

CONCERNING

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

AND

CONCERNING

a determination of the Standards Committee

BETWEEN

[Company A] / HJ Applicants

AND

IK

Respondent

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

Introduction

[1] The applicants have applied for a review of the decision of the Standards Committee to take no further action in respect of their complaints against Ms IK. Throughout this decision, I will refer to the applicants as “Mr HJ” or “the applicants”.

[2] Ms IK is a barrister who was instructed to act for Mr and Mrs XX. Mr and Mrs XX purchased land on which they intended to build, from [Company A]. The shares in [Company A] were owned by Mr HJ and his wife in their own names and as trustees. Ms DB, of the firm [Law Firm], acted for Mr HJ.

[3] A dispute arose between Mr and Mrs XX and Mr HJ concerning fill which had been deposited on the property which affected Mr and Mrs XX’s ability to build on the property.

[4] The relationship between Mr HJ and Mr and Mrs XX degenerated to the extent that trespass notices were served by each of them on the other and ultimately Mr and

Mrs XX issued proceedings against [Company A], Mr HJ, and the trustees of the HJ Family Trust.

[5] The complaint by Mr HJ arises out of correspondence from Ms IK to Ms DB, and the content of the pleadings prepared by Ms IK.

The complaint and the Standards Committee decision

[6] The Standards Committee summarised the complaint in the following way:¹

- a. By her letter of 27 August 2013 Ms IK made allegations against Mr HJ that were defamatory and/or an attack on his reputation without cause, and which were published to independent parties.
- b. Ms IK filed documents in court alleging fraud, dishonesty and other reprehensible conduct by Mr HJ and/or [Company A] in circumstances that breached rules 13.8.1 and 13.8.2 of [the Conduct and Client Care Rules].²
- c. That, in naming Mr HJ and the trustees as defendants, Ms IK breached rule 2.3 of [the Conduct and Client Care Rules].
- d. Ms IK threatened to make a complaint about [Ms DB's firm] to the NZLS if it did not retract certain comments.

[7] In response, Ms IK denied the allegations and provided comprehensive submissions including the following:³

- The “independent (unrelated) party” to whom Ms IK had sent a copy of her letter, was an engineer instructed by her clients.
- No exception had been taken to her letter for 12 months and Mr HJ's [City] solicitors did not take offence at the content of the letter.
- Reasonable grounds existed for the allegations made in her letter and incorporated into the pleadings.
- She took exception to the comments made in correspondence that implied she had “deliberately filed a false affidavit and ... had lied to and misled the Court through the evidence [she] prepared and that [she] was lying to [the solicitor] concerning the existence of information on [her clients'] previous lawyer's file, and that [she] was claiming privilege improperly”.

¹ Standards Committee determination 12 May 2015 at [16].

² Lawyers and Conveyancers Act (Lawyers:Conduct and Client Care) Rules 2008.

³ IK letter to Lawyers Complaints Service (23 September 2014) at 12-13.

[8] The Committee made an initial determination that it would take no further action on the fourth issue as it “was unable to conclude that [Ms IK] had some kind of ulterior motive or purpose” when advising that she would lodge a complaint with the Lawyers Complaints Service and the Committee considered the matter to “simply be not sufficiently serious to warrant inquiry.”⁴

[9] The Committee addressed the other issues in the following way:⁵

- (a) ... lawyers are required (within reason and within the bounds of their professional duties) to put forward what their clients want them to put forward, and this appeared to be exactly what Ms IK had done. ... The Committee accepted that there was a reasonable evidential basis for the single accusation levelled at Mr HJ ... and it [was] important to note that Ms IK was putting across her client’s views not her own.”
- (b) Ms DB’s complaint related to statements made in the original notice of claim “alleging fraud, dishonesty and other reprehensible conduct by Mr HJ and/or [Company A].”⁶ She also complained about some wording in the amended statement of claim, contending that there was no evidential basis for the allegations, that they were made without good cause and were completely irrelevant. The Committee concluded that it:⁷

... was satisfied that Ms IK had indeed taken appropriate steps to ensure that reasonable grounds for making the various allegations against Mr HJ existed. It was clear that [she] was acting on information provided by, and on instruction from, her clients. Further, the allegations themselves were not outrageous in the context of the dispute.

It concluded with the observation that “whether or not the allegations were made out were of course then a matter for the Court”.⁸

- (c) The Committee’s view was that:⁹

... [it] accepted that there were, on the face of it, reasons for naming Mr HJ and the trustees that did not seem glaringly inappropriate. Mr HJ was the sole director of [Company A] and he had carried out the actions attributed to [Company A]. The trustees seemed to have a vested interest (as trustees of the trust) in the matter. They were shareholders of [Company A] and the funds received from the XXs’ purchase may have ultimately become the property of the trust.

The Committee went on to say that it:¹⁰

⁴ Above n 1 at [27]

⁵ At [38].

⁶ At [41].

⁷ At [50].

⁸ At [50].

⁹ Above n 1 at [54].

... saw nothing to indicate, for example, that the parties were joined for the purpose of causing embarrassment, distress, or inconvenience or for a purpose entirely unrelated to the particular proceedings.

Ultimately, the Committee concluded:¹¹

... that it is not uncommon in litigation for the net to be thrown too widely (in terms of parties named) – and such issues are generally just dealt with within the context of the proceedings, rather than making the issue one of professional conduct.

Review

[10] Both parties have consented to this review being undertaken on the papers pursuant to s 206(2) of the Lawyers and Conveyancers Act 2006 (the Act). The supporting reasons provided in the review application refer only to the Committee's decision relating to the letter of 27 August 2013, although I may (indeed, am obliged to) consider the whole of the Committee's determination.¹²

[11] Mr HJ says "The letter contained comments which we consider to be defamatory as follows."¹³ He then proceeded to analyse the statements made by Ms IK and give reasons why he considered the content of the letter to be defamatory. He says " ... the Standards Committee ought to have approached the various statements on the basis of what a reasonable person would understand them to mean."¹⁴

[12] Mr HJ says that "there is a very high threshold to be met before such allegations can reasonably be put forward".¹⁵ My first observation, is that the only rule which addresses this issue, is rule 13.8 which refers to allegations made "in court or in documents filed in court proceedings." The letter of 27 August 2013 was plainly neither.

[13] Ms IK could have been more circumspect, and expressly stated that the allegations made in the letter were those of her client, and not herself personally. However, if inferences of what a reasonable person would draw from the statements made in the letter are to be drawn, then it is likely a reasonable person would infer that the statements made by Ms IK in the letter were based on information relayed to her by her clients.

¹⁰ At [55].

¹¹ At [55].

¹² S203 Lawyers and Conveyancers Act 2006 s 203; *Deliu v Hong* [2012] NZHC 158 [2012] NZAR 209 at [41].

¹³ Application for review - supporting reasons.

¹⁴ Above n 13.

¹⁵ Above n 13.

[14] At [38] of its determination the Standards Committee said:

... lawyers are required (within reason and within the bounds of their professional duties) to put forward what their clients want them to put forward, and this appeared to be exactly what Ms IK had done. She had written to [Law Firm] on the instructions of, and based on information provided by, her clients.

[15] I concur with that statement, and for that reason, nothing further need be advanced as reason for confirming the determination of the Standards Committee in respect of this aspect of the complaint. However, it must be noted that neither a Standards Committee or this Office will be drawn into a consideration of whether any statements made by a lawyer constitutes defamation. If the reason for making the complaint, and then applying for review, is somehow to bolster the defamation proceedings brought by Mr HJ, then that is an abuse of the complaints process, which exposes an applicant to an order for costs.

[16] Ms IK has advised she does not oppose judgment being entered against her and the reasons why she has adopted this approach.¹⁶ Nothing can be drawn from that when considering whether or not she has breached professional standards.

[17] I have not sought any submissions from the parties on costs and have decided there will be no orders for costs, although I consider that the complaint, and now this application for review, comes close to being an abuse of the complaints process.

The statement of claim

[18] Ms IK filed an initial statement of claim, and then an amended statement of claim. It is the content of the initial statement of claim with which Mr HJ takes issue.

[19] As noted by the Committee, Ms IK “questioned whether it was appropriate to complain about a statement of claim that had been superseded by an amended statement of claim”.¹⁷ The Committee did not specifically determine this submission, but rule 13.8 (and its subclauses) refers to “documents filed in court proceedings”. The initial statement of claim was a “document filed in court proceedings” and consequently, I see no reason to differentiate between the initial pleadings, and amended pleadings.

[20] However, these complaints are largely a repeat of the complaint that Ms IK made defamatory comments about Mr HJ in her letter of 27 August 2013. Ms IK

¹⁶ IK submissions to Standards Committee, 1 April 2015 at [8]-[9].

¹⁷ Above n 1 at [48].

provided 22 pages of submissions to the Standards Committee in which she provided details of the information provided to her by her client in support of the allegations made in the statement of claim and the amended statement of claim.¹⁸

[21] The Standards Committee noted:¹⁹

It was clear that Ms IK was acting on information provided by, and on instructions from, her clients. Further, the allegations themselves were not outrageous in the context of the dispute. Whether or not the allegations were made out were of course then a matter for the court.

[22] The evidence provided to Ms IK by her clients, was more than enough for Ms IK to form the view there were reasonable grounds for the allegations made in the documents filed in court, and of course, her client's claims would stand or fall on the evidence to be provided. There is no point in making claims that cannot be supported by the evidence, and Ms IK clearly had reasonable grounds to include the claims made in the pleadings. I agree with the Standards Committee with regard to this aspect of the complaint.

Breach of rule 2.3

[23] The final complaint to be considered in this review, is that Ms IK had breached rule 2.3 of the Conduct and Client Care Rules, by including Mr HJ and the trustees of the HJ Family Trust in the proceedings. The complaint is that these parties had been named as defendants for the sole purpose of ensuring there were parties financially able to pay any damages awarded by the court.

[24] I am somewhat at a loss to comprehend how this could amount to a breach of rule 2.3, when the complaint itself is not framed in the words of the rule, namely, that the purpose of including these parties as defendants was "for the purpose of causing unnecessary embarrassment, distress or inconvenience to another person's reputation, interests or occupation."

[25] As noted by the Standards Committee "... it is not uncommon in litigation for the net to be thrown too widely (in terms of the parties named) – and such issues are generally dealt with within the context of the proceedings..."²⁰ A plaintiff must establish a cause of action against each defendant, and determining whether or not the plaintiff will succeed is not a matter with which the complaints process should become involved. A plaintiff who does not succeed, will face potential adverse costs orders. A

¹⁸ IK submissions to Standards Committee 1 April 2015.

¹⁹ Above n 1 at [50].

²⁰ Above n 1 at [55].

lawyer who fails to promote his or her client's interests by not including potential defendants who have the means of meeting any judgments against them, would be the subject of criticism by his or her client.

[26] In circumstances where proceedings have been filed, it is difficult to envisage a complaint that a lawyer has breached rule 2.3 succeeding. To succeed in such circumstances, it would have to be shown, that the complainant was so far divorced from the events giving rise to the litigation that it could be said with the requisite standard of proof, that the purpose in naming the person as a party to the proceedings, was to tarnish that person's reputation (or the other matters included in the rule) rather than to ensure that the plaintiff has every chance of succeeding in the litigation.

Summary and decision

[27] In summary, I have come to the same conclusions as the Standards Committee, and agree with all of the reasons provided by the Committee for its determination to take no further action in respect of the complaints. I observe again, that the complaints procedure should not be invoked in support of matters that should properly, and were in fact, before the Court.

[28] In her submissions to the Standards Committee, Ms IK referred to several decisions by this Office.²¹ I have considered each of these decisions, and have come to the view that they each provide support for the view that a lawyer's duty to his or her client sometimes means that a lawyer must be forceful in the promotion of his or her client's interests, but in doing so, this does not ipso facto mean that a lawyer thereby breaches professional standards.

[29] I note that one of the outcomes sought by Mr HJ, was for Ms IK to apologise to him. At [39] of her submissions to the Standards Committee, Ms IK tendered an "unreserved" apology to Mr HJ for the "distress he says he felt when he read [her] letter."²²

[30] Having already been the recipient of this apology, it would seem, that Mr HJ has applied for this review more for the purpose of seeking the other outcome requested by him, namely, an order that Ms IK reimburses him for the costs of bringing the complaint. I do not consider there are any grounds for making such an order (which would necessarily be made pursuant to s 210(3) of the Act.²³ It was Mr HJ's choice to

²¹ *U v FLCRO 26/2009*; *EU v VK LCRO 233/2010*; *RK v LP LCRO 292/2011*.

²² Above n 18.

²³ Order for costs where no finding of unsatisfactory conduct

lodge the complaint, when other more appropriate courses of action were open to him, and for this reason I decline to make any costs order against Ms IK.

[31] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Standards Committee is confirmed.

DATED 19th day of February 2016

O W J Vaughan
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:

[Company A] and Mr HJ as the Applicants
Ms IK as the Respondent
The Standards Committee
The New Zealand Law Society