

LCRO 90/2011

CONCERNING

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

AND

CONCERNING

a determination of the National Standards Committee

BETWEEN

UF

Applicant

AND

OU

Respondent

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

Introduction

[1] UF has applied for a review of the determination by the National Standards Committee to take no further action in respect of UF's complaint about OU's conduct. OU had formerly acted for ZB who had then instructed CCS Chambers to act for him in respect of civil and criminal proceedings against him. OU objected to criticisms of his representation of ZB by UG, a barrister within CCS Chambers.

Background

[2] ZB, his wife (WR) and a company owned by them, were all defendants in summary judgment proceedings brought by CCT (NZ) Limited. ZB also faced criminal charges.

[3] OU was initially instructed as a barrister to act for all three parties in the civil proceedings and another barrister was instructed to act for ZB in respect of the criminal proceedings.

[4] The instructions to represent ZB were withdrawn from both barristers, and CCS Chambers was instructed. UF was briefed to act on the criminal charges, and UG was briefed on the civil proceedings. OU continued to act for the company and WR.

[5] At the time UG was briefed, the time allocated for filing affidavit evidence had passed. UG formed the view that further evidence was necessary and made an application to file further evidence out of time. In support of that application he filed an affidavit by ZB.

[6] In the memorandum in support of the application and in the affidavit, ZB and UG alleged that OU had failed to identify a conflict of interest in continuing to act for all defendants, and that "one person's interests [were] being sacrificed in the interest of another"¹ i.e. that ZB's defence was being sacrificed for WR.

[7] OU objected to these allegations, particularly as they had not been put before him to respond to before they were included in the Court documents. A telephone conversation between OU and UG took place on 13 December 2010 and UG followed that up with the following email:²

Dear Counsel,

You have advised me today via phone that the affidavit of [ZB] is incorrect, and that you advised him of the conflict before the evidence was filed on his behalf for the summary judgment application.

You have also advised me that you advised [ZB] of the conflict and requested him to obtain legal representation before the expiry of time of filing evidence by second defendant in Auckland High Court for the summary judgment application.

Pursuant to the above you have stated that "*unless I withdraw the application for more evidence already filed on behalf of [ZB] you will file a law society complaint against me*".

You are aware that your conduct is not proper and 'bullying' me into withdrawing an affidavit of a defendant.

¹ Second defendant's application to extend time for filing evidence (8 December 2010) at paragraph 2 (c) .

² Email from Mr UG to Messrs OU and UF (13 December 2010).

As a matter of urgency provide to me written and signed acknowledgement of [ZB] acknowledging the conflict before the expiry of the time the second defendant could file his evidence for the summary judgment application.

I will discuss the matter with [ZB] today.

Thanks and regards, [UG].

[8] OU responded on the same day:³

I am not going to respond to your requests except to say that your statements of what I allegedly said in my voicemail message to you are not correct.

It was unethical for you to file the affidavit and memo in court without consulting me first and you will now have to deal with the consequences in court or with the Law society. In advising [ZB] and [WR] I explored fully the facts of this case with them. There is no conflict between [ZB] and [WR] as to the facts of what happened and so I do not see how [ZB's] interests conflict with those of [WR]. They are in perfect agreement about the facts of what occurred. There is nothing about [WR's] defence which conflicts in any way with any defence that [ZB] might have. We discussed that it might be of tactical advantage for [WR] to be separately represented from [ZB] but they did not want to incur the additional costs of doing so at that early stage of the proceeding. Given that there was no factual basis for [CCU] and [ZB] to have an arguable defence to the claim, the agreed strategy was to file the notice and affidavits in opposition raising such matters as could be legitimately raised with a view to negotiating a settlement once they had sold their house. That is what was done. I do not see what further true evidence [ZB] can give that could raise any defence.

I am very concerned that you seem to be aiming to string out both the criminal and civil matters against [ZB] for no benefit to him because he has no defence to either. The appropriate advice to him on the criminal matter was to plead guilty at the first opportunity to minimise his sentence. That was the advice given by [HS]. I do not understand how you can legitimately give any different advice in his best interests. If he pleads not guilty and is ultimately found guilty, as he will be, then he will face a greater sentence.

The appropriate advice on the civil matter is that he has no defence on liability and his best strategy is to attempt to reach a settlement with CCT based primarily on his impecuniosity. He may have an argument regarding quantum but he will have to produce some evidence. I do not see how you can give any different advice in

³ Email from OU to Messrs UG and YM (13 December 2010).

his best interests. There is no merit in any proposed Credit Contracts Act defence for [ZB].

I discussed these matters with you at some length on the telephone last week. At no point during those discussions did you suggest any conflict of interest or that you proposed to file the documents that you have filed making scandalous allegations against me and CCV Law. I was quite happy with the proposition that [ZB] be separately represented for tactical reasons but there is no conflict of interest between [ZB] and [WR] because they are in complete agreement about the facts.

I request that you file a further memo before Court tomorrow withdrawing the allegations against solicitors and counsel. If you are not willing to do that then I will immediately complain to the Law Society.

[9] These emails capture the issues at the heart of UF's complaint.

The complaint and the Standards Committee determination

[10] UF listed seven complaints about OU's conduct. They were: ⁴

1. That he improperly threatened [UG] with a personal attack if he continued to advance [ZB's] instructions;
2. That he also, or in the alternative, failed to advise [ZB] of potential conflict-of-interest in representing both him and the wife;
3. That he further, or alternatively, was incompetent in not realising that the purported conflict-of-interest has nothing to do with a factual dispute, but rather potentially conflicting defences of CCT's claims;
4. That he furthermore, or additionally, has accused [UF] of giving poor criminal law advice when he is not a criminal lawyer and in any event not privy to the criminal file - and therefore disrespected [UF] without cause;
5. That he moreover, or also, has accused [UG] of giving poor civil law advice when [UG] is [ZB's] current counsel and acting on instructions - and therefore disrespected [UG] without cause;
6. That he fails to properly keep written records of important legal advice he gives to clients (as to conflicts) or on the other hand fails to properly keep file notes (as to non-conflicts); and

⁴ Email from UF to KX and Messrs YM, OU and UG (13 December 2010).

7. That it appears he failed to communicate important matters through his instructing solicitors.

[11] He subsequently amended his complaint to include an allegation that OU had accused UG of providing false information to the Court without any evidence to support that claim. He also complained that OU had provided evidence from the Bar when he (OU) filed a memorandum with the Court in which he asserted that the allegations in the application and affidavit were not correct (and known by UG to be incorrect) and advised that he intended to lodge a complaint with the Law Society unless the allegations were withdrawn.

[12] The Standards Committee recorded its determination in the following way:⁵

1. Pursuant to section 138(1)(e) of the Lawyers and Conveyancers Act 2006 (“the Act”) it [the national Standards Committee] is of the opinion that [UF], as the complainant, does not have sufficient personal interest in the subject matter of the complaint; and
2. Pursuant to section 138(2) of the Act it appears that having regard to all the circumstances of the case, no further action is necessary or appropriate, for the reasons below:
 - a) there appears to be no evidence of any professional misconduct issues on the part of [OU];
 - b) the conflict of interest accusations made by [UF] against [OU] were matters that were more appropriate for [ZB] or [WR] to raise; and
 - c) the proceedings to which the subject matter of the complaint relates appear now to be resolved

[13] UF has applied for a review of that determination.

Review

[14] A review hearing took place in Auckland on 4 December 2012 attended by both parties.

⁵ National Standards committee determination (23 March 2011).

Standing

[15] UF advised that he was the director of CCS Lawyers Limited. He further advised that UG was an employee of that company and that as an employer, it was his role to assist and protect his employees. He contends that this extends to lodging a complaint against other lawyers such as OU who threaten his employees.

[16] Regardless of his employment status, UF advised that UG had in any event asked him for help and he was prepared to assist. He argued that he therefore had a relevant personal interest such as to entitle him to lodge the complaint.

[17] He further referred to Rule 2.8 of the Conduct and Client Care Rules⁶ which requires a lawyer to make a confidential report to the Law Society if he or she has reasonable grounds to suspect that another lawyer has been guilty of misconduct. He also referred to Rule 2.9 which provides a discretion to a lawyer to make a similar confidential report to the Society where he or she suspects another lawyer's conduct amounts to unsatisfactory conduct.

[18] The complaint was not lodged in those terms but it was open to the Complaints Service to treat UF's complaint as a report in terms of Rules 2.8 or 2.9 and I have previously suggested to the Law Society that it should give consideration to treating complaints by a lawyer about another lawyer in this way.⁷ If the Society had treated UF's complaint in this way, whether or not he had personal standing would have become irrelevant.

[19] Alternatively, I accept UF's contention that as UG's employer he had sufficient personal interest in lodging the complaint and/or in addition, as UG's mentor, he similarly had sufficient interest to lodge the complaint.

[20] UG was also aware that UF had lodged the complaint. UG was not personally involved in pursuing the complaint or this review, but it could very well be that he chose not to lodge the complaint himself because he was aware that UF had already done that.

[21] I take note of a similar fact situation which was the subject of scrutiny in *Deliu v Hong & LCRO*.⁸ In that case, two junior barristers in Mr Deliu's chambers issued

⁶ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

⁷ LCRO 212/2010, 12/2011 (Unpublished decision).

⁸ *Deliu v Hong & LCRO* [2012] NZHC 158.

proceedings against Mr Hong, to which Mr Hong reacted in a direct way to the barristers. UF lodged a complaint about Mr Hong and neither the Standards Committee nor the Court adopted the view that UF did not have sufficient standing to pursue the complaint, or the review in this Office, or to then take the matter on judicial review.

[22] There seems no reason to adopt a different view in the present circumstances and taking all of these matters into account, it seems to me that there is no reason to decline to consider the complaint on the grounds that UF did not have sufficient personal interest in the matter.

Was there a threat for an improper purpose?

[23] Rule 2.7 of the Conduct and Client Care Rules provides:⁹

A lawyer must not threaten, expressly or by implication, to make any accusation against a person or to disclose something about any person for an improper purpose.

The question to consider is whether or not OU's communications to UG that he would lodge a complaint against UG if he did not withdraw the critical statements about OU in the proceedings filed by him, constitutes a 'threat for an improper purpose.' UF accepted that this was the issue of paramount concern to him.

[24] OU submits that his intention was to alert UG in a collegial manner to the fact that he considered UG's conduct was in breach of a number of Conduct and Client Care Rules and to give UG the opportunity to rectify those breaches. He stated that this was his preferred method of dealing with such matters rather than lodging a complaint without reference to the other party. There can be no issue with that approach and it is to be recommended.

[25] OU however put the matter to UG in a somewhat more direct manner. He finished his email of 13 December 2010 in the following way:¹⁰

I request that you file a further memo before Court tomorrow withdrawing the allegations against solicitors and counsel. If you are not willing to do that then I will immediately complain to the New Zealand Law Society.

⁹ As above n 6, Rule 2.7.

¹⁰ As above n 3.

[26] He says that he struggles to see how he could have dealt with the matter differently. He did in fact file a memorandum with the Court to the extent that he considered possible without prejudicing ZB's position, and the Court dealt with the matter in a way in which the offending material was effectively sealed. There was no need to include a threat to lodge a complaint with the Law Society if the offending material was not removed. To that extent therefore OU has answered his own question.

[27] OU submitted that he was concerned that in raising these matters, his former client had been put in a position where he had waived privilege in respect of the communications between him and OU which, if disclosed by OU, would be detrimental to ZB.

[28] He advised that his instructing solicitor and the barrister who had formerly represented ZB in the criminal proceedings had both raised concerns with him as to the advice being provided by Messrs UF and UG.

[29] He also acknowledged that he was concerned to protect his reputation. Statements which were critical of his advice had been put before the Court and OU was not prepared to allow those statements to go unchallenged in a public forum. He also considered that UG had breached a number of Conduct and Client Care Rules, primarily in that he had put these matters before the Court without first raising them with OU. He also considered that it was not necessary for these matters to be raised for the purpose of obtaining the extension sought. As it turned out, the plaintiff did not oppose the application and presumably would have indicated that to UG if he had approached the plaintiff's solicitor directly in the first instance.

[30] It is a common occurrence that a client decides for whatever reason to change lawyers. The prerogative of the client to do so is specifically recognised in Rules 4.3 and 4.4 of the Conduct and Client Care Rules. It is also understandable that the former lawyer may have concerns about what advice has been given to the client which led to the change in representation, and disagree with that advice. In this case, OU disagreed with the advice provided to ZB that there was a conflict of interest in his acting for all defendants, and had also been advised by ZB's former criminal barrister that there was no defence to the criminal charges.

[31] I refer again to *Deliu v Hong & LCRO*¹¹ where Mr Hong considered his former clients were not receiving good advice from the lawyers in CCS Chambers, and took certain steps based on his perceived fiduciary duties to his former clients. Whilst a duty of confidence continues after a retainer has been terminated¹² a lawyer's fiduciary duty to protect his or her clients' interests ceases once a retainer has been terminated, particularly where new counsel have been instructed.¹³ Such a perceived duty cannot be used to justify interference in the relationship between the former client and the new lawyer. In any event, lodging a complaint against UG would not have assisted ZB. I also take note of the fact that OU did not lodge the complaint even though UG refused to comply with OU's requests.

[32] UF produced records of various Standards Committee determinations where the Committees have found unsatisfactory conduct in these circumstances. The heading of each summary is sufficient to give the flavour of the issues:

- Conduct unbecoming: Lawyer sent letter threatening criminal complaint if compensation not paid.¹⁴
- Unsatisfactory conduct. Withdrawal of criminal complaint to settle dispute.¹⁵
- Unsatisfactory conduct: threat to complain to police.¹⁶
- Unsatisfactory conduct: inappropriate pressure on client to withdraw complaint.¹⁷
Note comment below.¹⁸

[33] I find it difficult to accept that a statement that a complaint to the Law Society will be made if UG did not comply with OU's demands is any different from the determinations referred to. The lodging of a complaint should have no ulterior motive.

¹¹ As above n 8.

¹² As above n 6, Rule 8.1.

¹³ Duncan Webb *Ethics, Professional Responsibility and the Lawyer* (2nd ed, Butterworths, New Zealand, 2000) at ch 5.10.3.

¹⁴ New Zealand Law Society "Conduct unbecoming: Lawyer sent letter threatening criminal complaint if compensation not paid" (2011) 765 LawTalk.

¹⁵ New Zealand Law Society "Unsatisfactory conduct. Withdrawal of criminal complaint to settle dispute" (2010) 753 Law Talk.

¹⁶ New Zealand Law Society "Unsatisfactory conduct: threat to complain to police" (2012) 791 LawTalk.

¹⁷ New Zealand Law Society "Unsatisfactory conduct: inappropriate pressure on client to withdraw complaint" (2012) 789 LawTalk.

¹⁸ UF also produced a copy of LCRO 212/2010 and LCRO 12/2011. No publication orders have been made in respect of this decision and the decision has not been published anonymously. LCRO hearings are conducted in private (refer s 206(1)) and this decision should not have been produced. The parties are advised that there should be no further dissemination of this decision.

The Conduct and Client Care Rules exist to maintain professional standards and any person is able to make a complaint about a breach of the Rules. It is one thing to draw the attention of a lawyer in a collegial way to a possible breach of the Rules. It is another to say that a complaint will be lodged unless the lawyer acts in accordance with demands made by the potential complainant – (in this instance withdrawing statements that are critical of the complainant).

[34] In other words, the “purpose” of the complaints process is to maintain professional standards. It is an “improper purpose” to threaten to lodge a complaint to have statements which are critical of the complainant withdrawn.

[35] OU also wrote subsequently to UF on 16 December 2010:¹⁹

Given the way that the Judge has dealt with this matter and the fact that the documents in question will not be considered going forward (see attached Minute), I would be willing not to proceed with a Law Society Complaint against [UG] provided that [UF’s] complaint against me is withdrawn also. This would be in the best interests of the clients.

This only serves to reinforce the view that OU’s primary objective was to have the critical comments about him withdrawn and not driven by his concerns about UG’s conduct.

[36] I am therefore drawn to the conclusion that in writing to UG in the manner expressed in the email of 13 December in particular (but repeated in other communications) OU has breached Rule 2.7.

Other issues

[37] UF did not pursue with any vigour any of the other seven original complaints, or two further complaints made by him, other than his complaint that OU has disrespected him without cause by accusing him of giving poor advice on the criminal charges.

[38] OU on the other hand stated that he was merely repeating the comments of the senior criminal lawyer previously retained by ZB.

[39] It was somewhat injudicious for OU to repeat those comments to UF, but similarly, UF himself has reacted somewhat sensitively to those comments. I do not

¹⁹ Email from OU to Messrs UG and YM (16 December 2010).

consider that this matter is such as should attract the attention of the Complaints Service and UF acknowledged that at the review hearing.

Orders

[40] Having reached the view that OU has breached the provisions of Rule 2.7, a finding of unsatisfactory conduct follows in terms of s 12(c) of the Lawyers and Conveyancers Act 2006. However, I acknowledge the dilemma facing OU in how to address the situation and that at the end of the day, the method he chose amounted to an error of judgement, but an error of judgement which nevertheless offended Rule 2.7. In similar circumstances²⁰ Standards Committees have made no further Order other than for the lawyer to pay costs. In the circumstances I consider that to be an appropriate outcome in this situation.

Decision

1. Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the National Standards Committee is reversed.
2. OU's conduct in threatening to lodge a complaint with the Law Society if UG did not withdraw the derogatory statements about OU constitutes unsatisfactory conduct in terms of s 12(c) of the Act.
3. Pursuant to s 156(1)(n) of the Lawyers and Conveyancers Act 2006 OU is ordered to pay the sum of \$500.00 to the New Zealand Law Society by way of costs, such sum to be paid no later than 22 April 2013.

Costs of Review

It is usual in circumstances where there has been a finding of unsatisfactory conduct in a review, for costs to be awarded against the lawyer in accordance with the Costs Orders Guidelines issued by this Office. In the circumstances it is appropriate that an Order for Costs should be imposed in respect of this review. Pursuant to s 210(1) of the Lawyers and Conveyancers Act 2006 OU is ordered to pay the sum of \$500 to the New Zealand Law Society by way of costs, such sum to be paid no later than 22 April 2013.

DATED this 20th day of March 2013

²⁰ As above n 15.

O W J 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:

UF as the Applicant
OU as the Respondent
The National Standards Committee
The New Zealand Law Society