

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

LO

Applicant

AND

RS, NL and TA

Respondents

DECISION

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

Introduction

[1] Mr LO has applied to review a decision by the [Area] Standards Committee [X] (the Committee) in which the Committee decided to take no further action on his complaint against his former lawyers, Messrs RS and TA and Ms NL.

[2] The Committee's decision was made pursuant s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act), which allows a Committee to take no further action on a complaint if it considers that it is unnecessary or inappropriate to do so.

Background

[3] Mr TA is a solicitor with his own legal firm.

[4] Mr TA administered Mr LO's parents' family trust, in which Mr LO was a beneficiary.

[5] In mid-1998, Mr LO was convicted of offences in the District Court (the 1998 convictions).

[6] In 2003, Mr LO obtained some information about the background to the 1998 convictions. He spoke to a barrister about a possible appeal against the 1998 convictions and paid that barrister \$3000 for advice.

[7] That did not progress matters.

[8] In 2016, Mr LO spoke to Mr RS, who practised as a barrister, about the 1998 convictions and the possibility of an appeal against them (the appeal).

[9] Mr RS gave some preliminary advice and then referred Mr LO to another barrister, Ms NL, for a second opinion.

[10] Mr LO met Ms NL in February 2017 and discussed the appeal with her. She reported to him in August of that year.

[11] Both lawyers had suggested to Mr LO that the provisions of the Criminal Records (Clean Slate) Act 2004 might apply to the 1998 convictions, and that there would be difficulties in bringing an appeal almost 20 years after the convictions had been entered.

[12] Neither barrister lodged any appeal, or application for leave to appeal out of time, in the High Court on Mr LO's behalf.

[13] Mr TA acted as the instructing solicitor for both barristers. He paid their fees from the family trust he administered. Mr TA also charged a fee for his involvement.

[14] In 2018, Mr LO lodged an application for leave to appeal the 1998 convictions out of time in the High Court. He represented himself.

[15] However, the Court declined leave.¹

[16] Mr LO has since sought leave to appeal that decision, to the Court of Appeal.

Complaint

[17] In an email to the New Zealand Law Society Complaints Service (Complaints Service) dated 11 January 2018, Mr LO indicated an intention to lodge a complaint, seemingly against Mr TA, Mr RS and Ms NL. The email referred to matters that had

¹ *LO v Police* [2018] NZHC 1083.

been in the Family Court in 2003 as well as to Mr LO's arrest on charges in December 1997 (which led to the 1998 convictions).

[18] The Complaints Service sought clarification from Mr LO about his complaint and invited him to complete a complaint form. However, he does not appear to have done so.

[19] In further emails to the Complaints Service Mr LO raised several different issues, including setting out some of his views of the court system.

[20] In an email dated 11 April 2018, Mr LO provided more clarification about his complaint, saying:

- (a) he had paid money to Mr RS, Mr TA and Ms NL totalling \$5000 and had not received any legal representation.
- (b) he had requested preparation of a Notice of General Appeal and a High Court hearing about the 1998 convictions.
- (c) the lawyers did not follow his instructions and he lodged his own Notice of General Appeal and appeared in court to argue it. None of the lawyers contributed in any way.
- (d) he does not understand why the lawyers have taken his money without doing the work he instructed them to.

[21] In subsequent correspondence with the Complaints Service Mr LO referred to having been wrongly convicted and that the three lawyers had acted without integrity and goodwill.

[22] Mr LO said that he first spoke to Mr RS in late 2016. Later that year Mr RS referred him to Ms NL who saw him in February 2017. She did not report back to Mr LO for six months. Ms NL then went on maternity leave.

[23] Mr LO said that in approaching the barristers, he did "not want advice", he wanted action to appeal his convictions.

[24] In relation to Mr TA, Mr LO noted that Mr TA administered a family trust in which Mr LO was a beneficiary. He said that Mr TA took on the role of instructing Mr RS and Ms NL, without Mr LO's authority.

[25] Moreover, Mr TA paid the barristers' fees from the trust's funds; again, without Mr LO's authority.

Responses

[26] Although invited to provide their responses to Mr LO's complaint, all three practitioners elected not to do so.

Standards Committee hearing and decision

[27] The Standards Committee identified the issue as "whether Mr LO ... received appropriate advice."²

[28] The Committee noted that before a conduct finding can be made against a practitioner, there must be evidence to support it.

[29] The Committee noted that the lawyers considered Mr LO's appeal prospects and advised him accordingly. This was what he had instructed them to do.

[30] The Committee held that there was insufficient evidence to support the claim that the lawyers had failed to follow Mr LO's instructions or had carried out work without his instructions.

[31] The Committee held that the practitioners were "entitled to the reimbursement of their time and expenses."³

Review Application

[32] Mr LO filed his application for review on 8 August 2018. The grounds may be summarised as follows:

- (a) He did not pay the lawyers for advice; he paid them to lodge an appeal.
- (b) He had previously paid another lawyer for the relevant advice in 2003.
- (c) Mr RS's office promised that Ms NL would take Mr LO's case to the High Court.
- (d) He had located Mr RS from a Google search and had indicated that legal fees would be paid from a trust administered by Mr TA. Mr TA then put

² Standards Committee decision at [10].

³ Standards Committee decision at [15].

himself forward as the instructing solicitor. Mr LO was not given any choice on that issue.

- (e) Mr LO did not authorise Mr TA to discuss any aspect of his [Mr LO's] personal circumstances, including the 1998 convictions.

Lawyer responses:

Mr TA

[33] Mr TA provided a response to the application for review in his letter to this Office dated 3 September 2018. Relevantly, he said:

- (a) DG Trustee Co (2010) is the trustee of Mr LO's parents' family trust and the trustee authorised payment of the barristers' fees.
- (b) In May 2016, Mr LO authorised Mr TA to instruct Mr RS.
- (c) Mr TA provided Mr LO with a letter of engagement dated 23 May 2016 recording that Mr TA was instructing Mr RS.
- (d) Mr LO was aware that the trustee had paid Mr RS's fees.
- (e) In relation to Ms NL, Mr TA sent Mr LO a letter of engagement dated 15 February 2017 recording that Mr TA was instructing Ms NL on Mr LO's behalf.
- (f) Mr TA's fees were \$624.47 (GST inclusive).

Ms NL

[34] In a letter to this office dated 7 September 2018, Ms NL said that she relied on the Committee's decision as "just and correct" and did not wish to comment further.

Mr RS

[35] Mr RS's response to Mr LO's application for review is dated 20 September 2018. Mr RS said:

- (a) Mr LO instructed him in 2016 "to assist ... with an opinion as to the merits of an appeal against historical criminal conviction."

- (b) Mr RS regarded the instructions as involving him giving Mr LO “an opinion on the merits of an appeal taking into account the amount of time that had elapsed since the [1998 convictions], and the actual sentence Mr LO received.”
- (c) Mr RS’s advice to Mr LO was “that he had no merits for the appeal.” He gave Mr LO and Mr TA that advice in writing.
- (d) Mr LO was unhappy with that, so Mr RS referred Mr LO to Ms NL for a second opinion.
- (e) Mr RS then closed his file and issued an invoice for a GST inclusive amount of \$1,962.50.

Nature and Scope of Review

[36] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:⁴

... 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.

(Footnotes omitted)

[37] More recently, the High Court has described a review by this Office in the following way:⁵

... 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

⁴ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39] – [41].

⁵ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475, at [2].

involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[38] Given those directions, the approach on this review will be to:

- Consider all of the available material afresh, including the Committee's decision; and
- Provide an independent opinion based on those materials.

Review on the papers

[39] All parties have consented to this review being conducted on the papers pursuant to s 206 of the Lawyers and Conveyancers Act 2006 (the Act).⁶ Section 206 allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all the information available if the LCRO considers the review can be adequately determined in the absence of the parties.

[40] 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 submissions 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.

Analysis

[41] Since lodging his application for review, Mr LO has written extensively to this Office. In some of that correspondence, Mr LO has raised issues about Mr TA's representation of his late mother; his administration of his late father's estate; his administration of his parents' family trust and the lack of any advice about (for example) the Family Protection Act 1955.

[42] I put all of that material to one side. It did not form part of Mr LO's complaint against Mr TA in relation to the appeal issue.

⁶ This Office wrote to the parties on 19 December 2018 indicating that a Review Officer had formed the view that the application for review could be adequately dealt with on the papers. The parties were invited to raise any objections to that process by 14 January 2019, pursuant to s 206(2A) of the Lawyers and Conveyancers Act 2006. The parties were advised that if no objection was received by this date then the matter would be dealt with by a Review Officer carrying out a hearing on the papers. None of the parties has raised objection to this process.

[43] This Office is one of review. That is to say, that it may only consider and make a decision about complaint material that was before the Standards Committee. Fresh complaints cannot form part of review considerations.

[44] Where Mr LO's correspondence deals with the appeal issue, which was the subject of his complaint, he does little more than repeat his original grounds for complaint.

[45] Tellingly, in an email to this Office dated 5 September 2018 Mr LO said "[the three practitioners] are effectively collateral damage in [his] quest to have [the 1998 convictions] acknowledged and reversed in the correct fashion."

[46] In that email, Mr LO maintained that advice from the two barristers that the Criminal Records (Clean Slate) Act 2004 effectively dealt with the 1998 convictions "is the wrong advice for wrongful convictions."

[47] Mr LO's complaint against Mr TA was that he had taken it upon himself to be the instructing solicitor for Mr RS and later Ms NL, and that he (Mr LO) was given no choice in the matter.

[48] The complaints against the two barristers are that they did not do what he instructed them to do: to lodge an appeal in the High Court against the 1998 convictions (effectively, an application for leave to bring an appeal out of time).

Mr TA

[49] The complete answer to Mr LO's complaint against Mr TA is to be found in the two letters of engagement that Mr TA sent to Mr LO.

[50] In the first (dated 23 May 2016), Mr TA records that Mr LO has "engaged [Mr TA] to act for [Mr LO] in connection with the instructing of [Mr RS]."

[51] Mr TA provides a fee estimate of \$556 plus GST and office services.

[52] In email exchanges between Mr TA and Mr LO during May 2016, Mr LO also authorised payment of fees to Mr RS of \$2,000.

[53] On 15 February 2017, Mr TA wrote to Mr LO noting that Mr RS was no longer being engaged by Mr LO.

[54] I deal below with Mr TA's fees for attendances in relation to instructing Mr RS.

[55] Mr TA's second letter of engagement (dated 15 February 2017) is, to all intents and purposes, identical to the May 2016 letter, except that it refers to instructing Ms NL.

[56] There was no fee estimate provided in that letter of engagement, but the hourly rates of the lawyers in Mr TA's firm who might be involved in the file were set out.

[57] Both letters of engagement record the following:

By instructing us to provide you with legal services, you are deemed to have accepted the terms of this Letter of Engagement. ... **If you decide that you do not require our firm to act on your behalf, please inform us promptly....**

[Emphasis added].

[58] In July 2016, Mr TA wrote further to Mr LO, attaching a statement and an invoice.

[59] Mr TA's invoice was for \$624.47. This included GST and office services. The fee component was \$502.80. It was for attendances in relation to instructing Ms NL.

[60] As indicated, Mr TA's letters of engagement, and the contemporaneous email correspondence between him and Mr LO, provide the complete answer to the complaint against Mr TA.

[61] Those letters of engagement describe the nature of Mr TA's instructions and provide opportunity to Mr LO to disagree or otherwise challenge them. Mr LO did not. None of his correspondence with Mr TA raised any concerns about Mr TA's involvement, his estimate, his fees or the advice and fees of the two barristers.

[62] Indeed, Mr LO authorised the payment of Mr RS's fees.

[63] Mr TA forwarded Mr LO's parents' family trust an invoice on 31 January 2018 for a GST and office services inclusive amount of \$1104.38. The fee component was \$889.20.

[64] The description of the services to which the invoice related was "[Mr LO] — correspondence with beneficiary for the period to 31 January 2018."

[65] This invoice was prepared on the basis of recorded time from 18 May 2016 to 31 January 2018. In fact, there is only one recorded entry for time spent in 2016 — 18 May 2016. This corresponds roughly with when Mr TA and Mr LO were discussing Mr RS's engagement. \$55.60 worth of time was recorded, and that was included in the invoice.

[66] The next entries on the time records begin in approximately 12 months later, in May 2017.

[67] There are some references to Ms NL although most of the activities described on the time records concern telephone or email exchanges between Mr TA and Mr NL, concerning medical and other issues.

[68] The Standards Committee appears to have concluded that Mr TA rendered Mr LO an invoice for \$889.20 in relation to Mr RS's retainer.⁷

[69] However, it appears to me that the invoice on which the Committee relied was for a range of other issues, of which only \$55.60 worth of time appears to have been charged for time spent by Mr TA in relation to Mr RS's instructions.

[70] This, I note, differs (in Mr LO's favour) from Mr TA's letter of engagement to Mr LO about Mr RS's engagement, in which Mr TA estimated fees of approximately \$550 plus GST and office expenses.

[71] No conduct issues arise on Mr TA's part and I agree with the Committee's conclusions about that.

Mr RS

[72] Mr RS was first approached by Mr LO in about May 2016.

[73] Mr RS said that he understood his instructions were to give advice about the prospect of appealing the 1998 convictions.

[74] His advice was that those prospects were slim at best.

[75] Mr LO was not happy with that advice, and so Mr RS referred him to Ms NL for a second opinion. Mr RS's retainer was terminated at that point.

[76] Mr RS rendered his invoice for \$1,962.50 (GST inclusive) on 2 November 2016 and this was paid by Mr TA.

[77] Before a lawyer lodges an application of any sort in any Court (whether a statement of claim, notice of application or application for leave to appeal), the lawyer is obliged to provide their client with advice about the nature of the application and the prospects of success.

⁷ Standards Committee decision at [5].

[78] The requirement for a lawyer to do so arises from the following:

- (a) a lawyer's duty to ensure that their client understands the nature of any retainer;⁸ and
- (b) a lawyer's duty to give their client objective advice based on that lawyer's understanding of the law.⁹

[79] I accept Mr RS's understanding of the nature of his retainer with Mr LO. It is entirely consistent with his duties to Mr LO. Mr LO may have said "I want you to lodge an appeal" but Mr RS was obliged to first advise Mr LO about the process and the prospects of success. This is all the more so when the events in question occurred in 1997, the convictions were entered in 1998 and Mr LO had taken initial steps in 2003.

[80] The fact that Mr LO may have received some advice about an appeal in 2003 — 13 years beforehand — is irrelevant.

[81] I am satisfied that Mr RS did what he was instructed to do, and that no conduct issues arise. His fees had been earlier authorised by Mr LO.

Ms NL

[82] Ms NL elected not to respond to Mr LO's complaint nor to his application for review, other than to say that she relied upon the Committee's decision as being "just and correct."

[83] In relation to all three of the practitioners, the Committee observed that the onus was on Mr LO to show where any of the lawyers had committed a professional or ethical breach. The Committee said that in the absence of any evidence to show this, there was no basis for a finding against any of the lawyers.

[84] The Committee's description of the complaints process is correct. It is for a complainant to provide evidence which demonstrates that it is more probable than not that a lawyer has breached one of the professional or ethical rules of conduct.

[85] The same applies to the process of deciding an application for review. The applicant who is disappointed with the Committee's decision must, on review, establish

⁸ Rule 7.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

⁹ Rule 5.3 of the Rules.

that it is more probable than not that despite what the Committee found, there is evidence of a professional or ethical lapse by the lawyer who was the subject of the complaint.

[86] I will apply that approach to Mr LO's complaint about Ms NL's conduct.

[87] Mr LO first saw Ms NL in February 2017. She appears to have given Mr LO written advice in July 2017.

[88] Ms NL's invoice, dated 14 August 2017, is for a GST inclusive total of \$2,990; the fee component being \$2,600.

[89] The narration on Ms NL's invoice describes the work done by her on Mr LO's behalf, between 14 February 2017 and up to at least the middle of July 2017. It refers to an hourly rate of \$200 and records total time spent by her of 13 hours.

[90] The invoice refers to a "letter of advice to [Mr LO]", which, according to the narration on Ms NL's invoice, was sent by her on or shortly after 17 July 2017 as attendances immediately preceding that date refer to her "review[ing] letter to [Mr LO]."

[91] Mr LO's complaint about Ms NL appears to be that she was wrong to say that the 1998 convictions could not be appealed because of the passage of time, nor were they serious enough.¹⁰

[92] In an email from the Complaints Service to Mr LO dated 12 February 2018, in relation to his complaint against Ms NL the Complaints Service said:

We understand your complaint to be that Ms NL was incorrect in her opinion that your matter was too long ago and that your convictions are not serious enough to warrant a High Court appeal. If we have understood this correctly, then you need to provide evidence in support of your complaint, such as a copy of the opinion and any other correspondence you received from Ms NL. We note that you have already sent us a copy of Ms NL's invoice.

[93] Despite receiving reminders from the Complaints Service about its 12 February 2018 email, Mr LO did not forward a copy of the material it requested. I note that he has not provided it to this Office, either, as part of his application for review.

[94] On 11 April 2018, in an email to the Complaints Service, Mr LO said of Ms NL that she was unable to assist because she was on maternity leave, and that she had wished him well with his efforts to challenge the 1998 convictions.

[95] Despite being asked by the Complaints Service to provide a copy of Ms NL's opinion and being reminded to do so on at least two occasions, Mr LO did not do so.

¹⁰ Email from Mr LO to the Complaints Service (9 February 2018).

[96] Piecing together what limited information I have, based on the copious emails sent by Mr LO to both the Complaints Service and this Office, it appears that — as with Mr RS — Mr LO simply disagreed with the advice that he received from Ms NL about the difficulties with successfully appealing the 1998 convictions.

[97] As the High Court's judgment in May 2018 reveals, both lawyers were completely correct in their assessments.

[98] It is not known what the Court of Appeal has made of Mr LO's application for leave to appeal there. The High Court's judgment remains the last word for now.

[99] As I have explained above in relation to Mr RS, Ms NL's obligations to Mr LO began with ensuring that he understood the retainer and with giving him clear advice based on her understanding of the law.

[100] Mr LO has not provided any evidence, either to the Complaints Service or to this Office, to show where Ms NL was wrong, or otherwise failed to carry out his instructions.

[101] No conduct issues arise in relation to Ms NL's representation of Mr LO.

Conclusion

[102] I am required to bring a fresh, independent and robust view to the complaint, the Committee's decision and the application for review. In doing so, I have carefully and comprehensively considered all of the relevant material that was provided to the Standards Committee and to this Office on review. I have paid particular attention to the areas in which the applicant has said that the Committee was in error.

[103] Nothing raised persuades me that the Standards Committee's conclusions on each of the issues of complaint were wrong. The Committee's decision is therefore confirmed.

Decision

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

Anonymised publication

[105] Pursuant to s 206(4) of the Act, this decision is to be made available to the public but with the names and identifying details of the parties removed.

DATED this 28th day of June 2019

Rex 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 LO as the Applicant
Mr TA as the Respondent
Ms AR as a Related Person
Mr RS as the Respondent
Ms NL as the Respondent
The [Area] Standards Committee [X]
The New Zealand Law Society
Secretary for Justice