

LCRO 99/2017

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

WH

Applicant

AND

**AREA STANDARDS
COMMITTEE X**

Respondent

DECISION

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

Introduction

[1] Mr WH has applied for a review of a decision by the Area Standards Committee X to take no further action following its own motion inquiry into difficulties with the secure retention of client files after the partnership between Mr WH and Mr BZ had come to an end.

[2] Although the Committee was concerned that inadequacies in long-term storage arrangements may compromise client confidentiality, it considered it was not appropriate to take disciplinary action. The Committee considered Mr BZ and Mr WH were jointly responsible for storage matters and were jointly responsible for files held in storage. However, although there was some security risk, there was no evidence that client confidentiality had been compromised and therefore no evidential basis for an adverse finding. Mr WH objects to the finding of joint responsibility.

Background

[3] Mr WH and Mr BZ were in partnership as a firm known as BZ & WH for a number of years. The relationship eventually broke down. The lawyers divided up their client files and went their separate ways, but it took some time to wind up the partnership. One of the practical issues related to what would happen to confidential client files.

[4] Mr WH believed he and Mr BZ had reached agreement on the basis that each of them would retain files for clients with whom each of them had had a professional relationship. Mr WH stored his client files at home, which effectively cost him nothing.

[5] Mr BZ relied on the continuation of an arrangement with a storage company called [Storage Company] Limited ([Storage Company]) pursuant to the terms of an agreement dated 15 April 2013. There was a cost to that.

[6] Payment of the storage fees fell into arrears in 2014. [Storage Company] began charging monthly late fees on 22 October 2014. Over the months that followed, [Storage Company] made various attempts to extract payment including threatening to seize and sell the files.

[7] Mr WH took the position that he was not liable for the storage fees. Mr BZ's position was that the storage fees were a partnership liability.

[8] By 3 August 2016 [Storage Company] had contacted the New Zealand Law Society (NZLS) hoping it would intercede.

[9] By December 2016 [Storage Company] appears to have adopted the position that only Mr BZ was liable for the storage fees, which by that stage had increased to \$6,500.

[10] [Storage Company] threatened to put the files in the landfill.

[11] NZLS wrote to [Storage Company] highlighting the highly sensitive and confidential nature of documents in the files, and the interests of the clients whose information was stored in the files.

[12] Mr BZ and Mr WH's views on who was responsible for which files, and which of them was liable to [Storage Company] were irreconcilable.

[13] In the circumstances NZLS commenced own-motion inquiries to consider conduct on the part of Mr WH and Mr BZ. NZLS was concerned about a potential

breach of security for client files based on rr 8 and 8.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the rules), which impose duties on lawyers to indefinitely protect and hold client information in strict confidence.

[14] Mr WH took steps to avert [Storage Company] destroying files, and undertook to NZLS that he would use his best endeavours to protect the files pending resolution of the complaint against him, without acknowledging that any of the files were his responsibility.

[15] Mr BZ then paid a lump sum to [Storage Company] on the basis that it was his half share of the storage fees, and would secure storage of the files. His expectation appears to have been that Mr WH would pay his share of what was owed to [Storage Company] and it would allow access to the files which could then be securely destroyed.

Standards Committee decision

[16] The Committee considered the files were the collective responsibility of the practice and its principals.¹ As such Mr WH and Mr BZ were jointly responsible for ensuring compliance with r 8. However, in the absence of evidence of any actual breach of confidentiality, the Committee considered it was not necessary or appropriate to take disciplinary action and determined the complaint pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act).²

Application for review

[17] Mr WH applied for a review. He objects to the Committee saying he is “jointly responsible for storage matters including joint responsibility for files held in storage”. He would like the decision modified to remove those words, and a decision made in terms that hold Mr BZ solely responsible for all storage matters.

[18] Mr WH provided various documents in support of his application for review including a copy of a letter Mr BZ sent to NZLS in September 2016 alleging Mr WH’s refusal to pay half of the storage fees was frustrating Mr BZ’s ability to comply with his obligations of confidence under r 8 and to administer his practice in a manner that ensures he meets his duties to existing, prospective and former clients pursuant to r 11.

¹ Standards Committee determination, 11 April 2017 at [12].

² At [18].

[19] The Committee has made no comment on Mr WH's review application, and abides the decision of this Office.

Review on the papers

[20] Mr WH attended an applicant only review hearing by telephone on 21 September 2017.

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:³

... 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:⁴

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

³ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

⁴ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

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

Analysis

[24] This Office cannot provide the blanket release from responsibility that Mr WH seeks by requesting modification of the decision that he is “jointly responsible for storage matters including joint responsibility for files held in storage”. It is noted that r 11 requires lawyers to administer their practices in a manner that ensures that duties to former clients and others are adhered to, and the reputation of the legal profession is preserved. However, this Office is not well placed to direct how Mr WH and his former partner should best manage any residual responsibilities arising from them having been in partnership.

[25] As the Committee correctly observed, r 8 imposes a duty on Mr WH to protect and hold in strict confidence all information concerning a client, the retainer and the client’s business and affairs acquired in the course of the professional relationship.⁵ Rule 8.1 says when that duty of confidence commences, and that it continues indefinitely after the person concerned has ceased to be the lawyer’s client. At this stage there is no evidence of Mr WH having breached either of those duties.

[26] In the circumstances, there is no reason to take a different view to that expressed by the Committee. As there is no evidence that Mr WH has contravened either rule, there is no basis on which to conclude Mr WH’s conduct has fallen below a proper professional standard.

[27] There is therefore no reason to depart from the Committee’s decision that further action is not necessary or appropriate.

Decision

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

DATED this 1st day of November 2017

D Thresher
Legal Complaints Review Officer

⁵ Standards Committee determination, above n 1, at [9].

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr WH as the Applicant
Area Standards Committee X as the Respondent
Area Standards Committee X
The New Zealand Law Society