

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

KE

Applicant

AND

HO

Respondent

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

DECISION

Introduction

[1] Mrs KE has applied for a review of a decision by the [City] Standards Committee [X] (the Committee). The Committee formed the view there had been unsatisfactory conduct on Mrs KE's part, pursuant to s 12(c) of the Lawyers and Conveyancers Act 2006 (the Act), in that she had contravened r 13.8 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

Background

[2] The allegation against Mrs KE is that, as a lawyer engaged in litigation, she had attacked Mr HO's reputation without good cause in documents filed in court proceedings commenced by Mr NE against Mrs KE's clients, Ms YS and her mother, Mrs CB. Mr HO was not a party to the litigation. However, he had acted for Ms YS/Ms CB and had files and trust account records that contained evidence that was material to the tracing exercise being carried out by Mr NE in the litigation. Mr HO's

files and trust account records were therefore material to Ms YS's position on discovery in the litigation.

[3] The impugned attack was contained in a document dated 5 May 2015 that Mrs KE had prepared for the purposes of r 2.8 of the Rules (the report). Rule 2.8 obliges a lawyer who has reasonable grounds to suspect that another lawyer has been guilty of misconduct to make a confidential report to the New Zealand Law Society (NZLS) at the earliest opportunity.

The Report

[4] The report contained the following:

2. The suspected misconduct relates to false recordings in the solicitors' trust accounts, in respect of three former clients of the law firm [HO Lawyers]. We currently act for two of these clients, Ms YS and Ms CB, who are daughter and mother. We have informed them that this was a matter for the Law Society to address.
3. Ms YS and Ms Lee instructed us that:
 - a. In August 2010, Ms YS entered into a sale and purchase agreement to buy a property at [Property 2], Freemans Bay, Auckland. She then signed a deed of nomination for the property to be registered in Ms CB's name. Ms CB paid to [HO Lawyers] \$121,379 on 3 September 2010
 - b. Around the same time, Ms CB's son, Mr Y ES, wanted to change the name on the title of [Property 1], Auckland, from his own name to Ms CB's name. There were no funds changing hands for this transaction.
 - c. Ms YS handled all the communications with [HO Lawyers]. She held the power of attorney to act on behalf of Ms CB and Mr Y ES.
4. The clients are currently facing High Court proceedings with an unrelated third party and have uplifted their conveyancing files as evidence. We have discovered settlement documentations, which appear to record various transactions through the trust accounts that did not occur according to our client's instructions. The uplifted documents show that:
 - a. Settlement funds of \$121,379 were received by [HO Lawyers] from CB for the property [Property 1] (attached and marked "A"). According to the clients' instructions, this is incorrect. Ms CB transferred this amount specifically for the settlement of [Property 2];
 - b. CB contributed \$121,904 towards the settlement of [Property 1] (Attached and marked "B"). This is also incorrect because, according to the clients' instructions, no funds were paid for the settlement of [Property 1];
 - c. CB needed to pay \$121,379 for the settlement of [Property 1] (Attached and marked "C"). This is incorrect according to

the clients' instructions. The property [Property 1] was only to undergo a name change;

- d. In relation to [Property 2] a previous contribution of \$120,004 from Ms CB (Attached and marked "D"). According to the clients' instruction, Ms CB paid \$121,379. It appears that funds were transferred with ledgers without the clients' authority;
5. Our clients have advised that these statements are incorrect, and the allocation of funds were done without their authority and contrary to their instructions.
6. We also note that there was a mix up of matter numbers for each property. In one statement of accounts, the matter number 2504-03 referred to the property [Property 2]. In another settlement, that same matter number refers to the property [Property 1].
7. We have written to [HO Lawyers] to request disclosure of copies of all trust account records and trust ledgers, in relation to the above properties – particularly for to numbers 2504-02, 2503-03, 2504-04, and 2504-05. They have refused to disclose these, stating that they were not required to disclose them to the clients (Attached and marked "E" and "F").

[5] Having obtained advice from counsel, Mrs KE sent the report to NZLS to comply with her obligation pursuant to r 2.8 on the basis that she had:

reasonable grounds to suspect misconduct when [HO] did not provide an explanation about the apparently misleading settlement statements and refused to disclose the trust account records.

[6] Also, on advice from counsel, Mrs KE declined to waive the confidentiality associated with the report. NZLS did not disclose the report to Mr HO, but notified the NZLS Inspectorate (the Inspectorate) so it could carry out its audit function.

The Litigation

[7] The position adopted by Ms YS/Ms CB in the litigation relied in part on the contention that Mr HO had acted without Ms YS's authority and/or contrary to her instructions. Unfortunately, Mr HO's trust account records did not reconcile with the instructions Mrs KE had been given by Ms YS/Ms CB to the effect that Ms YS had no financial interest in the money that had passed through Mr HO's trust account. It seems Mr HO was unwilling to be drawn into discussion with Mrs KE over the accuracy of his trust account records.

[8] During the discovery phase of the litigation Mr Zang sought materials from Ms YS/Ms CB that included Mr HO's records. In responding to those applications Mrs KE drafted two affidavits which set out Ms YS's evidence in respect of what she had done to comply with her obligations on discovery. The report was attached to

Ms YS's second affidavit as an exhibit, and Ms YS explained its relevance at paragraphs 16–19 of her affidavit dated 24 July 2015:

16. In August 2010, I was purchasing another apartment at [Property 2] and needed a lawyer to help with that. I went to [HO Lawyers] to complete the purchase. At the same time, I asked them to also help us change the name for the [Property 1] apartment from my brother to my mother. They told me that to change that we needed to have an agreement between my brother and my mother. I did not know the legal process to change the properties title from my brother's name to my mother's but I told them to organise whatever documents that were needed to complete that. We signed the documents as advised by the lawyers.
17. The lawyers also told me that the change needs to be made as a sale and purchase of the apartment and for this they needed to have a note from my brother saying that he gave money to my mother for the property. This is the note that I provided in the court documents – YS–007–190. We did as advised. I would like to clarify that no money was actually paid by my brother to my mother for this – all we wanted was for the title to be changed to my mother's name and she was the one who had actually paid for the property to be purchased in the first place.
18. When I uplifted the conveyancing files from [HO Lawyers] late 2014, my lawyers went through the files and asked me about the two sale and purchase agreements for [Property 1]. They told me that the transaction was confusing, and needed more information from [HO Lawyers]. My lawyers spent a lot of time trying to get information from [HO Lawyers] to understand this confusing transaction. But [HO Lawyers] refused to give the information.
19. I was really upset that [HO Lawyer] did not provide further information to my lawyers to explain this and their lack of records made a simple transaction looks so confusing. I asked my lawyers to complain to law society. Annexed and marked "E" is the letter to law society.

[9] Exhibit "E" is the report.

[10] Mrs KE's evidence on review was that, although at the time she swore her second affidavit Ms YS had understood the money was her mother's, it was eventually traced back to her brother. It seems there was a level of fluidity and little formality between Ms CB and her children over finances. However, the important point for Ms YS/Ms CB in the litigation was that none of the money invested, valued at the time of the litigation at around \$6 million, had been Ms YS's, or had come from Mr NE.

[11] In the course of the discovery process, Mr NE's lawyer, Mr Baird, served Ms YS's second affidavit on Mr HO. Until then Mr HO says he had been unaware of the report. Taken by surprise, Mr HO made a complaint to NZLS about Mrs KE's conduct in filing evidence that included the report.

The Complaint

[12] Mr HO's complaint is dated 20 August 2015. In it, Mr HO alleged that Mrs KE, as a lawyer engaged in litigation, contravened r 13.8. Mr HO said Ms YS made serious allegations against him and his firm in paragraphs 16–19 of her second affidavit, and that "the content of the affidavit and Exhibit E came out of the blue and surprised me".

[13] Mr HO refutes all of the allegations made in the affidavit and the report. Mr HO says that by exhibiting the report, Mrs KE effectively waived any confidentiality associated with the NZLS process. He considers Mrs KE's conduct abused and manipulated the NZLS complaints process and the processes of the Court. Mr HO expressed the view that Mrs KE's conduct:

is at the very least unsatisfactory conduct, but more probably, it is disgraceful conduct. I make this complaint on that basis and ask that it be referred to a Standards Committee as soon as reasonably possible.

Mrs KE's reply

[14] Mrs KE said the only purpose of Ms YS's second affidavit was to demonstrate that Ms YS/Ms CB "[had] no further documents in their possession or control, and had taken extensive steps to try to obtain relevant documents held by [HO Lawyers]".

[15] Mrs KE said Ms YS had done all she could to obtain complete conveyancing for the apartments, but [HO Lawyers] had said they were not required to provide the trust account records. Mrs KE says Mr HO did not explain the "apparently misleading settlement statements and refused to disclose the trust account records" that supported them.

[16] Mrs KE referred to the steps that preceded Ms YS swearing the affidavit, including her having written to Mr HO on 13 March 2015 and saying that the transactions were "confusing and appeared misleading", and asking whether they were inadvertent errors. She received no substantive reply, so on 10 April 2015 she followed up with a phone call and request for copies of the trust account ledger. Further correspondence followed between 13 and 15 April 2015, which did not result in Mr HO disclosing the information Mrs KE requested to assist her client in meeting what she believed, and what was being advanced by opposing counsel, were her obligations on discovery.

[17] Mrs KE says Mr HO's position was that for various reasons he could not disclose the materials sought by the parties to the litigation. Mr NE's lawyer made applications to the Court for orders for further and better discovery against

Ms YS/Ms CB and for non-party discovery against Mr HO. Ms YS/Ms CB resisted those applications on the basis they had met their obligations and had effectively run out of options with respect to Mr HO's refusal to disclose anything further.

[18] Mrs KE refers to Ms YS's first affidavit, sworn on 22 June 2015, deposing to Mr HO's refusal to provide trust account records was filed. Although the report was not attached or referred to, that affidavit referred to Ms YS having instructed Mrs KE to have the trust account matters dealt with by NZLS.

[19] Christiansen AJ made orders on [Date] 2015, directing Mr HO's office to make an affidavit of documents.

[20] Mrs KE says that on 7 July 2015, Mr NE's lawyer made a further application for particular discovery against Mr HO and from Ms YS/Ms CB. The affidavit of documents filed by Mr HO's office is dated 14 July 2015 and refers to the orders made by Christiansen AJ on 26 June 2015.

[21] Mrs KE says that on 21 July 2015, Mr NE applied for discovery orders against Ms YS's brother, Mr Y ES, as a non-party, to extract information from him that might be relevant to Mr NE's tracing exercise. Mr NE also made a further application for discovery against the defendants and Mr HO, supported by an affidavit sworn by a Mr MS who provided a detailed critique of Mr HO's conveyancing files and concluded that they were incomplete.

[22] I interpolate here that Mr MS' evidence, although more wide-ranging, was generally consistent with the concerns Mrs KE had raised, unbeknown to Mr HO, in the report.

[23] On 24 July 2015, Ms YS swore the second affidavit and annexed the report as an exhibit.

[24] I interpolate again: faced with a choice over whether to produce a copy of the report to protect Ms YS/Ms CB's position in the litigation, or to protect her own interests by maintaining its confidentiality, Mrs KE preferred her clients' interests over her own and annexed the report. Either way, the report was not annexed as a declaration that its contents were true.

[25] Mrs KE says in that regard:

15. The second affidavit of YS sets out her instructions to [HO Lawyers] in 2010 in relation to the conveyancing of the apartments. It then explains that further information had been requested from [HO Lawyers], and [HO Lawyers] had refused to provide the information. She had also described this in her first affidavit.

16. Because the plaintiff insisted on discovery of the complete conveyancing files, Ms YS then described her anxiety about the confusing transaction that was now the subject of a report to the Law Society. She then faced a discovery application that she could not meet.
17. As outlined above, the report was submitted to Law Society after we communicated with [HO Lawyers] multiple times seeking an explanation for the mismatching settlement statements. [HO Lawyers] not only failed to provide a response about the mismatching settlement statements, but also refused disclosure of key documents such as the trust ledgers.
18. The report outlines our clients' instructions as compared to the settlement statements prepared by [HO Lawyers] and the mix up of matter numbers, all of which were support[ed] by the settlement statements attached to the report.

[26] Mrs KE says Ms YS's second affidavit was served on Mr NE's lawyer, who provided it to Mr HO on 27 July 2015. On 28 July 2015, Bell AJ made orders in respect of materials held by Mr HO, requiring him to file an affidavit of documents. Mr HO's complaint to NZLS followed on 20 August 2015. The discovery process continued.

Further Correspondence

[27] Correspondence was exchanged between the parties in which Mr HO expressed the view that he had complied with his obligations in respect of trust account reporting to his client by providing "a complete and understandable statement" and other associated documents, to the extent he was required and able to provide those. Mr HO objected strongly to the contention advanced in the report that his statements were misleading. Mr HO says Mrs KE provided no evidence to support her claim. He contends there were no reasonable grounds on which Mrs KE could base a suspicion that he was guilty of any misconduct.

[28] As the report had been disclosed to Mr HO, he contacted NZLS and was told that since the report had been disclosed, he could seek an outcome, which he did. The committee that considered the report "did not consider that it was necessary to commence on an own motion investigation into the matter" and expressed the view that "the matter could appropriately be dealt with through the NZLS Inspectorate by way of a routine inspection of the trust account".

The Committee's Decision

[29] Mr HO's complaint was determined by the Committee on 29 October 2015 on the basis that further action was not necessary or appropriate. Not satisfied, Mr HO applied for a review. This Office directed the Committee to reconsider the complaint to the extent that the issue over whether Mrs KE had complied with r 13.8 had not been

considered.¹ The Committee determined that issue on 15 September 2016 on the basis that Mrs KE had breached r 13.8. The Committee's reasoning was:²

9. Ms KE submits that the affidavit and report contained only statements of fact supported by documentary evidence. Further, Mr HO did not say that he disputed any of the statements made in the report. Ms KE details the information she relied on when making the report and notes that multiple opportunities were provided to Mr HO to comment on matters stated in the report. Ms KE considers that she had no choice but to annex the report as emphatic evidence that her client was doing all she could to comply with the discovery obligations.
10. Ms KE acknowledges that she could have better conveyed the difficulties she was having in obtaining information she required. Ms KE did not accept that she breached rule 13.8. She considers that she took all possible steps to secure the information by directly contacting [HO Lawyers] and took all possible steps to seek clarification of inconsistencies by directly contacting [HO Lawyers]. Ms KE maintains that [HO Lawyers] declined to cooperate.
11. The Committee considered the affidavit and report. In the report Ms KE repeats her obligations pursuant to rule 2.8 that she is obliged to report another lawyer where she has reasonable grounds to suspect that a lawyer has been guilty of misconduct. Ms KE states that "[t]he suspected misconduct relates to false recordings in the solicitor's trust account..." After detailing the basis of the allegation Ms KE says with respect to settlement statements "[o]ur clients have advised that the statements are incorrect, and the allocation of funds were done without their authority or contrary to their instructions".
12. The LCRO has previously considered rule 13.8 where a lawyer has pleaded the tort of deceit and noted that such an allegation unquestionably brings a person's character into question. Where such an allegation is made, a lawyer must take appropriate steps to ensure that reasonable grounds exist for making that allegation. These steps must be taken prior to the allegation being made.
13. The Committee considered that the report which alleged misconduct on the part of Mr HO was a serious allegation of reprehensible conduct and that such an allegation brought Mr HO's character into question. To make such an allegation against a lawyer is particularly serious and damaging.
14. After considering all relevant material, the Committee was not persuaded that there were reasonable grounds to support such a serious allegation that Mr HO had engaged in professional misconduct. Ms KE relies on her client's clear instructions that the records were error-ridden and inconsistent with her understanding of the property transactions and the fact that the plaintiff did not accept Ms KE's client had complied with her discovery obligations. Ms KE submits that in the circumstances she considers that she had good cause to disclose the report and that she had taken appropriate steps to ensure that reasonable grounds existed to exhibit the contents of the report. Ms KE emphasised that the discovery proceedings were heard in chambers.

¹ LCRO 256/2015 (11 May 2016).

² Standards Committee determination, [Date] 2016.

15. The Committee did not accept that Ms KE had taken appropriate steps to ensure that reasonable grounds existed for making allegations against Mr HO. The confusion surrounding the trust account entries and her client's recollection of matters among others was not good cause to support an allegation Mr HO had made false recordings in the solicitor's trust account. The Committee was not satisfied that Ms KE made sufficient enquiries to obtain a response from Mr HO prior to attaching a copy of the confidential report to her client's affidavit. While she did write to Mr HO regarding her client's concerns, she did not provide him with the opportunity to respond to the report itself.
16. Having reconsidered the matter, taking into account Ms KE's obligations pursuant to rule 13.8, the Committee accepted that in the context of this rule Ms KE's conduct amounted to unsatisfactory conduct.
17. The Committee noted that the purpose of the affidavit was to explain to the Court and the other parties to the proceeding the difficulties that Ms KE's client was having in obtaining certain discoverable documents from Mr HO. It was not necessary for Ms KE to attach the confidential report to the affidavit. An alternative course available to Ms KE was to file the affidavit without the confidential report is attached. This would have been sufficient detail to convey that Ms KE's client was taking all steps possible to comply with the discovery obligations without bringing into question Mr HO's character.
18. In the Committee's view Ms KE had not taken appropriate steps to ensure that she had reasonable grounds for making the allegation of misconduct. The Committee found that Ms KE breached rule 13.8 of the RCCC.

[30] The Committee concluded that Mrs KE's conduct contravened r 13.8. She was ordered to pay a fine of \$500 and costs of \$1,000.

Application for review

[31] Mrs KE's application for review, in which she sets out her detailed grounds, is dated 28 October 2016. The review grounds are addressed in the discussion that follows. Mrs KE asks this Office to reverse the determination of unsatisfactory conduct made against her.

Review Hearing

[32] Mrs KE attended a review hearing by telephone on 13 June 2019. Mr HO did not exercise his right to attend.

Nature and scope of review

[33] 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.

[34] 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.

Discussion

[35] The breach of r 13.8 is the only professional standards issue under consideration by this Office on review. Rule 13.8 is a practice rule made under the Act that applied to Mrs KE. The question is whether Mrs KE complied with it. If she did not, her conduct may be unsatisfactory pursuant to s 12(c) of the Act.

[36] In forming a view, it is important to remember the purposes of the Act, which are:⁵

- (a) to maintain public confidence in the provision of legal services and conveyancing services:
- (b) to protect the consumers of legal services and conveyancing services:

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].

⁵ Lawyers and Conveyancers Act 2006, s 3(1).

- (c) to recognise the status of the legal profession and to establish the new profession of conveyancing practitioner.

[37] While Mr HO is also a member of the public, the report was concerned with his conduct as a lawyer. Mr HO was not a consumer of legal services provided by Mrs KE. The third purpose is met by the observation that the processes of mandatory reporting and audit by the NZLS Inspectorate are features of self-regulation, and are important elements in recognising the status of the legal profession.

[38] It is also important to be mindful of s 4 which sets out the fundamental obligations of lawyers who provide regulated services, as Mrs KE did for Ms YS/Ms CB. Section 4 says:

Every lawyer who provides regulated services must, in the course of ... her practice, comply with the following fundamental obligations:

- (a) the obligation to uphold the rule of law and to facilitate the administration of justice in New Zealand:
- (b) the obligation to be independent in providing regulated services to ... her clients:
- (c) the obligation to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients:
- (d) the obligation to protect, subject to ... her overriding duties as an officer of the High Court and to ... her duties under any enactment, the interests of ... her clients.

[39] The Rules are prefaced by the reminder that they are a “reference point for discipline”. In *Wilson v Legal Complaints Review Officer* Hinton J said that the Rules are:⁶

to be applied as specifically as possible. In my view they are also to be applied as sensibly and fairly as possible. These are practice rules, not a legislative code.

... the rules should not be enforced in an unduly technical manner. The conduct alleged should clearly offend. A finding of unsatisfactory conduct is a serious matter.

[40] Rule 13.8 and its sub-rules say:

- 13.8 A lawyer engaged in litigation must not attack a person’s reputation without good cause in court or in documents filed in court proceedings.
- 13.8.1 A lawyer must not be a party to the filing of any document in court alleging fraud, dishonesty, undue influence, duress, or other reprehensible conduct, unless the lawyer has taken appropriate steps to ensure that reasonable grounds for making the allegation exist.

⁶ *Wilson v Legal Complaints Review Officer* [2016] NZHC 2288 at [43]–[44].

13.8.2 Allegations should not be made against persons not involved in the proceeding unless they are necessary to the conduct of the litigation and reasonable steps are taken to ensure the accuracy of the allegations and, where appropriate, the protection of the privacy of those persons.

[41] Mr HO's position is that while she was engaged in litigation, acting for Ms YS/Ms CB, Mrs KE attacked his reputation without good cause in documents filed in court proceedings. Mr HO's complaint is advanced on the basis that there was absolutely nothing for the Inspectorate, or anyone else, to be concerned about in relation to his trust account records. However, it is evident from what Mrs KE says of Ms YS's understanding that was not the root of the problem.

[42] The root of the problem was that Ms YS did not understand the transactions and, without further information from Mr HO, Mrs KE could not advance Ms YS's understanding of them or be certain that her own understanding was correct. Mrs KE had obtained some facts from at least two sources, Mr HO and Ms YS/Ms CB, but she was aware she did not have all the facts.

[43] Mrs KE was unable to reconcile the facts she had obtained from her sources, and set out all of the concerns she later incorporated in the report in correspondence to Mr HO before she made the report. Mr HO had the chance to answer those concerns. I do not accept the Committee's comment that Mr HO did not have the opportunity to respond to the concerns advanced by Mrs KE about his record keeping. She put those before him. As far as he was willing to, he answered them in correspondence.

[44] However, Mrs KE was left to face the logical dilemma:

- (a) if what Ms YS/Ms CB said was true, Mr HO's file and trust account records may/must be false; or
- (b) if Mr HO's file and trust account records were true, what Ms YS/Ms CB said may/must be false.

[45] Mrs KE says she did not contravene r 13.8 or its sub-rules. Fundamentally her position is that she:

- (a) did not attack Mr HO's reputation;
- (b) had good cause to make the report;
- (c) did not file a document in court alleging Mr HO's conduct was reprehensible;

- (d) took appropriate steps to ensure that reasonable grounds for making the allegations in the report existed;
- (e) did not make allegations against Mr HO that were unnecessary to the conduct of the litigation;
- (f) took reasonable steps to ensure the allegations set out in the report were accurate; and
- (g) did not compromise Mr HO's privacy.

[46] All of this arises from Ms YS's involvement in property dealings on behalf of her family. Mr HO acted for family members, received money into his trust account, dealt with transactional matters and paid money out. Mr HO was obliged to follow client instructions and to comply with the Lawyers and Conveyancers Act (Trust Account) Regulations 2008.

[47] It is helpful to foreshadow the discussion that follows with the general proposition that trust account records should demonstrably be true, in the sense they should be an accurate record, rather than false, in the sense that the record conveys some sense of uncertainty or inaccuracy. Lawyers' trust accounting obligations are to be strictly complied with. The simple fact that a lawyer has brought a false or inaccurate or somehow ambiguous trust account record into existence could result in a finding of unsatisfactory conduct. Neglecting to take due care with trust account transactions and the records thereof, or worse, deliberately creating a false trust account record, could fall at the upper end of unsatisfactory conduct through to misconduct pursuant to the definitions in the Act.

[48] There is no suggestion in the report that Mr HO deliberately created false trust account records. That would be an accusation of reprehensible conduct. I repeat, no such allegation is made in the report. Mrs KE's evidence is that she understood from the information available to her that her duty to report was engaged, she took advice, made the report and left it to NZLS to decide what to do with the information she had provided. The report sets out the facts as Mrs KE understood them to be. Viewed objectively, there is no evidence of any conduct on the part of Mrs KE in making the report that clearly offends.

[49] However, Mr HO sees the report as an attack on his reputation. While that is an understandable reaction from the perspective that criticism, however moderately expressed, can be difficult to accept, the report cannot objectively be characterised as an attack. It is a report that sets out the facts as Mrs KE understood them to be and

implicitly acknowledges the facts are incomplete. The report was confidential. Mrs KE recorded her concerns in the report and raised them with the regulator.

[50] It is primarily a function of the NZLS Inspectorate to audit lawyers' trust accounts to ensure compliance. The evidence is that Mrs KE's conscience stirred her to consider her duty to report. She took advice from counsel before acting on her concerns. Lawyers do not generally seek to draw attention to other lawyers' trust accounts, just as most lawyers understandably do not seek out the Inspectorate's attention. If a lawyer has reasonable grounds to suspect that another lawyer has been guilty of misconduct, or of unsatisfactory conduct, lawyers should not be discouraged from making confidential reports. Mandatory reporting is a duty not to be taken lightly. There is nothing in the materials that suggests Mrs KE took any of her duties, including her duty to report, lightly.

[51] The report was premised on "suspected misconduct" relating to "false" (as opposed to true) recordings in Mr HO's trust account in respect of three of his former clients. Mrs KE disclosed that she was acting for Ms YS/Ms CB and advised NZLS that she had told them "this was a matter for the Law Society to address". Mrs KE did not advance the report on the basis that Mr HO had made fraudulent or dishonest trust account records. Only that on her clients' instructions, rather than being true, the records were false.

[52] While the concerns raised by Mr HO in his complaint are understandable, they are not valid. Mrs KE's obligations to her client, and to NZLS as regulator, outrank the far more limited obligations Mrs KE owed to Mr HO. There is no difficulty with Mrs KE having made the report. On the evidence, her conduct in that regard was entirely proper. There is no evidence of conduct on Mrs KE's part that clearly offends, and in any event, the reporting was not conduct in litigation so r 13.8 was not engaged.

[53] I move now to consider Mrs KE's conduct in the litigation. Mr HO's position is that while she was engaged in litigation, acting for Ms YS/Ms CB, Mrs KE conveyed the report to the Court, opposing counsel and anyone else who might have had access to it.

[54] Mrs KE points out that the interlocutory applications for discovery were dealt with in chambers rather than open court. Further, Mr HO's concerns about leakage of the report outside the litigation process are unsupported by evidence.

[55] It is clear from Ms YS's second affidavit that the report was not filed on the basis its contents were true. The affidavit and report were filed to demonstrate that Ms YS/Ms CB, and Mrs KE on their behalf, had done all they could to extract

information from Mr HO that may have been relevant to the proceeding. The report did not contain allegations against Mr HO that were to be made or tested in the litigation. Mr HO was not a party to the proceeding. The proceeding was against Ms YS/Ms CB. Mr NE's allegations were against one or both of them.

[56] As Mr HO was not a person involved in the proceeding, Mrs KE could not make allegations against him unless the allegations were necessary to the conduct of the litigation and Mrs KE had taken reasonable steps to ensure the allegations were accurate and, where appropriate, to protect Mr HO's privacy. It bears repeating that Ms YS's second affidavit and the report were not filed on the basis their contents were true. Mrs KE knew, and had told her clients, that the true/false propositions set out in the report were matters for NZLS.

[57] Mrs KE says the Committee misapplied r 13.8. Whether or not Mrs KE is correct, r 13.8 and its sub-rules are not a comfortable fit with the facts.

[58] Mrs KE says the Committee was incorrect in finding that she had not taken appropriate steps to ensure that reasonable grounds existed before she made the allegations set out in the report. I agree. I consider the steps Mrs KE took before she filed the report with NZLS were appropriate and that the grounds were reasonable. That view is based on the starting premise that trust account records are presumptively accurate (true). Viewed in isolation from the files and other trust account records, I find Mr HO's statements difficult to follow. That is not a criticism of Mr HO. It is simply an observation that supports Ms YS's view as a consumer of legal services provided by Mr HO, who says she found the transactions confusing. It is accepted that Ms YS's confusion may well be linked to events that preceded the transactions or of which she had limited or no knowledge, rather than being of Mr HO's making.

[59] Mrs KE says the Committee was wrong to find she had made "a serious allegation of reprehensible conduct". I agree. There is an expectation that trust account reports are accurate, but that expectation is not unassailable. Putting to one side for a moment, the inconsistencies with her clients' instructions, as I read Mrs KE's evidence her view was that the statements Mr HO (or his staff) had prepared contained "multiple and significant inconsistencies", ie. there were internal inconsistencies in Mr HO's statements, as well as inconsistencies with Ms YS/Ms CB's evidence and some doubt over what transactions had occurred in respect of which of Mr HO's files. Combined with the internal inconsistencies, Ms YS's instructions to Mrs KE tended to further undermine the expectation of accuracy.

[60] Mrs KE says the Committee was wrong to find that the report contained an allegation that “brought Mr HO’s character into question”. There is nothing in the report that brings Mr HO’s character into question. Mrs KE identified what might have been errors. People make mistakes. It is too much of a stretch to say that the report brought Mr HO’s character into question.

[61] In pursuit of information from Mr HO, Mrs KE’s view was that she made all reasonable inquiries. It is assumed Mrs KE made enquiries of all of those who had been involved in the transactions. She also wrote to Mr HO several times asking him to provide information she was missing so she could advise her clients. Mr HO declined to provide further information.

[62] It is important not to conflate Mrs KE’s duties to NZLS as regulator, in making the report to NZLS, with her duties to her clients as their lawyer in making the report to NZLS. It is important to emphasise that, because it is clear from the evidence that Mrs KE did not confuse those duties.

[63] Mrs KE had before her information that included instructions from her clients. She had reviewed the files Mr HO had provided and had run up against his refusal to add more to that information. Mrs KE is an experienced lawyer. There is no reason to believe she was not well placed to form an independent view in respect of the statements. Her evidence is that not only did she form such a view, but she also sought independent advice from a barrister to find out whether her colleague shared her view. While Mr HO’s denials were to be expected, there is no reason for this Office to second-guess Mrs KE or the lawyer whose advice she sought.

[64] From the perspective of Mr HO and Mrs KE’s common client, Ms YS/Ms CB, there were observable deficiencies in Mr HO’s trust account records. Ms YS/Ms CB had options which included making an application for non-party discovery against Mr HO themselves. That choice was overtaken by events, because Mr NE was so prompt in filing his applications. Nonetheless, as Mr HO was the lawyer who had given effect to the transactions, it was important for the parties to the litigation to get to the bottom of them, so that any investment that could be traced back to Ms YS could be identified. Mr HO’s trust account records provided evidence that may well have been material to that inquiry.

[65] Having discharged her duty to NZLS as regulator, whether Mr HO’s trust account records were true or false was of no importance to Mrs KE whatsoever. As she recorded in the report, “this was a matter for the Law Society to address”, not her. There is no evidence to contradict that.

[66] In summary, I am not convinced r 13.8 or its sub-rules were engaged. It is not accepted that Mrs KE attacked Mr HO's reputation. It is not accepted that Mrs KE filed a document alleging fraud, dishonesty or any other reprehensible conduct. It is not accepted that any of the propositions advanced by Mrs KE in the report were unnecessary to the conduct of the litigation, or that Mrs KE was not properly mindful of Mr HO's privacy.

[67] Mr HO's part in events was as a lawyer, not as a member of the public whose confidence in the provision of legal services was to be maintained. Mr HO was not a consumer of legal services provided by Mrs KE in need of protection.

[68] Mrs KE acted for Ms YS/Ms CB in the litigation. Her obligations were primarily to the Court, and then to her clients. There is no evidence of conduct on Mrs KE's part that clearly offends and that properly supports a finding of unsatisfactory conduct against Mrs KE, given such a finding is a serious matter.

[69] The decision is therefore reversed. For the reasons discussed above, further action on Mr HO's complaint is not necessary or appropriate.

Decision

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

[71] Pursuant to ss 211(1)(b) and 138(2) of the Lawyers and Conveyancers Act 2006, having regard to all the circumstances of the case, it appears to me that further action on Mr HO's complaint is unnecessary and inappropriate.

DATED this 21st day of June 2019

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 KE as the Applicant
Mr HO as the Respondent
[City] Standards Committee [X]
The New Zealand Law Society