LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2021] NZLCRO 057

Ref: LCRO 170/2019

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	**ZY** Applicant
AND	**LN QC** Respondent

DECISION

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

Introduction

[1] Ms ZY has applied for a review of a decision by the [Area] Standards Committee [X] to take no further action in respect of her complaint concerning the conduct of the respondent, Mr LN QC.

Background

[2] Ms ZY was a trustee of the XYZ Trust.

[3] The trust had been embroiled in a long-standing dispute concerning an easement over a property owned by the Trust.

[4] Mr JA had for a number of years, accessed and utilised a road on a property owned by the trust. That right had been exercised on the basis of argument that an easement was in place that granted Mr JA rights of access.

[5] The trust took proceedings to the High Court challenging the easement. The trust argued that in the event that the Court determined that the easement was not extinguished, directions should be made by the Court that the JA interests be required to meet the costs of upgrading the road. It was contended by the trust that Mr JA's trucks were causing significant damage to the road.

[6] The Court held that an easement that had been granted in July 2019 was invalid.

[7] Ms ZY was awarded substantial costs.

[8] Mr JA appealed the decision to the Court of Appeal. The Court reversed the High Court decision, concluding that a valid easement was in place.

[9] In doing so, the Court of Appeal made directions that the appellants were to pay 75 per cent of the costs of upgrading the road to the standard required to accommodate use by heavy trucks.

[10] In January 2018, Ms ZY's solicitor Ms TW recommended that Mr LN be instructed to provide advice as to how matters could be progressed. At this point, there was uncertainty as to whether Ms ZY was able to recover the costs she had been awarded in the High Court, in view of the fact that the success she had achieved in that jurisdiction had been significantly impacted by the Court of Appeal's finding that a valid easement was in place. There were concerns that little progress had been able to be made in implementing directions made by the Court of Appeal to advance remediation work on the Trust road.

[11] Mr LN recommended that enforcement steps be taken to recover the costs awarded to Ms ZY in the High Court. Enforcement proceedings filed were ultimately abandoned.

[12] Mr LN filed an interlocutory application in the High Court seeking both directions on costs, and orders to advance the directions that had been made in the Court of Appeal. That application was not successful.

[13] Mr LN ceased acting for Ms ZY around December 2018.

The complaint and the Standards Committee decision

[14] Ms ZY lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 20 December 2018. The substance of her complaint was that:

(a) Mr LN had failed to provide her with competent advice, in particular that he had:

(i) recommended that steps be taken to enforce the costs order obtained in the High Court when there was no prospect of enforcement proceedings succeeding; and

(ii) instigated proceedings in the High Court when there was no jurisdictional basis to sustain the proceedings.

(b) She had suffered considerable financial loss as a consequence of Mr LN initiating proceedings that lacked a proper foundation.

[15] Mr LN provided a response to Ms ZY's complaint on 18 February 2019. He submitted that:

(a) in considering the approach to adopt when addressing the recovery of the High Court costs (in light of the fact that the Court of Appeal had overturned the High Court), his research and experience persuaded him that the issue was not settled by authority; and

(b) he had concluded that there were factors in Ms ZY's case that would support the position that she was entitled to recover her High Court costs; and

(c) possibility that Ms ZY would be entitled to recover costs was supported by argument that the judgment obtained in her original first cause of action was replaced with judgment on her original second cause of action; and

(d) his decision to proceed in the High Court by way of interlocutory application rather than commencing by way of an originating application was a considered decision and one that he believed to have been the correct legal and strategic one to have made.

[16] Mr LN's response was not the last word on the matter. What followed was a raft of further exchanges in which both Ms ZY and Mr LN continued to provide further submission in response to the other.

[17] I identify, including the initial complaint and submissions filed in support, a total of 17 submissions/responses filed in the course of progressing the complaint investigation at the Committee stage, this followed by four submissions filed in the course of the review.

[18] This approach to the advancing of the parties' positions did not on occasions assist in refining the respective arguments. The exhaustiveness of the approach adopted had at times, the effect of both cluttering and expanding the arguments.

[19] When advancing her review application, Ms ZY made complaint that the Committee failed to address a number of aspects of her complaint and had, in doing so, elected to provide a "blanket exoneration" of Mr LN.[1]

[20] When identifying her complaints at commencement, Ms ZY in providing summary of her complaint said this:

> The backbone of my complaint, on both actions, is that Mr LN made fundamental errors of judgement regarding legal processes and in doing so he has breached his duty of care and failed to protect my interests. The result has been a significant financial loss to me in costs, legal fees, disbursements and time.

[21] The Standards Committee identified the issues to be addressed as:

(a) whether Mr LN provided Ms ZY with competent advice and representation in relation to the proceedings; and

(b) whether the retainer was inappropriately terminated.

[22] The Standards Committee delivered its decision on 16 October 2019.

[23] 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.

[24] In reaching that decision the Committee concluded that:

(a) the decision to file enforcement proceedings and the interlocutory application were tactical procedural steps, the filing of which did not reflect any competency failings on the part of Mr LN; and

(b) it considered that Mr LN had made a careful assessment of the options available to Ms ZY; and

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[1] Ms ZY, submissions accompanying review application (8 November 2019) at p5.

(c) it was unable to identify evidence to suggest that Mr LN had acted incompetently; and

(d) Mr LN's advice had been consistent with his professional obligations; and

(e) it had been necessary and appropriate for Mr LN to terminate the retainer.

Application for review

[25] Ms ZY filed an application for review on 8 November 2019.

[26] She submits that:

(a) the Committee had, in addressing two aspects of her complaints, failed to consider other issues of complaint raised by her; and

(b) the Committee had accepted Mr LN's account of events, and ignored her evidence; and

(c) the Committee's assessment of Mr LN's decisions to file enforcement proceedings and to proceed in the High Court by way of interlocutory application as tactical steps was fundamentally misconceived, as the approach adopted by Mr LN was procedurally wrong; and

(d) the Committee was wrong to ignore the conclusions reached by the High Court judge; and

(e) the Committee's decision was flawed by its acceptance of argument that Mr LN was under no obligation to "get it right"; and

(f) Mr LN had failed to properly inform her as to the consequences of the decisions taken; and

(g) the Committee's decision reflected a "blanket exoneration" of Mr LN.

[27] In concluding her initial submissions, Ms ZY indicated that she had been advised by her instructing solicitor against making a complaint against Mr LN, as it was her instructing solicitor's view that the Law Society would "protect their own," particularly when considering a complaint against a lawyer of Mr LN's seniority and reputation.

[28] Mr LN was invited to comment on Ms ZY's review application.

[29] He submits, in his first response, that:

(a) he considered the decision of Cooke J (the rejection of Mr LN's attempt to advance matters in the High Court by filing of an interlocutory application) to be wrong; and

(b) his decision to proceed by way of interlocutory application was a considered decision, and one which he believed in the circumstances was both legally and strategically sound; and

(c) his research and experience led him to the view that argument could fairly be advanced that the costs order obtained by Ms ZY in the High Court was able to be enforced by her, despite the substantive finding in that Court being reversed on appeal; and

(d) Ms ZY was adamant that he take enforcement proceedings.

[30] Further submissions were filed on review. They have been considered.

Review on the papers

[31] 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.

[32] 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

[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:[2]

> … 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.

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

> 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:[3]

> 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.

[35] 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

[36] The first issue to be addressed is:

(a) Did the Standards Committee address all of the issues of complaint identified by Ms ZY?

[37] Consideration of that issue raises these issues to be addressed on review:

(a) Did Mr LN provide competent advice and representation in regard to the interlocutory application?

(b) Did Mr LN provide competent advice and representation in regard to the enforcement steps taken?

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

(c) Did Mr LN keep Ms ZY adequately informed?

(d) Was the retainer terminated without good cause?

Analysis

Did the Standards Committee address all of the issues of complaint identified by Ms ZY?

[38] The Standards Committee identified the focus of its investigation as engaging two issues:

(a) Did Mr LN provide competent representation?

(b) Was the retainer terminated appropriately?

[39] Ms ZY contends on review that the Committee, in confining its inquiry to two issues, failed to address a number of her concerns.

[40] I have noted the extent to which the articulation of, and response to, Ms ZY's complaint, evolved over a number of submissions.

[41] Those submissions, in large part, do not raise fresh issues of complaint but rather give indication of both Ms ZY and Mr LN providing more nuanced and detailed account of their respective positions.

[42] To the extent that those accounts provide individual recollections of what was said, suggested, or inferred in discussions, the accounts are not particularly helpful. Ms TW, the instructing solicitor, is on occasions drawn into the fray, with both Ms ZY and Mr LN inviting Ms TW to substantiate their accounts of what had taken place. Ms TW's responses, whilst on occasions direct and unequivocal, at others simply record that she is unable to recall what was said at a particular point in the exchanges between Ms ZY and Mr LN. It may have been that Ms TW was on occasions discomforted by being drawn into a dispute between a client whom she had acted for over a number of years, and a colleague with whom she had enjoyed a close professional relationship.

[43] It was regrettable that Ms ZY's confidence in the independence of the complaints process appears to have been undermined by comments purportedly made by Ms TW who had, according to Ms ZY, advised her that it would be fruitless to advance a conduct complaint against Mr LN, as the persons conducting the inquiry would likely adopt a deferential manner to its examination of Mr LN's conduct due to his standing in the profession.

[44] I have no evidence from Ms TW of what was said, or the context in which comments, if made, were made, but what is clear is that regrettably Ms ZY has clearly viewed the Committee as being less than independent, a view reinforced by her belief that the Committee failed to investigate a number of her complaints.

[45] I do not consider that the comprehensive submissions filed by Ms ZY provide indication of her raising a number of new standalone issues, independent of, and distinct from the succinct summary of her concerns identified at [21] above. Much of the additional information simply provides additional context. A significant focus of the additional submissions is on argument that Mr LN failed to keep Ms ZY sufficiently informed about the decisions that were being made. The advancement of that argument draws Ms ZY into what is, at times, a detailed analysis of every facet of every exchange. It is an approach which, whilst comprehensive, can on occasions divert attention from the issues.

[46] However, I consider it would have been helpful if the Committee had addressed, as a separate issue, question as to whether Mr LN kept Ms ZY adequately informed during the progressing of the retainer and I propose to do so on this review.

[47] Ms ZY's complaints are adequately addressed by a consideration of the following:

(a) Did Mr LN provide competent advice and representation in regard to the interlocutory application?

(b) Did Mr LN provide competent advice and representation in regard to the enforcement steps take?

(c) Did Mr LN keep Ms ZY adequately informed?

(d) Was the retainer terminated without good cause?

Did Mr LN provide competent advice and representation in regard to the interlocutory application?

[48] In the course of providing regulated services to their client, a lawyer must act competently, and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.[4]

[4] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 3.

[49] A lawyer's conduct may be deemed to be unsatisfactory if, in the course of providing regulated services to their client, their conduct falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.[5]

[50] The duty to act competently has been described as "the most fundamental of a lawyer's duties" in the absence of which "a lawyer's work might be more hindrance than help".[6]

[51] The standard of competence is an objective one. The question is whether the lawyer under scrutiny applied the care or skill that any reasonable lawyer in the same position would have done.[7]

[52] It has been noted that lawyer competence, though pivotal to public confidence in the profession and the administration of justice, lacks any generally accepted meaning; it instead takes its flavour from the perspective of the observer.[8]

[53] Not surprisingly, neither the Act, nor the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), attempt to lay down a definitive definition of competence, a determination of which must inevitably be attempted through an examination of a variety of factors including, but not limited to, the nature of the retainer and the context in which the conduct complaint arises.

[54] It is important to recognise that an obligation to provide competent advice does not impose unreasonable burden on a practitioner to be always right, or to always provide the right advice.

[55] It has been noted that:[9]

> while there is an existing professional duty of competence in New Zealand, albeit one which is particularly narrow, there is no duty to provide a high level of service to clients. The duty of competence is, in reality, a duty not to be incompetent and is aimed at ensuring minimum standards of service.

[56] What may on first reading present as a singularly less aspirational objective for a profession than would be expected is, on closer examination, an affirmation of a

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[5] Lawyers and Conveyancers Act 2006, s 12(a).
[6] Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington 2016) at [11.1].
[7] At [11.3].
[8] GE Dal Pont *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2017) at [4.20].
[9] Webb, Dalziel and Cook, above n 6 at [11.3].

reasonable standard of expectation of the level of competency required of lawyers. All lawyers are expected to provide a competent level of service to their clients.

[57] A broad, and useful expression of the indicia to be considered in determining competency was attempted by the American Bar Association in a discussion document where it said:[10]

> Legal competence is measured by the extent to which an attorney (1) is specifically *knowledgeable* about the fields of law in which he or she practises, (2) performs the techniques of such practice with *skill*, (3) manages such practices *efficiently*, (4) identifies issues beyond his or her competence relevant to the matter undertaken, bringing these to the client's attention, (5) *properly* prepares and carries through the matter undertaken, and (6) is intellectually, emotionally, and physically *capable*. Legal incompetence is measured by the extent to which an attorney fails to maintain these qualities.

[58] Ms ZY argues that Mr LN elected to proceed an application in the High Court through the vehicle of an interlocutory application, when there was no jurisdictional basis for him to do so. She contends that the presiding judge's rejection of Mr LN's application is irrefutable evidence of Mr LN having made a fundamental error which would not be expected of a senior practitioner. Ms ZY counters argument that a lawyer does not labour under the oppressive yoke of having to be always right, by submission that Mr LN's error is procedural, and not an error of legal interpretation which could be countered by argument that in areas of unsettled law, there will always be competing views.

[59] Mr LN, in rejecting submission that he made a fundamental procedural error in advancing the application, argues that he believes the presiding judge made an error in rejecting the application. He finds support for this position in argument that a judge who had earlier considered the application, had rejected argument that Mr LN's choice of procedure was defective.[11]

[60] Ms ZY is critical of Mr LN for advancing argument that the High Court judge erred. In her view, the Judge's finding on the procedural issue was definitive and binding. She regards Mr LN's criticism of the Judge as reflecting an arrogance on his part, characterised by what she perceived to be his prevailing attitude that he was "always right".

[61] With every respect to Ms ZY, I do not consider that the distinction she argues for as being determinative in her conduct complaint (procedural errors vs errors or disagreements on issues of legal argument) provides accurate assessment of the effect,

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[10] American Bar Association and American Law Institute *Committee on Continuing Professional Education Model Peer Review System* (discussion document, 15 April 1980).

[11] [redacted]. Note: I have no record before me of what was said by [redacted], but I accept that Mr LN would appreciate the importance of providing accurate account of the approach taken by the Judge.

in a disciplinary context, of possible consequences of a lawyer making a procedural mistake in the course of conducting litigation.

[62] Procedural errors can be made in advancing litigation that do not necessarily, or automatically, reflect a failure of competency on the part of the lawyer responsible for determining the procedural approach.

[63] It is not uncommon for lawyers to exercise a degree of creativity in electing the procedural approach to be adopted when determining the strategy for a particular piece of litigation. On occasions, lawyers, faced with various options, may adopt differing procedural approaches.

[64] Nor do I consider Mr LN's criticism of the judge's approach to be either improper, or reflective of an arrogant insistence that he "must be right".

[65] Every litigation lawyer who has argued a number of cases before the courts, has experienced instances of judges issuing decisions in which the judge has rejected what the lawyer considers to have been, conscientiously prepared, well-reasoned, and robustly advanced arguments.

[66] Lawyers are entitled to disagree with judges' decisions, and frequently do.

[67] It is not the case that judges are cloaked with a mantle of infallibility such as to inoculate them from possibility of error.

[68] Ms ZY had stark reminder of that when her successful outcome in the High Court was reversed on appeal.

[69] Accusation that Mr LN failed to provide competent representation is not automatically established because of the judge's rejection of the procedural steps taken.

[70] The question is not whether Mr LN erred in adopting the procedure he did, but rather whether he had, on the information available to him and after considering that information in the context of the proceedings to date, made an election to adopt a procedural approach which was reasonable and open to him to make.

[71] Having carefully considered the arguments advanced, I am satisfied that Mr LN's decision to proceed by way of an interlocutory application does not, and could not, provide proper basis for conclusion that Mr LN had breached obligations owed to Ms ZY, or that he had failed to provide her with competent advice.

[72] I accept Mr LN's argument that he had reasonable grounds to conclude that he could reactivate the proceedings in the High Court through the process of filing an interlocutory application, rather than an originating application.

[73] Nor do I consider that his assessment that it was worthwhile to attempt to reactivate the issues in the High Court was, in light of the Court of Appeal's failure to address the High Court costs issue, a decision that reflected a failure on Mr LN's part to provide his client with competent advice.

[74] Ms ZY enlists support for her argument that Mr LN's procedural approach was flawed, by noting that Mr LN's application was resisted by opposing counsel.

[75] The fact that opposing counsel had argued that Mr LN could not advance matters in the High Court by way of an interlocutory application, does not stand as conclusive evidence of Mr LN having adopted the wrong approach.

[76] Mr LN argues that if he had proceeded by way of an originating application, that approach would also likely have been criticised by opposing counsel.

[77] Mr LN argues, and provides authority to support his position, that it was open to the judge to convert the application filed, and he notes that he had made representations to the judge to do so.

[78] It was, in my view, reasonable of Mr LN to have considered the cost implications of endeavouring to advance the case on the back of the existing proceedings, rather than by starting again.

[79] He considered that he could achieve a less costly and more expeditious resolution, by seeking to reactivate the High Court proceedings.

[80] There were then, in Mr LN's view, advantages for Ms ZY in adopting the approach he chose.

[81] I accept that for Ms ZY, the Judge's rejection of the procedural steps taken by Mr LN was, for her, forceful evidence to support her argument that Mr LN got it wrong. It is understandable that the Judge's outright rejection of the procedural steps taken by Mr LN gave her serious pause to consider whether she had been adequately represented.

[82] But it is necessary, when examining the steps taken by Mr LN, to carefully consider whether those steps were reflective of a lawyer providing an assessment of options which were open to a competent lawyer to take.

[83] This is not a situation where the procedural decision taken by Mr LN (whilst ultimately unsuccessful) can be fairly described as reflecting a failure to competently advise or represent his client, because for example, there was compelling or unassailable argument to support the proposition that the procedural steps taken by Mr LN could never have succeeded.

[84] There was risk to Mr LN that his application be rejected, but it was not the case that he had neglected to assess those risks.

[85] He, as a senior and experienced practitioner, had formed the view that the procedural approach adopted was sustainable, and if challenged, opened with amendment in the court. He considered that his approach was supported both by his own research and assessment and supported by a Judge who had in the early stage of the proceedings, addressed objections raised by opposing counsel. It is my view, that Mr LN had, on the information available to him, made a litigation decision which was reasonable and open for him to have made.

[86] I do not consider the evidence advanced by Ms ZY to be of sufficient weight to support conclusion that Mr LN had failed to provide a competent level of representation. I find myself in agreement with the Committee's conclusion, that there was insufficient evidence to suggest that Mr LN had acted incompetently or without exercising reasonable care.

Did Mr LN provide competent advice and representation in regard to the enforcement steps taken, and did Mr LN keep Ms ZY adequately informed?

[87] The second major issue of importance to Ms ZY, was concern that Mr LN had guided her down the wrong path when he recommended commencing enforcement proceedings.

[88] Her concern was similar to those she had raised regarding the interlocutory process. She considered that Mr LN had, in commencing enforcement steps, advanced her down a path that had little prospect of success. As a consequence, she had incurred further costs.

[89] Ms ZY found support for her argument that she had been poorly advised on the enforcement issue, as she had on the interlocutory matter, in the comments made by the presiding judicial officer.

[90] [The Judge], who had addressed the cost implications of the enforcement proceedings being withdrawn, had concluded that the enforcement proceedings commenced "were not justified".[12]

[91] [The Judge]'s judgment ventilates both Mr LN's arguments in justification of the steps taken, and the Judge's explanations for rejecting the arguments advanced by Mr LN.

[92] At first step, Mr LN argued that the trustees were entitled to take steps to enforce the High Court costs order, as the Court of Appeal decision gave no indication that the High Court costs order was to change.

[93] The Judge countered that argument with comment that "it seems to me that the fact that the Court of Appeal expressly overturned the High Court's judgement might have been such an indication".[13]

[94] There is obvious force to that argument. It is difficult to envisage that a robust and determined litigant such as Mr JA was, would placidly accept that the High Court costs decision would stand unchallenged, in light of the Court of Appeal's rejection of the High Court's position.

[95] The Judge then addressed Mr LN's argument that, in reliance on rr 48(4) and 53J of the Court of Appeal (Civil) Rules 2005, the High Court costs order remained in place, unless specifically set aside.

[96] The Judge rejected that submission, on grounds that the Court of Appeal decision had not merely "adjusted" the decision of the lower court, but substantially reversed it.

[97] In his final submission, Mr LN argued that the minute issued by the Court of Appeal established firstly that a higher court referencing a matter of costs back to a subordinate court was a matter of practice rather than law and secondly, that in this case, the minute issued from the Court of Appeal gave indication that it intended that the costs issue be traversed in the High Court.

[98] Whilst both arguments were rejected, the Court noted that it did accept "the understated contention that the [XYZ] trustees and their advisers at the time might be

[12] *ZY v JA* [2018] NZHC XXXX at [16].
[13] At [11].

forgiven for misunderstanding the position given that the Court of Appeal did not deal with the High Court costs order expressly".[14]

[99] At the heart of this element of Ms ZY's complaint, is accusation that Mr LN failed to provide her with competent advice.

[100] She expressed her position clearly and succinctly in first setting out her complaint when she explained that "the backbone of my complaint, on both actions, is that Mr LN made fundamental errors of judgement regarding legal processes and in doing so he has breached his duty of care and failed to protect my interests".[15]

[101] The articulation of this limb of Ms ZY's complaint became, as the process of advancing and responding to the complaint progressed, overarched with allegation that Mr LN had failed to advise Ms ZY as to the possible adverse consequences of commencing enforcement proceedings and accusation that the decision to commence enforcement, had been largely driven by Mr LN.

[102] Mr LN rejected argument that he had pushed Ms ZY into taking steps to enforce the High Court costs order.

[103] The argument then turned to an examination of the nature of Mr LN's initial instructions, what he had been asked to do, and what he had done.

[104] Ms ZY and Mr LN have diametrically opposing recollections as to what was discussed at the commencement of the retainer, and what was discussed and agreed as to steps that would be taken.

[105] Argument as to whether Mr LN was initially instructed to provide advice on steps to be taken in respect to the Court of Appeal judgment, or whether he was first instructed to provide advice on enforcing the High Court costs decision, are not particularly helpful in illuminating the conduct issues under consideration. I am satisfied that both steps (enforcement and request to the Court of Appeal for clarification) were discussed in the early stages of Mr LN being instructed. In reaching that view, I find assistance in the correspondence between Mr LN and Ms ZY and a file note prepared by Mr LN.

[106] Mr LN was first approached by Ms ZY's instructing solicitor early in 2018. It is his recollection that the primary issue on which his guidance was being sought was in respect to the implementation of the Court of Appeal orders, and secondly, enforcement of the High Court costs orders.

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[14] At [15].
[15] Ms ZY, complaint to New Zealand Law Society (dated 15 December 2018) at p6.

[107] Mr LN wrote to Ms TW on 11 January 2018. He attached to that correspondence a copy of a High Court rule he considered relevant, together with commentary on the rule. He expressed his view that the High Court costs order remained in force, irrespective of the subsequent Court of Appeal decision. His advice was for Ms TW to make demand for payment of the High Court costs, and, in the event she encountered "pushback", to file a memorandum with the Court of Appeal.

[108] This advice presents as prudent and uncontentious. Importantly, it identifies two possible options for moving forward.

[109] On 30 January 2018, Ms TW forwarded to Mr LN a response she had received from counsel for Mr JA. Mr LN responded promptly to that correspondence to advise Ms TW that "… The next step I think is a memorandum to the Court of Appeal on the costs issue. Do you want me to draft that?"

[110] Mr LN was advised the following day, that Ms TW would wish for him to draft the memorandum.

[111] Mr LN met with Ms TW and Ms ZY on 1 March 2018.

[112] There is a degree of disagreement between Ms ZY and Mr LN in their recollections as to what was, or was not, discussed at that meeting.

[113] Ms TW has, in response to requests from both Mr LN and Ms ZY, provided, to the best of her recollection, her understanding of the matters discussed at that meeting. She is unable to precisely recall whether some specific issues were discussed or not.

[114] It was clearly the case that options being considered at this point were either filing a memorandum with the Court of Appeal seeking clarification on the costs issue, or alternatively, commencing enforcement proceedings.

[115] Ms ZY complains that Mr LN failed to adequately inform her of the consequences of the steps that were being proposed. She says that Mr LN neglected to inform her of the possible costs risks in pursuing enforcement action. She contends that "Mr LN didn't give me any advice - not relating to enforceability or anything else".[16]

[116] Mr LN completed a file note recording matters discussed at the 1 March 2018 meeting. The note is brief. Under the heading "decided" the file note records the following:

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[16] Ms ZY, correspondence to New Zealand Law Society (24 June 2019).

> proceed to "set up" thru correspondence enforcement/implementation of CA order. [ZY] v keen to enforce costs orders – out-of-pocket and JA has been obstructive. [LN] (Mr LN) counselled against – position on HC costs questionable following appeal outcome. [ZY] insists on pursuing/testing.

[117] Whilst the file note is brief, it clearly evidences a discussion having taken place in which options were being considered. It indicates that Mr LN had reservations about proceeding with enforcement action.

[118] On 19 March 2018, Ms ZY wrote to Mr LN to advise that she did not feel comfortable with seeking clarification from the Court of Appeal. She advises Mr LN that "I am not comfortable going back to the Appeal Court at all because we could lose our position. They may say they don't owe it. Clarification could do us more damage than good".

[119] Subsequent to Ms ZY filing her complaint, Mr LN sought confirmation from Ms TW as to the advice that had been proffered at the 1 March 2018 meeting. In correspondence to Mr LN of 4 February 2019, Ms TW recorded her recollection of what had transpired at that meeting as follows:

> I recall that [ZY] gave clear instructions that she wanted to pursue the award of costs she had been granted at the High Court against [JA] and [ABC Trustees Ltd]. [ZY]'s former barrister [RH] had told her she should pursue Mr [JA] for bankruptcy for the non-payment of costs. I recall that you (LN) were not keen to do this but redrafted a letter to be sent by me to [JA] solicitor concerning the bankruptcy notice.

[120] I am satisfied that the option of both making application to the Court of Appeal for clarification on the costs issue, and possibility of attempting to enforce recovery of the High Court costs, was discussed with Ms ZY, and that she indicated agreement to enforcement steps being taken.

[121] Ms ZY complains however, that Mr LN failed to sufficiently inform her of the potential risks involved in commencing the enforcement process. She says that her understanding of the enforcement steps being advocated by Mr LN, was that the process was procedural in nature and relatively straightforward.

[122] She sought support for argument that she was inadequately informed as to the risks involved in seeking to recover the High Court costs, from Mr LN's instructing solicitor, Ms TW. Ms ZY wrote to Ms TW asking her as to whether she was able to recall whether Mr LN had, at the meeting convened at Ms TW's office, alerted Ms ZY that commencing a bankruptcy action "may be risky or incorrect".[17] Ms TW responded to that request with indication that she could not recall as to whether Mr LN had addressed

[17] Ms ZY, correspondence to Ms TW (17 February 2019).

potential risks in pursuing a bankruptcy action, but noted that he "may have said any civil action can be risky".[18]

[123] Whilst I cannot establish with certainty on the evidence before me as to whether Mr LN provided comprehensive and cautionary advice to Ms ZY of the potential risks, it is compellingly clear that there was considerable uncertainty arising from the Court of Appeal's omission in providing direction on what steps should be taken in regard to the High Court costs. That uncertainty was compounded by the fact that the Court of Appeal's decision, whilst adverse to Ms ZY, nevertheless provided her with a degree of success in upholding the remediation argument that had been argued for in the High Court. I do not consider it likely that Ms ZY would not have well understood that any of the possible options open to her, were not without a measure of risk.

[124] It would have been helpful if Mr LN had provided Ms ZY with a written summary recording the options available to her and explaining the risks and costs of pursuing those options but his failure to do so, in these circumstances, does not constitute conduct which would meet the threshold to establish a disciplinary breach.

[125] Mr LN had expressed reservations about commencing enforcement steps. Ms ZY was made aware of those concerns but was nevertheless willing to commence action. She was understandably anxious to try and recover the costs she had been awarded. But it is clear from the confirmation provided by Ms TW, that Ms ZY "wanted to pursue the award of costs".

[126] I think it unlikely that Ms ZY would not have been aware that a failure in the enforcement attempts would inevitably carry a costs consequence. She was, by this stage of the proceedings, an experienced litigant who well understood that lack of success in the court was inevitably accompanied by orders for costs being made against the unsuccessful party.

[127] Nor am I persuaded that Ms ZY's understanding of the process involved in seeking enforcement of the costs awarded, was that it was essentially a procedural step in the nature of a "rubber stamping" process. The very fact that there were discussions as to whether Mr LN should proceed to, as described in his file note, "set up … enforcement implementation of CA order", gives clearest of indications that neither option contemplated could provide a guarantee of successful outcome.

[128] Ms ZY was well aware that the Court of Appeal decision had resulted in confusion as to the status of the costs awarded in the High Court. But her firmly

[18] Ms TW, correspondence to Ms ZY (undated email on file, but likely sent on 18 February 2019).

expressed instructions to Mr LN to move quickly on the enforcement action reflected in my view, an understanding on her part that an assertive approach was required.

[129] Nor was there anything unconventional or improper in Mr LN taking steps to commence enforcement proceedings, in circumstances where he could not guarantee the outcome sought.

[130] Having carefully considered the submissions filed, together with the relevant Court decisions, I am not persuaded that Mr LN's decision to commence enforcement action reflected a failure on his part to provide Ms ZY with competent advice. He had given careful attention to how a rule of the Court of Appeal had application to issues of cost recovery and had concluded that the measure of success that Ms ZY had enjoyed in the High Court provided foundation for argument that the costs awarded in the High Court should survive the Court of Appeal decision.

[131] He did not consider the enforceability issue to be clear cut.

[132] The Committee concluded that Mr LN had made a careful assessment of the options available to Ms ZY and, having done so, was unable to identify evidence to suggest that he had acted incompetently or without exercising reasonable care. I agree with that conclusion.

[133] Nor do I consider that Mr LN failed to adequately inform Ms ZY of the steps that were being taken.

[134] Whilst it may have been the case that Mr LN could have taken steps to ensure that Ms ZY was more fully informed, when I consider the steps taken, the discussions that took place, the evidence of Ms TW's involvement and the correspondence (including Mr LN's file note), I am not persuaded that it has been established that Mr LN failed to keep Ms ZY informed to the extent that the failure would meet the threshold for establishing grounds for an adverse disciplinary finding.

Was the retainer terminated without good cause?

[135] Rule 4.2 of the Rules reinforces the obligation on lawyers, once retained, to complete the retainer, and explains the circumstances in which a lawyer may terminate the retainer.

[136] Rule 4.2 relevantly provides:

Duty to complete retainer

4.2 A lawyer who has been retained by a client must complete the regulated services required by the client under the retainer unless—

(a) the lawyer is discharged from the engagement by the client;

(b) the lawyer and the client have agreed that the lawyer is no longer to act for the client; or

(c) the lawyer terminates the retainer for good cause and after giving reasonable notice to the client specifying grounds for termination.

4.2.1 Good cause includes—

(a) instructions that require the lawyer to breach any professional obligation:

(b) the inability or failure of the client to pay a fee on the agreed basis or, in the absence of an agreed basis, a reasonable fee at the appropriate time:

(c) the client misleading or deceiving the lawyer in a material respect:

(d) the client failing to provide instructions to the lawyer in a sufficiently timely way:

(e) except in litigation matters, the adoption by the client against the advice of the lawyer of a course of action that the lawyer believes is highly imprudent and may be inconsistent with the lawyer's fundamental obligations.

…

4.2.3 A lawyer must not terminate a retainer or withdraw from proceedings on the ground that the client has failed to make arrangements satisfactory to the lawyer for payment of the lawyer's costs, unless the lawyer has—

(a) had due regard to his or her fiduciary duties to the client concerned; and

(b) given the client reasonable notice to enable the client to make alternative arrangements for representation.

4.2.4 A lawyer who terminates a retainer must give reasonable assistance to the client to find another lawyer.

[137] Once a retainer is terminated a lawyer must provide "reasonable assistance to [their] client to find another lawyer".

[138] In *Ethics, Professional Responsibility and the Lawyer*, the learned authors noted that:[19]

> When the lawyer has a discretion to terminate the retainer, he or she must take into account the prejudice that will flow from the termination. Indeed, whenever a lawyer terminates a retainer, the lawyer must act to minimise the prejudice to the client. … More explicit provision exists in respect of a lawyer who has terminated (or seeks to terminate) for non-payment of fees. In that case, the lawyer must show that he or she [has complied with the requirements of rule 4.2.3(a) and (b)].
>
> If the client would be unable to obtain legal assistance before a hearing or other important event (such as a scheduled meeting) where assistance was required, the lawyer should refrain from terminating the relationship. The prejudice may be minimised when the lawyer assists the client by contacting and meeting with another lawyer and handing over and explaining documentation …
>
> …
>
> It goes without saying that it would be wholly inappropriate for a lawyer to threaten the termination of a retainer preceding some important trial date (or other date such as an arbitration or mediation) simply to ensure fees are paid.

[139] When filing her initial complaint, Ms ZY contends that Mr LN had endeavoured, on two occasions, to terminate his retainer. The first on 14 December 2018 when he had directed her to contact Ms TW with directions to her to bring the retainer to an end, the second on 15 December 2018 when he himself had advised that he could no longer continue acting.

[140] On 14 December Ms ZY wrote to Mr LN expressing concern that his advice had been inadequate. In her correspondence, Ms ZY:

(a) complained that Mr LN had taken her, for the second time, down the wrong path; and had

(b) embarked her on a litigation path that could never succeed; and

(c) expressed concerns at what she perceived to have been Mr LN's lack of understanding of legal process; and

(d) expressed a view that she had made an error in electing to continue with Mr LN after experiencing what she described as "the bankruptcy debacle".

[141] Mr LN responded to Ms ZY's 14 December correspondence in an email forwarded to Ms TW on 15 December 2018. Mr LN indicated to Ms TW that, in view of what he considered to Ms ZY's latest "outburst", he felt that he had no option but to

[19] Webb, Dalziel and Cook, above n 6 at [5.8.3].

terminate his brief. He concludes with request to Ms TW to advise what is to be done with Ms ZY's files.

[142] There had been earlier problems in the relationship when Ms ZY had, on receipt of [redacted]'s decision, made accusation that Mr LN had been negligent. The problems were smoothed over, but on receipt of Ms ZY's email of 14 December, Mr LN was emphatic that he would not continue to represent Ms ZY. I agree with the Standards Committee, that Ms ZY's indication to Mr LN that she considered he had been negligent in managing her affairs, left Mr LN with no realistic option but to withdraw.

[143] The lawyer–client relationship was irreparably damaged.

[144] At this point, it became essential for Ms ZY that she obtain fresh representation.

[145] Having indicated to Ms ZY that he was no longer prepared to continue acting, Mr LN had obligation to assist Ms LN in finding another lawyer.

[146] Mr LN says that he spoke to Ms TW on the day he gave notice that he was not prepared to continue. He says that Ms TW informed him that she was reasonably confident that Ms ZY had taken steps to engage another lawyer. Mr LN says he advised Ms TW that he would assist in both transferring files to Ms ZY's new lawyer, and that he would be happy to discuss the case with new counsel and provide whatever assistance he could.

[147] Following that conversation, Mr LN wrote to Ms TW on two occasions, making request of her to advise as to where his files should be sent. In that correspondence, Mr LN reaffirmed his willingness to meet with replacement counsel at no cost to Ms ZY, to assist in facilitating the transfer.

[148] On 29 January 2019, Ms TW advised Mr LN that replacement counsel had been retained. Mr LN personally delivered his files to Ms TW on 30 January 2019.

[149] I am satisfied that Mr LN fulfilled his obligations to ensure that his files were smoothly transitioned to Ms ZY following his decision to terminate the retainer, and that he made every effort to ensure that freshly instructed counsel had opportunity to consult with him.

Conclusion

[150] Ms ZY is understandably distressed at the events that followed the Court of Appeal's decision to reverse a High Court judgment which would, if it had stayed on foot, brought to conclusion a longstanding dispute.

[151] Mr LN says that he had formed a view that Ms ZY had been unfairly treated in the long running dispute engaging the easement over her property. Expressions of concern that Ms ZY was facing a relentless and obdurate opponent who was seemingly consistently receptive to commencing or continuing with litigation in the court, likely provides cold comfort to Ms ZY.

[152] It is understandable that she felt concerned that proceedings commenced by Mr LN had not simply been rejected by the Court but had been rejected on grounds that the court considered there was no proper foundation to advance the proceedings.

[153] But I am not persuaded that the steps taken by Mr LN, despite their lack of success, reflected any professional failing on his part such as would merit consideration of need for a disciplinary response. Mr LN made, as he was required to do, tactical and strategic choices which he considered were appropriate. They were choices that may, in my view, have been made by a number of practitioners faced with similar circumstances.

[154] I see no basis to interfere with the Standards Committee's decision.

Anonymised publication

[155] 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 23rd day of April 2021

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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 ZY as the Applicant
Mr LN as the Respondent
[Area] Standards Committee [X]
New Zealand Law Society