

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of the [city] Standards Committee X

**BETWEEN**

**CB**

Applicant

**AND**

**DS**

Respondent

**DECISION**

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

**Introduction**

[1] Mrs CB has applied for a review of a decision by the [city] Standards Committee X which decided to take no further action in respect of her complaint that Ms DS had improperly registered a notice of claim to an interest in a property owned by Mrs CB and her husband.

[2] The issues on review arise from rule 2.5<sup>1</sup> and relate to whether Ms DS had reasonable grounds for her belief that there was a truthful basis on which to register the notice of claim, and had taken appropriate steps to ensure the certification she gave at the time of registration was accurate.

**Background**

[3] In 2011 Ms DS acted for Ms H, who had been in a relationship with Mrs CB's son W for eight years or more. W was named as registered proprietor on the title to

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<sup>1</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

property at Papamoa Beach. Mrs CB contends W had no beneficial interest, was only registered on the title to the property and was a bare trustee.<sup>2</sup> On that basis Mrs CB says Ms H had no right to claim any interest in that property.

[4] Mrs CB says she and her husband allowed Ms H and W access to their bank account, and then transferred that account to Ms H and W while they were together. Ms H and W are said to have put money in and taken money out.

[5] After Ms H separated from W, she instructed Ms DS to register a notice of claim against the property, on the basis that she had contributed to mortgage payments.<sup>3</sup>

[6] W and Ms H each claimed to have contributed to the acquisition and maintenance of the property.<sup>4</sup>

[7] In 2014 Mr and Mrs CB's lawyer drafted proceedings in the High Court naming W and Ms H as defendants, based on their contention that W's name was only registered against the title to the property because he was a trustee.

[8] Ms H instructed her new lawyer to withdraw the notice shortly after receiving those draft proceedings.<sup>5</sup>

[9] In 2016 Mrs CB complained to the New Zealand Law Society Complaints Service (Complaints Service), saying Ms DS had registered the notice without diligently checking her facts, and it had cost Mrs CB and her family a considerable amount of money, she says \$20,400, to sort matters out.

[10] The complaint was diverted to the Early Resolution Service, the Committee having indicated its preliminary view that it was not necessary or appropriate to inquire further into the complaint. Ms DS's employer was contacted and advised of the complaint. The employer declined to comment and indicated that Ms DS had taken up residence overseas. Ms DS was contacted separately by the Complaints Service, advised of her right to comment and of the Committee's preliminary view. Ms DS also declined to comment.

[11] The Committee then decided Ms H did have grounds for registering the notice, so there was no reason to take further action in respect of the complaint.

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<sup>2</sup> Unsworn Affidavit CB (2014).

<sup>3</sup> Letter from DS to [Firm A] (9 June 2011).

<sup>4</sup> Letter from G to [Firm B] (17 June 2014).

<sup>5</sup> Email from K to G (16 July 2014).

[12] Mrs CB disagrees with the Committee's decision, saying she has proof that defeats Ms H's claims, so the notice of claim was unsustainable. She seeks compensation from Ms DS via her employers.

### **Review hearing**

[13] Mrs CB attended a review hearing by telephone on 30 May 2017.

### **Nature and scope of review**

[14] 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>6</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 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.

[15] More recently, the High Court has described a review by this Office in the following way:<sup>7</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.

[16] 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 Mrs CB's comments at the review hearing; and

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<sup>6</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

<sup>7</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

- (b) Provide an independent opinion based on those materials.

## Analysis

*Did Ms DS have reasonable grounds for her belief that there was a truthful basis on which to register the notice of claim?*

[17] It is unfortunate that the Complaints Service did not obtain a response from Ms DS or her firm, because it is not possible to definitively state what Ms H's instructions to Ms DS were in 2011. However, any instructions Ms DS did receive from Ms H would have been subject to privilege. That means that if Ms H did not waive her privilege, any response from Ms DS could not be disclosed to Mrs CB in any event. Mrs CB says it is most unlikely Ms H would waive her privilege. Although this Office could request information, it is possible to proceed from the basis of what can be ascertained from the uncontroversial information made available in support of Mrs CB's complaint and review application.

[18] It is reasonable to assume that Ms DS would have been told by Ms H how long she and W had been together in a relationship. There is no dispute that they were married in 2002 and separated in 2011. The duration of the marriage alone gives rise to a presumption under the Property Relationships Act 1976 that if the parties have interests in property, either may be entitled to claim against the interest of the other.

[19] It is reasonable to assume from the fact that Ms H appears to have operated a business, H Imagery, that she had an income during the relationship. Mrs CB says she helped Ms H set that business up. No doubt Ms H disclosed the existence of her interest in the business to Ms DS. The value of that business is later stated in correspondence from W's lawyer to Ms H's,<sup>8</sup> and is claimed as relationship property.

[20] It is clear from the unsworn affidavit drafted for Mrs CB in 2014 that she and her husband had allowed W and Ms H access to their bank account while they were together. Mrs CB says she and her husband were removed from the revolving credit account, leaving it to be operated by W and Ms H, both of whom are assumed to have made contributions, in the widest sense, to the pool of relationship property. Ms H can be presumed to have told Ms DS that, as well as providing what detail she had of the parties' shared living and financial arrangements.

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<sup>8</sup> From G to [Firm C] (29 October 2013).

[21] It is also relevant to note that Ms H and W have a daughter. Doubtless Ms H would have told Ms DS about her.

[22] W's name appeared as registered owner on the title to property. It is reasonable to assume that Ms H would have told Ms DS that, and that Ms DS would have seen evidence of W's registered interest on the Land Register, either before or at the time that she registered the notice of claim in February 2011. The Land Register gives no hint that W may have owned the property as a trustee, rather than in his personal capacity. The appearance of his name on the title as registered proprietor gives rise to a presumption that the property was his, hence the need for Mr and Mrs CB to commence proceedings to enable the Register to be amended to reflect their interest in the property.

[23] All of those are factors that can be taken to have contributed to a reasonable belief on Ms DS's part that there was a truthful basis on which she could register the notice of claim. That is not to say Ms H's claims were incontestable. They were not. While Mrs CB objects to the swiftness with which Ms DS registered the notice of claim, no disciplinary issue is constituted by Ms DS having acted promptly to protect her client's interests. She was professionally obliged to do so, even if that came at a cost and inconvenience to Mrs CB, to whom Ms DS owed very limited duties. Ms DS's first duty was to her client, Ms H.

[24] It is possible to be satisfied that Ms DS had reasonable grounds for her belief that there was a truthful basis on which to register the notice of claim. It is therefore not necessary or appropriate to take that matter any further.

*Did Ms DS take appropriate steps to ensure the certification she gave at the time of registration was accurate?*

[25] Again, a response from Ms DS or the firm would have been helpful, but the obstacle privilege presents cannot be ignored.

[26] What can be seen from the details on the View Instrument sheet from the Land Register is that Ms DS appears to have had all the details correct. The certifications Ms DS was required to provide related to her authority and instructions from Ms H, which for the purposes of Mrs CB's complaint are assumed. There is no evidence to the effect that Ms DS did not comply with any relevant statutory provision specified by the Registrar for registration of the notice. The evidential basis to support the claim is assumed from Ms H's instructions as discussed earlier, a record of which is

presumably held on the firm's file, and is privileged. On its face the certification Ms DS gave at the time of the registration was accurate.

[27] Mrs CB's point is that she had evidence, which she was later ready and able to provide, to rebut Ms H's claims. The financial arrangements between Mr and Mrs CB, W and Ms H were not straightforward. There is no reason Ms DS should have implicitly trusted, or been aware of, the information on which W or Mrs CB intended to rely. She had grounds to argue an increased division in her client's favour and make the most of the ambiguities available to her. If matters had proceeded to Court, all of those could have been tested. It did not, because the notice was withdrawn without a costly formal court process challenging the basis on which the notice was filed.

[28] In the circumstances there is no good reason to believe that Ms DS did not take appropriate steps to ensure the certifications she gave at the time of registration were accurate, and good reason to believe she did.

[29] It is not necessary or appropriate to take that matter any further.

### **Summary**

[30] As it is not necessary or appropriate to take any further action in respect of Mrs CB's complaints, the decision of the Committee is confirmed.

[31] In circumstances where there is no unsatisfactory conduct on Ms DS's part, no order for compensation can be made, as Mrs CB requests.

### **Decision**

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

**DATED** this 2nd day of June 2017

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**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:

Mrs CB as the Applicant

Ms DS as the Respondent

Ms E, Mr P, Mr A, Ms M and Mr T as related persons

[city] Standards Committee X

The New Zealand Law Society