

**LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE**

[2021] NZLCRO 91

Ref: LCRO 17/2021

CONCERNING

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

AND

CONCERNING

a determination of the [Area] Standards Committee [X]

BETWEEN

NV

Applicant

AND

WQ

Respondent

DECISION

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

Introduction

[1] Mr NV has applied for a review of a decision by the [Area] Standards Committee [X] to take no further action in respect of his complaint concerning conduct on the part of Mr WQ.

Background

[2] Mr NV was the part owner of a parcel of land (“the blocks”) situated in [Region].

[3] There were proceedings before the High Court in 2009 involving the blocks.

[4] An order, described by the High Court as an “order disposing of proceedings” was issued, and appears to have been sealed on [Date] 2009. The order is recorded as having been made with the consent of the parties.

[5] The order provided a mechanism for sale of the blocks in the event that any of the parties named in the order wished to sell.

[6] At paragraph 6, the order said this:

Within three calendar months of the date of this order, any of the persons named in paragraphs 3 or 4 in respect of either block other than the plaintiff may give written notice that he or she wishes to sell his or her share in that block or both blocks. Written notice shall be given to [Law Firm A].

[7] At paragraph 7, the order said this:

Upon receipt of written notice under paragraph 6, [Law Firm A] shall, within 14 days, engage a registered valuer appointed by the president or the equivalent office of the [Region] branch of the New Zealand Law Society to produce an opinion of the then current market value of the relevant block or blocks, including, for the avoidance of doubt, all improvements. The valuation report shall be provided to [Law Firm A] with a copy to [Law Firm B]. [Law Firm A] shall then immediately provide copies of the valuation report to the notice giver and to the plaintiff.

[8] Mr NV provided [Law Firm A] with written notice of his intention to sell his share in a block on 5 March 2019. In that correspondence, Mr NV's lawyer (Mr GX) confirmed that Mr PY, who had acted for the plaintiff in the proceedings, had been a partner in the law firm [Law Firm A] at the time of the Court hearing. Having formally complied with the requirement to provide notice of his client's intention to sell, Mr NV's lawyer recorded his expectation that he would receive confirmation by 19 March 2019 that a valuer had been appointed. In so doing, Mr NV's lawyer was recognising that paragraph 7 of the September 2009 order for disposal of proceedings, provided that a valuer was to be appointed within 14 days of [Law Firm A] being notified.

[9] On Wednesday, 6 March 2019, [Law Firm A] advised Mr NV's lawyer, that his correspondence had been referred to Mr PY. Mr PY was no longer a partner with [Law Firm A].

[10] On 14 March 2019, Mr PY advised Mr NV's lawyer that he would be initiating the valuation required.

[11] On 22 March 2019, Mr PY forwarded an email to the Law Society's [Region] branch, making request of the Society to suggest an appropriate valuer.

[12] On 25 March 2019, the [Region] branch wrote to Mr PY, advising that his request had been forwarded to the Law Society's national office.

[13] Mr FL from the Law Society's national office, wrote to Mr PY on 25 March 2019 to advise that the Law Society would be happy to assist with appointing a valuer. Mr FL

sought some further information from Mr PY, including advice as to who he was acting for.

[14] Mr PY responded to confirm that he was, until 31 July 2012, a partner at [Law Firm A]. He advised that the notice had been sent to him in his new capacity.

[15] Mr FL wrote further to Mr PY on 10 April 2019. In that correspondence he advised that the court order required that [Law Firm A] were to request the valuer's appointment.

[16] On 18 April 2019, Mr NV's lawyer Mr GX, wrote again to [Law Firm A]. In that correspondence, Mr GX:

- (a) advised that he had written to Mr PY on 13 March 2019; and
- (b) confirmed that Mr PY had responded on Thursday 14 March 2019 advising that he would initiate the valuation required; and
- (c) advised that he had written to Mr PY on 11 April 2019 making request as to whether the valuation had been ordered or received; and
- (d) confirmed that he had received no response from Mr PY; and
- (e) noted that the order disposing of proceedings dated [Date] 2009, sealed on [Date] 2009, placed obligations on [Law Firm A], not Mr PY personally to take steps to organise the valuation; and
- (f) complained that Mr PY was proving to be unresponsive; and
- (g) confirmed that Mr NV looked to [Law Firm A] to complete its obligations under the order; and
- (h) sought confirmation that [Law Firm A] would complete the obligations required under the order disposing of proceedings; and
- (i) advised that if confirmation was not received by Friday 26 April 2019 that steps had been taken, his instructions were to take the matter back to court.

[17] On 26 April 2019, Mr PY wrote to Mr GX inquiring as to whether Mr NV would consent to him undertaking the role of [Law Firm A] in terms of the court order.

[18] On 13 May 2019, Mr GX wrote to [Law Firm A] to confirm agreement to Mr PY facilitating the appointment of a valuer, but on certain conditions. [Law Firm A] responded on 29 May to advise that they would consent to Mr PY's appointment, but in that correspondence no reference was made to the firm agreeing to the various conditions that Mr NV had requested. [Law Firm A] considered that those conditions were best addressed by Mr PY.

[19] Mr WQ became involved on 27 June 2019. Mr WQ wrote to Mr PY noting that no response had been received to correspondence forwarded. Mr WQ drew further attention to the information the Law Society required, and sought clarification as to whether Mr PY, as a former partner of [Law Firm A], had necessary authority to request that a valuer be appointed.

[20] In early August 2019, Mr NV consulted a barrister. His barrister drafted correspondence on Mr NV's instructions for forwarding to Mr GX. Mr GX was instructed that providing he had no objection to the matters set out in the correspondence drafted, he was to transfer the correspondence to his firm's letterhead, and forward the correspondence to [Law Firm A] and Mr PY.

[21] In compliance with that request, Mr GX forwarded correspondence to [Law Firm A], Mr PY and Mr WQ on 7 August 2019. In this correspondence, Mr GX:

- (a) confirmed that Mr NV did not agree to Mr PY performing the role of [Law Firm A] under the court order; and
- (b) advised that Mr NV required the court order to be observed in its terms; and
- (c) made request for [Law Firm A] to engage a valuer; and
- (d) sought costs from [Law Firm A] for legal costs incurred.

[22] On 12 August 2019, Mr TM, a lawyer with [Law Firm A], wrote to the New Zealand Law Society, making request for the appointment of a registered valuer. Attached to that correspondence, was a copy of the 2009 court order.

[23] On 23 August 2019, Mr WQ wrote to Mr TM, Mr NV, and a lawyer representing the plaintiff in the court proceedings.

[24] In this correspondence, Mr WQ noted that as it appeared that formal written notice had been given on 5 March 2019, the timeframe stipulated by clause 13 of the High Court order had elapsed. He advised that in order for the Law Society to proceed

with appointment of a valuer, it would require either a fresh notice to be served under clause 12 of the order, or the consent of all the parties to the appointment proceeding on the basis of the notice that had been issued.

[25] On 3 September 2019, Mr NV's lawyer advised [Law Firm A] that Mr NV's notice of 5 March 2019 had been cancelled, and that he was issuing a fresh notice effective immediately. Request was made of [Law Firm A] to take steps to arrange the appointment of a valuer. [Law Firm A] promptly attended to that request, forwarding the fresh notice to the Law Society immediately, and making request for a valuer to be appointed.

[26] A valuer was appointed on 11 September 2019.

The complaint and the Standards Committee decision

[27] Mr NV lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 15 July 2020.

[28] He made complaint regarding various lawyers who have been involved in the matter.

[29] To the extent that his complaint focused on Mr WQ, the substance of his complaint was that:

- (a) he had given advice that the notice had expired without any "documentary authority to support the decision", and
- (b) it was clear that the directive issued by Mr WQ would have potential to delay resolution of the matter; and
- (c) Mr WQ's suggested path to resolution, being to either commence the process again or to attempt to resolve the matter with the consent of the parties, neglected to take into account that two of the signatories to the agreement had passed away; and
- (d) Mr WQ's conduct, along with the conduct of the other lawyers, had resulted in him incurring additional costs.

[30] Mr WQ responded to the complaint on 25 September 2020. In providing context for his role with the New Zealand Law Society Complaints Service, he explained that he had held a practising certificate as an in-house lawyer since 1 August 2019.

[31] At the time relevant to Mr NV's complaint, Mr WQ's principal role was as a Legal Standards Officer/solicitor with the Lawyers Complaint Service. In April 2019, Mr WQ assumed temporary responsibility for managing the Law Society's obligations in respect to appointment of arbitrators, mediators, and experts.

[32] Mr WQ submitted that:

- (a) Mr NV's complaint was in effect a challenge to a procedural decision of the Law Society and that such a challenge would appear to be outside the intended purpose of the lawyer's disciplinary regime; and
- (b) by the time the New Zealand Law Society was notified of the request to engage a valuer, the deadline for an appointment had passed; and
- (c) it was not open either to him as an individual, or to the Law Society, to unilaterally vary an agreement recorded in a court order; and
- (d) no actions by him could reasonably be determined to have constituted a breach of any rule, practice or principle of professional responsibility.

[33] Mr NV responded to the reply received from Mr WQ.

[34] Mr NV submitted that:

- (a) Mr WQ had ignored the directive in the court order that "time was of the essence"; and
- (b) Mr WQ's role was confined to appointing a valuer, a task he should have undertaken on receiving instructions from [Law Firm A]; and
- (c) Mr WQ had cast himself into the role of a judge in advising that the parties would need to start the process again;

[35] In concluding his submission, Mr NV posed the question that if procedures followed by the Law Society contravened court orders, what consequences followed for the Law Society?

[36] The Committee identified the scope of its investigation, as being inquiry as to whether any professional conduct issues arose on the part of Mr WQ.

[37] The Standards Committee delivered its decision on 11 December 2020.

[38] 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.

[39] The Committee concluded that:

- (a) Mr WQ was performing an administrative task which did not involve the provision of regulated services; and
- (b) where the alleged conduct is unrelated to the provision of regulated services, the conduct must reach the higher disciplinary standard of misconduct; and
- (c) the alleged conduct could not remotely fall within the category of misconduct; but in any event,
- (d) the Committee was satisfied that Mr WQ had acted professionally in undertaking his administrative tasks; and
- (e) it was satisfied that Mr WQ had acted appropriately and did not bear any responsibility for delays that had occurred in the appointment of a valuer.

Application for review

[40] Mr NV filed an application for review on 28 January 2021.

[41] He submits that:

- (a) Mr WQ was at the “core of the problem”; and
- (b) it was Mr WQ who had determined that the process for appointing a valuer should be restarted when there was no legal requirement to do so; and
- (c) Mr WQ had elected, on his own volition, to cast himself into the role of a judge and modify the order; and
- (d) Mr WQ was not a fit and proper person to carry out the administrative duties he was entrusted to perform; and
- (e) the Law Society had incorrectly referred to the High Court order as a “consent order” when the correct description of the order was an “order disposing of proceedings; and

(f) it was his understanding, that the order could not be changed.

[42] Mr WQ was invited to comment on Mr NV's review application. He advised that he considered that his initial response to the complaint adequately addressed the issues raised by Mr NV.

Review on the papers

[43] This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[44] In responding to request to advise as to whether he was in agreement with the review being determined "on the papers", Mr NV advised that it would be his preference for a "hearing with all the parties present in Wellington or a hearing on the papers".

[45] If the hearing was to proceed on the papers, Mr NV made request for further submissions to be noted, those being his contention that:

- (a) Mr WQ had given legal advice; and
- (b) The Law Society was not able to provide legal advice as evidenced by a comment posted on the Law Society's website; and
- (c) He had not been informed as to the authority that Mr WQ had relied on in overruling the order disposing of the proceedings which carried the seal of the High Court; and
- (d) the High Court order did not require a new notice to be issued if the "suggested timeframe had elapsed".

[46] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party. On the basis of the information available I have concluded that the review can be adequately determined in the absence of the parties.

Nature and scope of review

[47] 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.

[48] 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.

[49] 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.

Discussion

[50] I agree with the Committee that Mr WQ was not providing regulated services.

[51] I do not consider it necessary to provide detailed explanation as to why I arrive at that conclusion. It is compellingly apparent that Mr WQ was at all material times,

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].

acting in his capacity as a representative of the Complaints Service. He was, although not at first instance, responsible for managing an administrative task that it not infrequently falls to the Law Society to perform. He was, at relatively late stage, called on to assist in responding to request made of the Law Society to facilitate the appointment of a valuer.

[52] Mr NV submits that Mr WQ was responsible for the delay in having the valuer appointed. He goes further and suggests that Mr WQ was providing legal advice and acting in the role of a de-facto judge. Framed in these terms, Mr NV argues that what should have been a relatively straightforward process of securing and finalising arrangements to effect a sale of his share in the block, were frustrated by Mr WQ's intrusive and unnecessary interventions.

[53] This account misrepresents Mr WQ's role and overstates the degree and extent of his involvement.

[54] The starting point is the order of the High Court.

[55] Mr NV is critical of the Law Society for describing the High Court order as a consent order, when he says that the correct description of the order was (as it is described in the order's intituling page) an "order disposing of proceedings".

[56] The distinction in the description is of no relevance to this review.

[57] The introduction to the order confirms that the proceedings were determined "with the consent of the parties" and that the orders were "made by consent".

[58] The orders, as noted, detailed the process to be followed if any of the parties named in the order (other than the plaintiff in the proceedings) wished to sell their interest in either of the blocks of land that were the subject of the proceedings.

[59] The process required a prospective vendor to give notice of his intention to sell.

[60] That notice had to be in writing.

[61] The order specifically directed who the notice was to be provided to ([Law Firm A] solicitors). Further, the order provided that references to [Law Firm A] included any successors of the firm.

[62] This could not be clearer. A notice of intention to sell had, at first step, to be notified to [Law Firm A].

[63] Upon receipt of written notice of a vendor's indication of intention to sell, [Law Firm A] were required to facilitate the appointment of a valuer. [Law Firm A] were required to organise the appointment through the [Region] Law Society.

[64] Following receipt of the valuer's report, the court order detailed the process which was to follow. A number of the steps to be taken, were required to be completed within a specified time.

[65] Underpinning Mr NV's criticism of Mr WQ is suggestion that Mr WQ sabotaged his efforts to advance the sale.

[66] Pivotal to Mr NV's argument (advanced in further submissions filed) was suggestion that the time frames and directions required by the orders were overarched by a prevailing direction that "time was of the essence".

[67] That direction is found in paragraph 25 of the order which provides that "time is of the essence in respect of all notices to be given and things to be done under paragraphs 6-20."

[68] Mr NV appears to interpret the "time of the essence" clause as imposing an obligation of urgency on all parties to the consent order to take whatever steps necessary to ensure that a vendor was able to sell his or her share in one of the blocks.

[69] In my view, the "time of the essence" reference in the Court order, is intended to reinforce that actions which are required to be performed within a specified time frame, must be completed within the time frame indicated. The clause would lack coherent meaning or purpose if its intention was to provide a general and unspecific direction that time was, in ways that were not explained, important.

[70] The phrase "time of the essence" is frequently encountered in a contract context, where agreements specifically direct that compliance with time frames specified in the contract is essential.

[71] The High Court order provides clear directions to the parties, as to the time frames that must be complied with, if steps are taken to exercise options available to the parties.

[72] Clause 6 and 7 of the orders are unequivocal.

[73] If a party wished to sell his or her share in a block, the first step required was for the party to notify their intention to the specified law firm, [Law Firm A].

[74] The order did not provide opportunity for another law firm to fulfil the role that had been given to [Law Firm A]. The order, reflecting a prescient approach on the part of the parties negotiating its terms, provided that if [Law Firm A] was not in business as a legal entity at the time when a prospective vendor wished to initiate the sale process, notices were required to be given to the firm's successors.

[75] Mr NV endeavours to sheet home responsibility for delay to Mr WQ but it is clear that the problems with complying with the court order began when the notice issued to [Law Firm A] was mistakenly forwarded to Mr PY with intention that Mr PY take over the task of organising the valuer.

[76] This was a genuine and, in my view, understandable mistake. Mr PY had formerly been a partner with [Law Firm A]. He had acted for the plaintiff in the High Court proceedings.

[77] Mr PY indicated a willingness to take on the task. This had consequence of adding further to the delay.

[78] But Mr NV himself had provided conflicting instructions on the question as to whether he would agree to Mr PY undertaking the task of facilitating the appointment of a valuer. There had been substantial delay in the process before Mr WQ became involved.

[79] It was not until August 2019 that [Law Firm A] assumed, as they were required to do, responsibility for managing the appointment of the valuer. At this stage in proceedings, Mr NV had confirmed that he was not agreeable to Mr PY being appointed.

[80] It was necessary that there be clarification that the process required to be followed under the Court order was adhered to.

[81] Whilst Mr NV considered that the Law Society, and Mr WQ in particular, had acted well outside the scope of their authority and accusation is made that Mr WQ was providing legal advice and effectively cast himself in the "de-facto" role of judge, I see no evidence of the lawyers involved taking issue with the Law Society's requirement that the Society be satisfied that their involvement in the process of appointing a valuer complied with the directions in the court order.

[82] It is imperative when request is made of the Law Society to appoint a valuer, that representatives acting on behalf of the Law Society ensure that the appointment is made in terms that are consistent with agreements, instructions or orders that provide foundation for the engagement of the Law Society.

[83] Most commonly, requests are made of the Law Society to assist in appointing a valuer in circumstances where parties require the process of appointment to be independent. The basis on which the appointment is to be made is frequently recorded in an agreement or court order.

[84] The Law Society, when instructed, must ensure that its appointment proceeds in accordance with those instructions.

[85] In this case it was the court order that provided the authority for the Law Society to proceed. It would be self-evident that in accepting responsibility for the task of making the appointment, the Law Society was required to ensure that the appointment process followed that set out under the court order.

[86] The Law Society could not amend or modify the process in any way.

[87] Before an appointment could proceed, it had to be satisfied that there had been compliance with the notice provisions required under the order. They had not been complied with. Mr NV considered that in the interest of achieving more expeditious resolution in the face of what understandably for him had become frustrating delays, that the Law Society could be more proactive. It could not.

[88] Mr WQ was not the first representative from the Law Society to take steps to ensure that the appointment was properly authorised.

[89] Mr FL initially looked after the matter for the Law Society. In April, Mr FL had written to Mr PY to advise that he had perused the Court order. In that correspondence Mr FL observed that the order required [Law Firm A] to request the appointment.

[90] By the time Mr WQ became involved in the matter, the deadline for an appointment had passed.

[91] I agree with the observation made by Mr WQ when first responding to the complaint, that it was not open to him or the Law Society to unilaterally accept a variation to the court order or waive the party's compliance.

[92] Mr NV contends that Mr WQ's indication to him that it would be necessary in order for the appointment to proceed, for the agreement of all the parties to be secured or alternatively for a fresh notice to be issued, was not, as Mr NV contends it to be, a situation where Mr WQ was providing the parties with legal advice.

[93] Mr WQ was identifying, as it was appropriate for him to do, the requirements that the Law Society considered were necessary to have been met, if it was to proceed

with the appointment. This was not a case of Mr WQ providing legal advice to the parties and none of the lawyers that were involved at this point in proceedings appear to have raised concern that Mr WQ was stepping into territory that he should avoid. To the contrary, when the issues were correctly identified, steps were promptly taken to ensure compliance with the court order. This was not a case, as Mr NV describes it of Mr WQ breaching his duty to comply with a court order. To the contrary, the approach followed by Mr WQ (and his colleague who had initially dealt with the matter) reflected a proper determination to ensure that correct process was followed.

[94] I am satisfied, as was the Standards Committee, that Mr WQ had acted appropriately when performing his administrative duties, and that he was not responsible for any delay that occurred in the appointment of a valuer.

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

Anonymised publication

[96] Pursuant to s 206(4) of the Act, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and bereft of anything as might lead to their identification.

Decision

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

DATED this 30th day of June 2021

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:

Mr NV as the Applicant
Mr WQ as the Respondent
[Area] Standards Committee [X]
New Zealand Law Society