

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

MF

Applicant

AND

PM AND SL

Respondents

DECISION

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

Introduction

[1] Ms MF has applied for a review of a decision by the [City] Standards Committee [X] to take no further action in respect of her complaints concerning the conduct of Mr PM and Ms SL.

Background

[2] In 2005, Mr PM was retained by Ms MF to act for her in respect to a matter that was before the Family Court.

[3] Ms MF was dissatisfied with the service she received from Mr PM. After the retainer was terminated, Mr PM obtained judgment for his outstanding fees. Ms MF endeavoured to challenge that judgment through a number of applications to the Court. She was unsuccessful with those applications.

[4] In 2012, Ms MF filed the first of a number of complaints against Mr PM. None of those complaints were upheld by the Standards Committees tasked with inquiring into the complaints.

[5] Those Committee's decisions have been the subject of review by Ms MF to the Legal Complaints Review Office (LCRO).

[6] It is difficult to consider these reviews in isolation. To a degree, the various reviews traverse similar ground.

[7] To the extent that the subject of this review raises a discrete issue, the review concerns complaint made by Ms MF that Mr PM had instructed a lawyer from his office (Ms SL), to serve proceedings on her, with deliberate intent to cause her embarrassment.

The complaint and the Standards Committee decision

[8] Ms MF lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on [Date] The substance of her complaint was that:

- (a) On [Date] she was conducting an open home.
- (b) On arrival at the property, she observed Ms SL leaving the vendor's home. Ms SL was carrying some papers.
- (a) Ms SL advised Ms MF that she had papers to serve on Ms MF.
- (b) She raised objection to Ms SL attempting to serve her with papers, whilst she was engaged in conducting her business.
- (c) This was not the first occasion that Mr PM had arranged for Ms SL to serve papers on Ms MF whilst Ms MF was working. On [earlier date], Ms SL had attended an auction at which Ms MF was selling a property and endeavoured to serve her with papers.
- (d) The incidents had compromised her professionally and had caused her considerable embarrassment.

[9] In providing response to the complaint, Mr PM submitted that:

- (a) Ms MF had been unsuccessful in pursuing several court actions in which she had endeavoured to overturn a judgment Mr PM had secured for his outstanding fees.
- (b) Ms MF had been deliberately elusive and had taken steps to avoid service.

- (c) Ms MF had refused to accept service of documents by email. He had no option but to effect service of documents by means of personal service.
- (d) There was nothing inherently objectionable in serving Ms MF whilst she was engaged in work. If Ms MF had been prepared to simply accept service without raising objection, the service of the documents would have been able to be achieved without fuss.

[10] The Standards Committee distilled the issues to be considered as follows:

- (a) Did Mr PM arrange for documents to be served on Ms MF in a way that caused unnecessary embarrassment or damage to Ms MF's reputation, interests or occupation?
- (b) Did Ms SL serve documents on Ms MF in a way that caused unnecessary embarrassment or damage to Ms MF's reputation, interest or occupation?

[11] The Standards Committee delivered its decision on 23 October 2013.

[12] The Committee determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) that no further action on the complaint was necessary or appropriate.

[13] In reaching that decision the Committee determined that:

- (a) Previous Committees had considered other complaints pursued by Ms MF against Mr PM.
- (b) The Committee's focus for this particular inquiry was on complaint that Mr PM (and Ms SL) had served documents in an inappropriate manner.
- (c) The Committee considered that there was nothing inherently objectionable in serving documents on Ms MF whilst she was engaged in her work.
- (d) A real estate agent being given copies of documents at an open home would in the normal course of events, present as quite unremarkable, and an event that would go unnoticed.
- (e) All that was required of Ms MF was a simple acceptance of the documents.

Application for review

[14] Ms MF filed an application for review on 29 November 2013.

[15] She submits that:

- (a) The Committee erred in failing to find a breach of conduct (this ground inferred by virtue of her repetition of the complaint).
- (b) The Committee failed to acknowledge that her previous complaints (whilst not upheld by the Committees who inquired into them), were currently the subject of review before the office of the LCRO, her challenge then to Mr PM's account still to be determined.
- (c) The Committee failed to take sufficient account of the fact that the Court had dismissed Mr PM's application for a bankruptcy notice (argument being that if there was no legitimate basis to issue the notice, the concerns arising from service of that notice would not have arisen).

[16] By way of remedy, Ms MF sought:

- (a) A penalty to be imposed for a breach of rule 2.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
- (b) Damages and compensation for stress and humiliation.

[17] Mr PM provided a response to the complaint on 6 December 2013 in which he stated:

I had hoped that the decision of the [City] Standards Committee [X] might represent a final decision on what has been a series of complaints to the Law Society then received by the Legal Complaints Review Officer and a series of High Court decisions in the last few years, all declining Ms MF-D's complaints or applications or memoranda and in the case of the High Court proceedings issuing costs orders.

Hearing

[18] A hearing, attended by both parties was convened on 25 January 2017.

[19] Ms MF amplified on her written submissions at hearing. She submitted that:

- (a) Ms SL had adopted an aggressive manner when serving the papers.
- (b) Mr PM knew that her office was in close proximity to his, and could have served the papers at her office.
- (c) Mr PM had deliberately arranged to have the papers served whilst she was managing an open home in order to maximise potential embarrassment to her.
- (d) Mr PM was intent on damaging her business and reputation.
- (e) She refused to accept service by email because of problems she had experienced with her email being hacked.

[20] Ms SL submitted that:

- (a) Ms MF had a history of endeavouring to avoid service.
- (b) Ms MF had refused to accept service by email.
- (c) She had arrived early at the open home in order to complete the service before the open home got underway.
- (d) She had entered the home and spoken to the vendor, but only to make inquiry as to Ms MF's whereabouts.
- (e) Her discussions with Ms MF took place outside of the vendor's home.
- (f) On introducing herself to Ms MF, Ms MF responded aggressively, and refused to accept service of the papers.
- (g) Ms MF commenced taking photos on her mobile phone.
- (h) What could have been a quite uneventful and straightforward transaction, was complicated by Ms MF's aggressive overreaction.

[21] Mr PM submitted that:

- (a) Attempts to serve Ms MF at her office had been unsuccessful.
- (b) Ms MF had a history of avoiding service.
- (c) Ms MF had refused to accept service by email.

- (d) It had not been his intention to cause Ms MF embarrassment.
- (e) Ms MF's overreaction and aggressive response had complicated what should have been a straightforward transaction.

Nature and Scope of Review

[22] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:¹

... 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.

[23] More recently, the High Court has described a review by this Office in the following way:²

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.

[24] 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.

¹ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

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

Analysis

[25] Three matters need to be addressed:

- (a) Does the Court's cost decision on Mr PM's application as judgment creditor support Ms MF's contention that the application should not have been made, her argument being that if the application had not been made, there would have been no need to serve the application?
- (b) Does the fact that Ms MF has review applications before the LCRO which seek to challenge the fee charged, and the adequacy of the services provided by Mr PM, provide grounds to challenge Mr PM's decision to serve Ms MF with court proceedings?
- (c) Did Mr PM's attempts (through Ms SL) to serve Ms MF with proceedings at her place of work, constitute a breach of the lawyer's obligations, such as would establish grounds for an adverse conduct finding?

Court's Costs decision

[26] Ms MF argues that Mr PM did not have proper grounds to issue a bankruptcy notice. She suffered, she says, considerable embarrassment as a consequence of Mr PM attempting to serve a notice for which there was no legitimate basis. In advancing this argument, Ms MF places reliance on the costs decision of Associate Judge [X]³

[27] I do not agree with Ms MF's submission that the costs decision issued indicates that the Court had concluded that there was no merit in Mr PM's application.

[28] I note that at [7] of the judgment the Judge records that:

Given that the jurisdictional requirements existed, the judgment creditor was prima facie entitled to make an application for an order of adjudication. There is no substance to the judgment debtor's argument that the judgment creditor was not legally entitled to commence bankruptcy proceedings.

[29] Further, the Court records that the substantive matters were settled by consent (Ms MF agreeing to pay the outstanding judgment debts without the application proceeding to a hearing) and that the judgment creditor had "at first glance, acted reasonably".⁴

³ *PMv MF-D* [2013] 2907.

⁴ At [8].

[30] The only issue of substance that the Court considered had been raised by Ms MF, was the question as to whether Mr PM had knowledge of her solvency. The Court concluded that it “[did] not accept that the judgment creditor necessarily had knowledge of the judgment debtor’s solvency”,⁵ it being a possibility that he did not.

[31] It was clearly not the case that the Court had concluded that there were no legitimate grounds for pursuing the application.

Previous complaints being subject to active reviews

[32] I agree with the Standards Committee that the matters raised by this complaint are discrete, and fall properly to be considered as a separate complaint, rather than as an adjunct to the broader raft of complaints that have been progressed by Ms MF.

Did the attempts to serve Ms MF at her place of work raise conduct issues?

[33] It was Ms SL who attempted to serve Ms MF. It is clear however, that she did so on the instructions of her employer, Mr PM. Whilst there is not, to the best of my knowledge, any specific prohibition on a lawyer serving documents on behalf of their employer, in my view, a decision to do so should be approached with a degree of caution, and an acute awareness as to whether the decision to do so has potential to place the employee in a potentially compromising situation. This is particularly so, when the Conduct Rule that may be engaged, is considered.

[34] Rule 2.3 provides that lawyers must use legal processes only for proper purposes. A lawyer must not use, or knowingly assist in using, the law or legal processes for the purpose of causing unnecessary embarrassment, distress, or inconvenience to another person’s reputation, interests, or occupation. It is important to note that the rule is breached, if it is determined that the lawyer set out with specific “purpose” to cause unnecessary embarrassment, distress or inconvenience, and that the degree of aggravation caused, must be seen to have approached the “unnecessary”. Significantly, the footnote to Rule 2.3 which provides example of circumstances in which a breach of the Rule may occur, notes that serving documents in a way that causes unnecessary distress may amount to conduct that would constitute a breach of the Rule.

[35] This rule precisely addresses the issue which is at the nub of Ms MF’s complaint. She alleges that in endeavouring to serve her with documents, firstly at an

⁵ At [13].

auction, and secondly at an open home she was managing, the lawyers were intending to cause her embarrassment and to compromise her reputation.

[36] If a lawyer elects to serve documents in circumstances where the act of service has potential to cause unnecessary embarrassment to the recipient, the lawyer puts themselves at risk of breaching the Conduct Rule.

[37] That being said, being served with court documents is a situation which, for many people, will inevitably involve a degree of discomfort and that cannot be avoided. It would be unrealistic to adopt an unduly sensitive or cautionary approach. It is an inevitable result of court processes that parties are required to be served with documents.

[38] Any potential for a lawyer (or their employee) to be compromised would be clearly avoided by the lawyer instructing a process server to serve the documents. That is the approach most commonly adopted.

[39] I am uncertain as to why Mr PM elected to instruct his employee to serve the documents rather than to put some distance between himself by engaging a process server. If he had elected to do so, argument that he had set out with deliberate intent to embarrass Ms MF could gain little traction.

[40] It is not the case that there is a prohibition on serving parties at their place of work. On occasions, parties take strenuous steps to avoid service, and an unreasonable sensitivity to the consequences arising from service would materially impede the ability to efficiently and effectively carry out the necessary process of effecting service of court documents.

[41] Ms MF references two occasions when Ms SL had endeavoured to serve her whilst she was working, but it is the attempt to serve her at the open home on which she places most emphasis. Her account of what happened is comprehensive. She provides photographs to support her argument as to where both she and Ms SL were positioned when the exchange took place, with purpose to support her allegation that she was extraordinarily compromised by the public exposure.

[42] The Committee considered that there was nothing inherently objectionable in serving a person at their place of work, and to a certain extent I agree with that but not in its totality.

[43] Ms SL entered Ms MF's client's home. She was aware that an open home was being run, but would have had no knowledge as to whether the vendor was at the

property, or what the arrangements for the open home were. In my view, this was unnecessarily intrusive. On being advised that Ms MF had not arrived, Ms SL left the home. She met Ms MF on the driveway, whilst heading back to her car. Ms MF and Ms SL moved out on to the road.

[44] Ms MF argues that the exchange between the two was observed by others, and in ways unspecified, caused disruption to the open home.

[45] I am satisfied that the exchanges between Ms MF and Ms SL took place on the driveway and road.

[46] Whilst Ms MF endeavours through the production of photographic evidence to establish that the encounter between herself and Ms SL could have been witnessed by other parties (in particular her vendor) there is no evidence to support her allegation that her sale was compromised or her vendor embarrassed by the exchange that took place between herself and Ms SL. I think it highly probable that her vendor (who she describes as elderly) was quite oblivious to the discussion that was taking place on the road outside her property.

[47] In my view, there was an element of risk in Mr PM instructing Ms SL to serve papers on Ms MF whilst Ms MF was conducting her open home. Having his staff solicitor serve papers in such a public forum and in circumstances where there was genuine potential for Ms MF to be unnecessarily embarrassed, put him (and his staff solicitor) at risk of breaching his obligation to ensure that legal processes were not used for the purpose of causing unnecessary embarrassment or distress to another person's reputation.

[48] I am not however persuaded, having given careful consideration to the lengthy history between the parties (of which I have a thorough understanding having now considered five reviews engaging these parties) and the facts of this particular case, that a disciplinary response is merited.

[49] I am not convinced that Mr PM set out with deliberate purpose to organise service of the documents in a manner which had potential to cause unnecessary distress to Ms MF. He says that he had made a number of efforts to serve Ms MF without success. He had formed a view that Ms MF had on occasions deliberately attempted to avoid service. He says that offers to have documents served by email were rejected. He argues that Ms MF was resistant to attempts to communicate with her. Whilst Ms MF understandably has a different view, and it may have been prudent of Mr PM to have given closer thought to the potential consequences of having his staff

solicitor serve Ms MF at her open home, I am not satisfied that Mr PM set out with deliberate purpose to cause unnecessary distress to Ms MF.

[50] I also give particular weight to the evidence of Ms SL. Ms SL presented at hearing as being particularly attentive to the need to ensure that service of the documents was completed in an unobtrusive fashion. She presented her evidence in a measured and careful manner, and I think it highly probable that the way in which she presented that evidence was properly reflective of the way in which she carries out her duties as a lawyer. I think it unlikely that Ms SL would, as alleged by Ms MF, have comported herself in an aggressive fashion when speaking with Ms MF.

[51] I consider it relevant that the exchange between Ms MF and Ms SL took place on the road. Whilst Ms MF argues that this situation was highly compromising for her, in my view she overstates the case. Her decision for example to commence taking photos of Ms SL was an action which created possibility of attention being drawn to the situation.

[52] Whilst I have reservations about Ms SL entering the vendor's home, I accept Ms SL's evidence that she had only entered the home to make inquiry as to Ms MF's whereabouts, and in making that inquiry, she gave no indication as to the reason for her visit.

[53] I agree with the Committee that Ms MF's apparent refusal to accept service of the papers likely aggravated rather than ameliorated the situation. Her refusal to accept the documents complicated what could have been a simple resolution. The potential for embarrassment to Ms MF would have been considerably reduced if she had simply accepted service of the papers without objection or fuss.

[54] Having given the matter careful consideration, I conclude that no disciplinary issues arise as a consequence of the decision made to serve Ms MF.

[55] I see no grounds which could persuade me to depart from the Committee's decision.

Decision

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

DATED this 2nd day of February 2017

R 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:

Ms MF as the Applicant
Mr PM and Ms SL as the Respondents
[City] Standards Committee [X]
The New Zealand Law Society