

LCRO 192/2015

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of the [Area] Westland Standards Committee

**BETWEEN**

**VH**

Applicant

**AND**

**RM**

Respondent

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

**DECISION**

**Introduction**

[1] Mrs VH has applied for a review of a decision by the [Area] Westland Standards Committee (the Committee), which decided that delays by Mr RM in attending to instructions from Mr and Mrs VH constituted unsatisfactory conduct on Mr RM's part, and ordered him to pay compensation of \$2,000 to Mrs VH for anxiety and stress, and costs to the New Zealand Law Society (NZLS).

[2] Mrs VH does not consider the outcome properly reflects the serious effects Mr RM's actions and inactions have had on her. She considers he was instrumental in her being declared bankrupt, so he should be censured and ordered to pay her significantly more in compensation.

## Background

[3] Mr RM acted for Mr and Mrs VH in December 2013 when they sold their house to pay off debt that exceeded their assets.

[4] Mr RM negotiated with various secured creditors, including a debt collection agency [Company A] acting for [Company B], so the sale could proceed. He says he also attempted without success to reach agreement with another unsecured creditor that had indicated it may seek to register a charging order against the VHs' home.

[5] Mr RM proposed settlement with [Company A]/[Company B] on the basis that it would be paid \$3,000 in full and final settlement. Mr RM believed from his conversations with [Company A]'s representative that [Company A]/[Company B] had agreed settlement would be full and final. When prompted for a response to his written offer of full and final settlement, [Company A] replied to Mr RM on 17 December 2013 saying:

Apologises [sic] for not getting back to you sooner, but I have been away on annual leave.

Our Client will accept the \$3,000.00.

Our banking details are as follows...

Please advise when this will be paid and email me proof of payment.

[6] On that basis, on 18 December 2013 Mr RM discharged the charging order securing [Company B]'s debt, the sale settled, and Mr RM paid [Company A] \$3,000 from the sale proceeds.

[7] After their property was sold Mrs VH moved to another town. She and Mr RM both say they believed the debt to [Company B] was fully and finally settled.

[8] Towards the end of January 2014 Mr VH contacted Mr RM saying a process server was trying to serve him with High Court papers. Mr RM says Mr VH was angry and upset and did not communicate to him exactly what documents were to be served, and it may be that Mr VH did not know. However, he was willing for Mr RM to accept personal service on his behalf, and wanted Mr RM to contact [Company A]/[Company B] to stop them pressing for more money that the VHs say they simply did not have.

[9] Given the agreement he understood he had reached with [Company A]/[Company B], Mr RM believed the High Court papers would be the start of a process that could readily be averted, and there was no reason for immediate concern. Mr RM did not immediately contact [Company A]/[Company B], and while his assessment of

Mr VH's position may or may not have been correct, it became apparent later in February that Mrs VH was in a different situation.

[10] [Company A]/[Company B] had commenced bankruptcy proceedings against Mrs VH in mid-2013 on the basis the debt Mr and Mrs VH owed [Company B] had not been paid. For some reason, it had not been possible to personally serve the bankruptcy proceeding on Mrs VH, so substituted service was effected by advertising. Mrs VH says she was unaware [Company B] had applied for her to be declared bankrupt, did not tell Mr RM, and took no steps. Without Mrs VH, Mr RM or apparently the person he was dealing with at [Company A] being aware of the bankruptcy proceeding, orders were made declaring Mrs VH bankrupt on 11 February 2014.

[11] It appears the message that [Company A]/[Company B] had agreed to full and final settlement did not reach whoever at [Company A]/[Company B] was responsible for conduct of the bankruptcy proceeding against Mrs VH. Mrs VH says she only discovered she was bankrupt later, either when her bank card was declined or when she was contacted by the Official Assignee around the same time, in mid-February 2014.

[12] On discovering his wife had been declared bankrupt, Mr VH confronted Mr RM. Mr RM expressed the view that there was an error [Company A]/[Company B]'s part over the terms of settlement. The VHs instructed Mr RM to have the bankruptcy annulled or set aside on the basis that the agreement he had reached with [Company A] was that the VHs would make payment of \$3,000 in full and final settlement of [Company B]'s claims against them.

[13] Having agreed to act, Mr RM accepts he was slow to attend to matters. In November 2014, the VHs terminated their retainer with Mr RM, and laid a complaint to the NZLS shortly after, referring to Mr RM's part in events and his delays in carrying out their instructions to have the bankruptcy annulled or set aside.

#### **Standards Committee decision**

[14] The Committee agreed Mr RM had been responsible for undue delay and determined the complaint on the basis that delay was unsatisfactory conduct on Mr RM's part. The Committee ordered Mr RM to pay \$2,000 of compensation to Mrs VH for the anxiety and distress he had caused her, and imposed an order for costs against him.

### **Application for review**

[15] Mrs VH accepted Mr RM's conduct was unsatisfactory but objected to outcome. She refers to her anxiety, stress, depression, ignominy, humiliation, effects on her credit rating for 4 years, reputation, health and employment prospects.

[16] Mrs VH says her bankruptcy has since been annulled or set aside by consent with the Official Assignee and assistance from another lawyer. Mrs VH says Mr VH was also declared bankrupt for the same debt to [Company B], and she also attributes that to failings on Mr RM's part. As that is a new complaint it cannot be addressed in the course of this review.

[17] Mrs VH contends the Committee's assessment of the level of financial harm to the VHs was completely wrong. In addition to compensation, the VHs say the actual cost of having her bankruptcy annulled was:

- (a) \$2,320 to have their new lawyer attend to the annulment or setting aside; and
- (b) \$1,100 for the Official Assignee's costs.

[18] Mrs VH says Mr RM was incompetent, and his conduct was worse than only moderately unsatisfactory. She wants the penalty increased so that Mr RM pays a fine and perhaps also more compensation to her.

### **Review Process**

[19] A letter and direction were sent to the parties referring to r 5.11 of the Lawyers and Conveyancers Act (Conduct and Client Care) Rules 2008 (the rules), which are attached to this decision.

[20] After receiving and considering those communications, Mr RM accepted that r 5.11 had been engaged and said he was unable to demonstrate he had complied with it. Mr RM acknowledged he should have taken a more objective view and referred Mrs VH for independent legal advice at the time he was advised that she had been declared bankrupt. He accepts that an independent lawyer could have dealt with Mrs VH's annulment or had the bankruptcy orders set aside more quickly, and apologised to Mrs VH for making an error of judgement.

[21] Mr RM says he was not oblivious to the issues involved, but persuaded himself that he was able to continue acting.

[22] The parties attended a review hearing by telephone on 16 November 2017. Mrs VH's friend, Mr YK, assisted Mrs VH to put her case.

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

[23] The nature and scope of a review have been discussed by the High Court, which said of the process of review under *Lawyers and Conveyancers 2006* (the Act):<sup>1</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.

[24] More recently, the High Court has described a review by this Office in the following way:<sup>2</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.

[25] 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
- (b) provide an independent opinion based on those materials.

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<sup>1</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

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

## Discussion

[26] The Committee accepted Mr RM's assertion that [Company A]/[Company B] was entirely at fault, and did not consider r 5.11 which says:

When a lawyer becomes aware that a client has or may have a claim against him or her, the lawyer must immediately –

- (a) advise the client to seek independent advice; and
- (b) inform the client that he or she may no longer act unless the client, after receiving independent advice, gives informed consent.

[27] In the course of this review, Mr RM has come to accept that the VHs may have a claim against him, and that he did not advise them to seek independent advice, or inform them that he may no longer act unless they gave informed consent after receiving independent advice.

[28] Mr RM says he was aware of the issues. I take him to mean that he was aware the settlement he had reached in his discussions with [Company A] was not properly documented, and proving [Company A]/[Company B] had foregone its right to pursue the VHs further would rely on him giving evidence of the terms of the settlement he had negotiated with [Company A].

[29] In my view, while the VHs may have a claim against Mr RM, on the evidence available on review it would be a very weak one, and might perhaps result in a contribution to their losses. That is consistent with the view Mr RM seems to have formed at the time, and with his actions. As he now accepts, continuing to act for the VHs was not correct. The rule required Mr RM to confess to the VHs that they may have a claim against him regardless of its prospects of success, and he was prohibited by the rule from acting further until and unless the VHs gave informed consent after receiving advice from someone else.

[30] Mr RM's failure to observe that the rule was engaged and act accordingly was unsatisfactory, but understandable in a sense, given his certitude that he had in fact negotiated full and final settlement with [Company A] and that he, therefore, could not be held responsible or liable.

[31] It is not possible to say whether events would have taken a different turn in January or February 2014, because [Company A]/[Company B] had a judgment against the VHs that could be enforced.

[32] There is no evidence, and no other reason to believe, that [Company A]/[Company B] would necessarily have abandoned enforcement action at the time.

[Company A]/[Company B]'s conduct at the time could have been a demonstration of tenacity based on the perhaps flawed belief that the VHs selling their home was the optimal time for actual recovery.

[33] [Company A]/[Company B]'s persistence at the time could equally be attributed to the fact and terms of settlement not having been communicated to the [Company A]/[Company B] debt recovery/enforcement team.

[34] Mr RM admits he contravened r 5.11. Routinely, a contravention of a rule falls within the definition of unsatisfactory conduct pursuant to s 12(c) of the Act, although this Office exercises a degree of discretion when considering whether the circumstances are such that a determination of unsatisfactory conduct should properly be made.

[35] Mr RM's acknowledgement of wrongdoing, albeit late, was appropriate. Although Mr RM says he was not oblivious to the issues at the time, he accepts he could have exercised his judgement in a different way. Having accepted that he made an error of judgement, Mr RM apologised to Mrs VH, perhaps not for the first time. Mr RM also repeated his offer to help offset the costs the VHs had incurred in having Mrs VH's bankruptcy set aside.

[36] Mrs VH says she was completely unaware that she was at risk of bankruptcy until it was too late, so she cannot have forewarned Mr RM. He could not take steps to assist her in avoiding a bankruptcy he knew nothing about.

[37] However, the case put for the VHs relies on the premise that if Mr RM had responded promptly to the concerns raised by Mr VH in January, Mrs VH's bankruptcy in February could have been avoided. While it is remotely possible that Mrs VHs bankruptcy *could* have been avoided with Mr RM's intervention at that point, it is not necessarily the case that Mr RM's intervention *would* have resulted in her avoiding bankruptcy.

[38] The short point is that, while Mr RM's conduct could have been better, there is simply no proper basis on which to order Mr RM to pay compensation for the actual losses Mrs VH claims.

[39] However, the Committee ordered Mr RM to pay compensation to Mrs VH of \$2,000 for anxiety and distress pursuant to s 156(1)(d) of the Act, on the basis that Mr RM's delays between February and when he ceased acting for the VHs were unsatisfactory. Mr RM accepts that his delays were unsatisfactory, and the determination that delay on his part was unsatisfactory is confirmed on review.

[40] As r 5.11 prohibited Mr RM from acting until the VHs had received independent legal advice, he should have referred the VHs away immediately. Except to say that it does not warrant an additional finding of unsatisfactory conduct, Mr RM's offer to try and assist Mrs VH without charge did her and him no favours. I have no doubt that the delays, at a time when Mr RM should not have been acting at all, added to Mrs VH's anxiety and distress.

[41] If Mrs VH's bankruptcy were to have been annulled, that should have occurred as soon as possible after February 2014. As Mrs VH says, it is not possible to compensate her for the months she spent anxiously waiting to see if she could become not bankrupt. To a degree Mrs VH can be compensated for the anxiety and distress she experienced while Mr RM acted, albeit slowly, and should not have done.

[42] The maximum available compensation under the Act is \$25,000. Orders for compensation are generally made by this Office on the basis that the amount is "modest but not grudging". It would be unprecedented to order a payment of compensation for \$25,000 for anxiety and distress.

[43] The Committee ordered Mr RM to pay \$2,000 for the anxiety and distress experienced by Mrs VH over a period of months, when Mr RM should have been acting in a timely way, but, for various reasons, did not.

[44] Once the retainer with Mr RM ended, without him charging any fees from January 2014 onwards, Mrs VH faced the cost of obtaining legal advice and dealing with the costs incurred by the office of the Official Assignee to get her to the point where she was no longer bankrupt.

[45] Mrs VH says she is still having to produce the annulment documentation to satisfy credit checks. If it is correct that certain records are inaccurate, that is not something Mr RM can influence.

[46] In advance of the review hearing, Mr RM willingly paid the amount Mrs VH says it cost her to obtain legal advice and pay the Official Assignee's costs in getting herself to a point where she was no longer bankrupt. Mr RM had offered to pay that amount early in the review process. The amount that Mr RM paid exceeds the amount of compensation ordered by the Committee, and he says he is willing and able to pay an amount assessed as proper by this Office, which could exceed the \$3,420 already paid.

[47] Consideration has been given to the other orders available pursuant to s 156 of the Act, including a fine and rectification of errors or omissions. The Committee did



not order Mr RM to pay a fine, and I agree that his conduct does not warrant that response. It seems to me that the proper focus for any payment is Mrs VH, and, in my view she has been adequately compensated by Mr RM having paid her \$3,420.

[48] While I accept that Mrs VH does not perceive this payment is compensatory in nature, the basis of her claim for compensation on grounds other than for anxiety and distress is not well founded.

[49] In the circumstances, the order that Mr RM pay compensation of \$2,000 pursuant to s 156(1)(d) of the Act is modified to record a compensatory payment of \$3,420, which is an amount he has already paid.

[50] The order that Mr RM pay \$500 in costs to the Committee is also confirmed.

### **Costs on review**

[51] Mr RM's conduct in the course of this review, once the difficulties around r 5.11 were brought to his attention, is such that no order for costs against him should properly be made. He acknowledged wrongdoing when the case was put to him, he accepts he was responsible for delays in attending to matters after Mrs VH's bankruptcy and he promptly paid the amount recommended by this Office.

[52] There is no reason to make an order for costs against either party.

[53] In the circumstances, no costs orders are made on review.

### **Decision**

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is modified to record that the compensatory amount is \$3,420, which Mr RM has already paid, and is otherwise confirmed.

**DATED** this 22<sup>nd</sup> day of November 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 VH as the Applicant  
Mr RM as the Respondent  
Mr YK as the Applicant's Representative  
Ms VN as a Related Person  
[Area] Westland Standards Committee  
The New Zealand Law Society