

LCRO 23/2014

CONCERNING

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

AND

CONCERNING

a determination of the XX Standards Committee

BETWEEN

ZA

Applicant

AND

YB

Respondent

DECISION

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

Introduction

[1] Mr [ZA] has applied for a review of a decision by the [XX] Committee dated 10 December 2013 in which his conduct was found to have been unsatisfactory pursuant to s 12(b)(i) and/or (ii) of the Lawyers and Conveyancers Act 2006 (the Act). Mr [ZA] was censured and ordered to pay costs to the New Zealand Law Society (NZLS) of \$750. On review he challenges the finding of unsatisfactory conduct and the consequential orders.

Background

[2] In early December 2012 Ms [RI] instructed lawyers in practice under Mr [ZA]'s supervision in respect of a claim (the claim) to the Weathertight Homes Tribunal (WHT). The claim was at a reasonably advanced stage. The lawyers sent an authority to Mr [YB] seeking to uplift Ms [RI]'s file. Mr [YB] was instructed jointly by Ms [RI] and others.

[3] Mr [ZA] says that when a client provides a written authority to uplift their file from the client's former lawyer, his chambers operate according to a two-stage policy (the policy). Step one of the policy, Mr [ZA] says, is to ask nicely. That involves a request of the former lawyer for the file, accompanied by a standard form of authority signed by Mr [ZA]'s client. If step one results in the file being made available without undue delay, it is not necessary to move to step two.

[4] Step two of the policy, Mr [ZA] says, may be necessary if the former lawyer does not act upon the written request to uplift documents without undue delay. Step two is to make a complaint to the NZLS on the basis that the former lawyer has contravened rule 4.4.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the rules).

[5] Step two was taken in the present matter, with complaint very promptly being laid against Mr [YB].

[6] At the review hearing Mr [ZA] clarified that the policy is not quite as simple as might appear from the description of the steps taken that was available to the Standards Committee. Mr [ZA] says that a measure of judgement is to be exercised before complaint is made under step two of the policy. That is because rule 4.4.1 calls for consideration to be given in any particular matter to whether any delay may be "undue". The timing of step two depends on the assessment of when, in any particular case, the delay has reached the point of being "undue". Mr [ZA] says he generally has little tolerance for delay when he receives new instructions, and says expediting access to the file, by means of step two if necessary, is a pragmatic and practical approach to acting for a new client. The policy also circumvents any delays that might arise from the involvement of an instructing solicitor.

[7] In the circumstances of the present complaint the task of managing the uplift of the file in question fell to Ms [TG] and Mr [UF]. As Mr [ZA] describes the position, Mr [UF] was a junior lawyer. Ms [TG], depending on perspective, can be described either as more senior or less junior, than Mr [UF]. Either way, there is no evidence that she was in practice on her own account and Mr [ZA] appears to accept he was professionally responsible for competently supervising and managing Ms [TG] and Mr [UF].

[8] The policy forms part of the supervision and management arrangements Mr [ZA] had in place at the time. The availability of a standard form of authority also forms part of those arrangements.

[9] On this occasion the authority, apparently amended by Mr [UF], did not follow the standard form. Mr [ZA] is unable to account for that inconsistency. The standard form is more comprehensive.

[10] The authority was headed "Authority to Act", dated 4 December 2012, and says:

I, Ms [RI], authorise [ZA] to act for me in regards to my civil matters.

(the Authority to Act).

[11] It appears there was some confusion about the urgency of uplifting the file. Mr [YB] was aware the WHT had extended the deadline for briefs of evidence to be filed. It appears he had advised Ms [RI] that an extension had been granted. However, that information appears not to have made its way to Mr [ZA]'s chambers.

[12] Charged with responsibility for uplifting the file from Mr [YB], and in possession of the two-day old authority, on Thursday 6 December 2012 Mr [UF] set about the task of uplifting the file from Mr [YB], embarking on step one of the policy and pursuing that with some vigour, given he appears to have believed the deadline for filing briefs was only eight days away.

[13] Mr [UF] started by writing to Mr [YB] on [SH Law] letterhead thus:

RE: UPLIFT OF FILE FOR [Ms RI]

With reference to the above, we have recently received instructions to act for Ms [RI]. Please find enclosed our authority to act.

Due to the urgent attention which the case requires and in light of witness statements which must be completed by next week, we wish to uplift Ms [RI]'s files today at the earliest opportunity. It would be much appreciated if you would please be so kind as to contact us regarding facilitating the uplift of Ms [RI]'s files at your earliest convenience.

Thank you very much for your assistance and we look forward to hearing from you soon.

[14] The letter was signed by "[X UF]", gave his email address as [XUF@email], but included no indication of Mr [UF]'s status, designation or whether he was a lawyer.

It is pertinent to note that Mr [UF] was in fact a lawyer, but that his name did not appear on the register of lawyers held by NZLS as “[X]”.

[15] Mr [UF] attached the authority and despatched the letter to Mr [YB]’s office.

[16] Mr [YB]’s administrator, Ms [QJ],¹ then describes having received several phone calls from Mr [UF] after his initial fax was received at about 10:07am on 6 December 2012. She says he phoned her to check she had received his letter and its attachment, and pressed her several times during the day over the release of the file. Ms [QJ] says she explained to Mr [UF] that Mr [YB] was otherwise engaged, and would attend to Mr [UF]’s correspondence when he was free to do so. She repeated the essence of that message several times through the day, having checked with Mr [YB], who says he was fully engaged in preparing documents and drafting submissions to meet a rapidly approaching High Court filing deadline.

[17] At around 11am Mr [ZA] sent an email to Mr [YB] referring, amongst other things, to Mr [YB]’s obligations under rules “4.4, 4.4.1, 10 and 10.2 in relation to transfer of files, respect for other practitioners and communications with clients represented by other legal counsel”. Mr [ZA] did not repeat the request for the file, but indicated he was carrying out an investigation into whether Mr [YB] had approached Ms [RI] with a view to persuading her not to change counsel, Mr [YB] having contacted Ms [RI] shortly after receiving Mr [UF]’s letter attaching the authority.

[18] It is relevant to note at this point that Mr [YB] had been acting in the proceeding on joint instructions from Ms [RI] and her husband Mr [PK] and that they had separated. Mr [PK] at least was separately represented in respect of relationship property disputes, to which the claim had some relevance. It is also relevant to note that Mr [YB] had received a settlement offer made to Ms [RI] and Mr [PK] the day after Ms [RI] signed the authority, and the day before Mr [UF] emailed the letter and authority to him. Shortly after becoming aware of Mr [UF]’s correspondence Mr [YB] sent a letter by email advising Ms [RI] and Mr [PK] he had received the settlement offer, inviting reconsideration of the change of representation, and suggesting a meeting “with your proposed new lawyer present” and an interpreter to assist communications.

[19] When Mr [YB] had not disgorged the file by the morning of Thursday 7 December 2012, Mr [ZA] sent an email to NZLS lodging a formal complaint about

¹ File Note, [QJ], 7 December 2012.

Mr [YB]'s conduct. Mr [ZA]'s complaint referred incorrectly to the earlier deadline for filing briefs (which by then WHT had extended), and expressed concern about Mr [YB] not having responded to Mr [UF]'s repeated enquiries and not releasing the file in a timely way.

[20] Mr [YB] wrote to Mr [UF] on 7 December 2012 explaining his position, and was critical of Mr [UF] for his persistence in attempting to uplift the file given the extended deadline for filing. Mr [YB] said he considered the "request for immediate uplift was unwarranted and misleading", describing Mr [UF]'s phone calls as harassing, unreasonable, disrespectful, discourteous and in contravention of rule 10.1. Mr [YB] said he would make a professional conduct complaint and concluded with the view that replying to Mr [UF] within one day was reasonable.

[21] Mr [YB] continued to progress towards releasing the file to Mr [UF].

[22] Alongside the complaints process, Mr [ZA] and his team continued to press Mr [YB]'s office to release Ms [RI]'s file.

[23] On 10 December 2012 Mr [YB] wrote to NZLS referring to the complaint Mr [ZA] had made. Mr [YB] defended his actions and set out a number of concerns arising from the particular facts and the uplift process. He described Mr [ZA]'s complaint as intimidation and an abuse of the complaints procedure and expressed the view that matters could have been handled in a more reasonable way. Mr [YB] proposed a way forward to advance the clients' positions and attached correspondence and a memo from Ms [QJ].

[24] Further correspondence followed, then on the morning of 12 December 2012 Mr [YB] phoned Mr [ZA]'s [Firm], and advised that the files were ready to be collected.²

Standards Committee Process

[25] NZLS' initial response to the parties' correspondence was to suggest mediation pursuant to s 137(1)(b) of the Act.

[26] Mr [ZA] did not accept that Mr [YB] had laid a valid complaint against him, but agreed to mediation.

² Email [QJ] to [TG] (12 December 2012 at 12:20pm).

[27] When Mr [YB] did not confirm his willingness to engage in mediation, the Committee decided to inquire into the complaint, and on 3 May 2013 invited Mr [YB] to particularise his complaint to better define the scope of its enquiry by 20 May.

[28] Mr [YB] did not respond.

[29] Mr [ZA] raised a series of procedural issues including that the complaint did not meet the minimum criteria to be entertained as a complaint. Mr [ZA] expressed the view that the Committee asking for further information is evidence that it was biased against him. Mr [ZA] also took issue with Mr [YB] not responding to the Committee's request that he particularise his complaint.

[30] All of those materials were forwarded to Mr [YB] and on 6 June 2013 he wrote to NZLS setting out his concerns in greater detail, attaching his letter of 10 December, other correspondence and file notes in support.

[31] Mr [YB] set out the facts as he had come to know them after making enquiries of his receptionist, Ms [QJ], and alleged contraventions of rules 14.4, 10.1, 11.3, 11.3, 10.1, 2.3.

[32] The Committee considered the information provided and determined the complaints on the basis that unnecessarily escalating the matter to a complaint within 24 hours of requesting the file, without awaiting a substantial response from Mr [YB], constituted unsatisfactory conduct pursuant to s 12(b)(i) and/or (ii) of the Act. The Committee took no further action in respect of the other aspects of concern to Mr [YB], but censured Mr [ZA] and ordered him to pay costs of \$750 to NZLS.

[33] Mr [ZA] objected to that determination and applied for a review.

Review Application

[34] Mr [ZA] says the decision should be reversed, and no further action should be taken against him on the basis of seven separate review grounds:

- (a) Mr [YB]'s purported complaint was frivolous, vexatious and/or not made in good faith, so the Committee should have determined it by the exercise of its discretion under s 138(1)(c);

- (b) The Committee made a fundamental error of fact by inferring from Mr [ZA]'s involvement in seeking to uplift the file that he was providing regulated services when he made a complaint about Mr [YB]'s conduct, because he made the complaint under his own name and was not acting on his client's instructions;
- (c) As Mr [ZA] was not providing regulated services, he considers the Committee lacked jurisdiction under s 12(b) over his conduct;
- (d) Mr [ZA]'s complaint about Mr [YB]'s conduct was legitimate and not improper, so the Committee erred in law by finding his complaint was improper;
- (e) The Committee lacked authority for the proposition that his conduct in laying a complaint about Mr [YB]'s conduct was premature, and failed to take into account "looming deadlines, urgent client instructions" and Mr [YB]'s "unhelpful approach";
- (f) The Committee wrongly concluded Mr [ZA]'s conduct was sufficiently serious to warrant disciplinary intervention;
- (g) The disciplinary response of ordering costs and censuring Mr [ZA] was disproportionate.

Nature and Scope of Review

[35] 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.

[36] 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.

[37] 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.

Review Hearing

[38] Mr [ZA] attended an applicant only review hearing on 23 October 2015. Mr [YB] was not required to attend and the review hearing proceeded in his absence.

Recusal Application

[39] Mr [ZA] requested my recusal from determining this review. For the reasons set out in the decision to which this decision is attached, bearing the same date as this decision, Mr [ZA]'s request is declined.

Analysis of Review Grounds

⁴ [REDACTED]

[40] I have considered each of the grounds for review set out by Mr [ZA]. Of those, the most significant point is the concern set out in his fifth ground of review that the Committee did not place sufficient emphasis on “looming deadlines, urgent client instructions”.

[41] For reasons explained in greater detail elsewhere,⁵ I do not consider Mr [YB]’s approach is properly described as unhelpful. Nor do I consider the Committee had grounds to dismiss his concerns as frivolous or vexatious. There is no reason to believe there was any element of bad faith in raising concerns as he did on 10 December 2012. As Mr [ZA] accepted at the review hearing, the file uplift could have been better managed, and there are lessons to be learned from it. Those comments address the first ground and the criticisms of Mr [YB] in the fifth and seventh ground.

[42] As to the second and third grounds, which relate to whether Mr [ZA] was providing regulated services or not, the High Court clarified the scope of regulated services in *Orlov*. There is no gap between personal and professional conduct. Personal conduct is unconnected with the provision of regulated services. On the present facts, Mr [ZA]’s conduct was closely connected with the provision of regulated services because, as he says, the complaint was made at step two of his policy to uplift client files. In his personal capacity he has no role in uplifting client files. His conduct must therefore be assessed according to the standards of professional conduct.

[43] It is not necessary to address the fourth, sixth and seventh grounds because this review is determined on the basis that Mr [ZA]’s conduct was not unsatisfactory, for the reasons discussed below, so the consequential orders fall away.

Review Issue

[44] The question on review is whether, in all the circumstances, Mr [ZA]’s conduct in laying a complaint fell within the definition of unsatisfactory conduct in s 12(b)(i) or (ii) of the Act.

Analysis

⁵ LCRO [REDACTED]

[45] Mr [ZA]'s chambers received instructions to act for Ms [RI] in the claim. No explanation has been provided for the delay of two days between the authority being signed on 4 December 2012 and Mr [UF] providing that to Mr [YB] on 6 December 2012. There is no reason to believe anyone at Mr [ZA]'s chambers was responsible for that delay, and no evidence of the circumstances in which the authority was signed.

[46] Given the alacrity with which Mr [UF] approached the task of uplifting the file from Mr [YB], I take it that once the task of uplifting the file fell to Mr [ZA]'s chambers it was seized upon and attended to diligently. That is consistent with the obligation to provide regulated services to Ms [RI] in a timely manner consistent with the terms of their retainer with her and their duty to take reasonable care that arises under rule 3.

[47] Without the files, Mr [ZA] could not know the scope of the task before him. Knowing the claim was at an advanced stage, it is reasonable to assume there was a substantial amount of paperwork to come to grips with. Mr [ZA] says Ms [RI]'s instructions were that matters were urgent. The full scope of those instructions has not been aired in the complaint and review process, nor should they be, given Ms [RI]'s instructions were no longer joint.

[48] Having been instructed, it was incumbent on Mr [ZA] to get the files and get on with the job Ms [RI] had instructed him to do. He was entitled to rely on Ms [RI]'s instruction that briefs were to be filed by 14 December 2012.

[49] Matters were not so straight forward for Mr [YB]. His reactions were understandable in circumstances where he was acting for more than one party whose interests were diverging, and who had a different appreciation of the deadline. An extra week can make a big difference to the amount of work that can be done.

[50] On one view, Mr [ZA]'s swift invocation of the complaints process could be seen as precipitate. The escalation to complaint, and the pressure applied by that process could be seen as disproportionate, and having the effect of compromising Mr [YB]'s ability to get on with the job of releasing the file without undue delay. That is the view the Committee formed.

[51] The scope of Mr [ZA]'s complaint expanded as Mr [YB] took steps to manage the transition of Ms [RI]'s file. I doubt Mr [YB]'s ability to respond was assisted by the ambiguity of the authority, uncertainty about whether Mr [UF] was a solicitor, or if and how he would be paid. I also doubt Mr [YB] was assisted by Mr [ZA] telling him he was

carrying out an investigation into whether Mr [YB] had approached Ms [RI] with a view to persuading her not to change counsel.

[52] However, there is no challenge to the fact that Ms [RI], had instructed Mr [ZA]. There is no reason Mr [YB]'s concerns should matter to Mr [ZA]. Mr [ZA]'s obligations were to the WHT and Ms [RI]. Any difficulties Mr [YB] had in transitioning the file to Mr [ZA]'s chambers could only slow Mr [ZA] down.

[53] The alternative view to that taken by the Committee is that having been instructed, Mr [ZA] was under an obligation to Ms [RI] to seize conduct of her matter, and in particular to act in a timely manner consistent with the terms of his retainer. Mr [ZA] was obliged to consider his obligations to Ms [RI] over any professional obligation he may have owed to Mr [YB]. The lawyers' different understandings of the urgency of filing the client's briefs appears to have been at the root of the conduct about which Mr [YB] laid complaint.

[54] I had the advantage of hearing from Mr [ZA] in person at the review hearing. He accepted that obtaining the file could have been managed differently at his end.

[55] I share the Committee's view that the job of uplifting a file can be delegated to a junior lawyer such as Mr [UF]. Mr [ZA] cannot account for Mr [UF]'s apparent failure to follow the protocols Mr [ZA] had in place, but of greater significance is Mr [ZA]'s confirmation that before complaint is laid at step two of the process, an exercise of professional judgement is called for.

[56] The question for Mr [ZA]'s team was whether delay of approaching 24 hours by Mr [YB] was "undue". They could have been wrong, but Mr [ZA] says the judgement was exercised before complaint was made. Although it may have appeared at the Committee stage that complaint was made as a simple product of an unyielding application of a strict policy, and that may well be more problematic, that is not what Mr [ZA] says occurred.

[57] As it transpired, the making of the complaint was an unnecessary escalation of the matter, but, as the Committee noted, at the time, Mr [ZA] could not have known whether it would be necessary or not. The Committee's view was that laying the complaint was professionally improper. If Mr [ZA] had laid the complaint the same day the request was made, I might have agreed. But he did not. He waited, albeit only over night, but he did wait. And Ms [RI]'s instructions, Mr [ZA] says, were to act with

urgency. He was obliged to act in a manner that was consistent with those instructions.

[58] In making complaint Mr [ZA]'s position relies on there being a substantial file and not a lot of time to come to grips with the material in it. That being the case, while he could have waited for a substantive response from Mr [YB], doing so might have compromised Ms [RI]'s interests. There is little evidence of what her instructions were. The communication difficulties that might arise from English not apparently being Ms [RI]'s first language may also have added to the urgency for Mr [ZA] and his team.

[59] What is clear is that Mr [ZA]'s obligations were primarily to the WHT and Ms [RI], rather than to Mr [YB]. People rarely enjoy being put under pressure, but that was part of what Mr [ZA] appears to have been instructed to do, and he did it well. Whether the pressure he placed on Mr [YB] resulted in Mr [ZA] receiving the file any sooner than he otherwise would have is unknowable. He could not know what objections Mr [YB] might raise to the uplift request, legitimate or otherwise. He exercised his professional judgement as a lawyer. I am not convinced Mr [ZA] was wrong, but if he was, there is no rule that says lawyers must always be right: to err is human.

[60] There is room for a range of views among members of the profession, and I am conscious that the Committee is constituted of a number of lawyers. However, I do not consider that Mr [ZA]'s conduct was so unsupportable as to warrant a disciplinary response. It follows that I consider Mr [ZA]'s conduct does not fall within the definition of unsatisfactory conduct in s 12(b)(i) or (ii), or otherwise. He was acting in what he considered to be his client's best interests.

[61] I agree with the Committee's decision that further action in respect of the other aspects of Mr [YB]'s complaint was not necessary or appropriate.

[62] In the circumstances the decision that Mr [ZA]'s conduct was unsatisfactory is reversed. The consequential orders fall away. The balance of the decision is confirmed.

Decision

[63] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006:

- (a) The decision that Mr [ZA]'s conduct was unsatisfactory is reversed; and

- (b) The determination that further action is not necessary or appropriate is confirmed.

DATED this 31st day of August 2016

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:

Mr [ZA] as the Applicant
Mr [YB] as the Respondent
Ms [VE] as a Related Party
The [XX] Standards Committee
The New Zealand Law Society