that the Committee considered Mr ZU's invoices and reviewed his file in some detail, and the Committee did not raise any concern about the reasonableness of Mr ZU's fees.

[95] As part of this review, I have considered Mr ZU's fees and the work he did for the ADs, and can find no basis that would justify any reduction below the \$24,787.50 he invoiced.

Summary

[96] The decision was reasonable and is confirmed on review.

Costs

[97] Section 210 of the Act provides a broad discretion to make such order as to the payment of costs and expenses as the LCRO thinks fit.

[98] I have found no evidence that Mr and Mrs AD brought their review application other than in good faith. They were entitled to seek a review and did so. There has

²⁶ Mr & Mrs ADs complaint to NZLS dated 15 December 2011.

been no behaviour by them that might attract consideration of a costs order against them.

[99] There is a discretion to order costs on review against a practitioner even where no adverse finding is made. The purpose of an award of costs in favour of NZLS is to help to defray the costs of administering the complaints and disciplinary mechanisms under the Act which are otherwise met by all practitioners. It is also relevant to note that costs are not a penalty.

[100] Mr ZU acknowledged he could have done better with respect to drinking one beer, and socialising with the GQ' lawyer before the ADs had signed the Deed. His acknowledgement was prompt and appropriate. He also confirmed he would not do anything like that again. As set out above, no penalty has been imposed in respect of that allegation.

[101] It was apparent at the review hearing that the ADs were so aggrieved, they would probably have laid a complaint against Mr ZU even if he had not taken a beer with the GQ and their lawyer after the negotiations were concluded. The drinking and socialising allegation may have been the "final straw", but it was by no means the ADs' only complaint, and was only one aspect of a reasonably broad and detailed review. The drinking and socialising allegation added little to the overall time and cost of carrying out the review.

[102] In all the circumstances, no order for costs is appropriate.

Decision

Pursuant to s 211(1)(a) of the Act, the Standards Committee decision is confirmed.

DATED this 3rd day of March 2014

Dorothy 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 & Mrs AD as the Applicants
Mr ZU as the Respondent
Mr HS as the Respondent's counsel
Mr GT as a related person or entity
The [X] Standards Committee
The New Zealand Law Society