LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2021] NZLCRO 040/21

Ref: LCRO 170/2020

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	**KLM LIMITED** Applicant
AND	**ND** Respondent

DECISION

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

Introduction

[1] [KLM] Limited ([KLM]) has applied for a review of a decision by the [Area] Standards Committee [X] to take no further action in respect of its complaint concerning the conduct of Mr ND who acted for [ABJ] Limited (ABJ), the sublessee of rural land in a dispute with [KLM], the sublessor.

[2] [KLM] is a company established by the [UVW] Trust (the Trust), an ahu whenua trust constituted under Part 12 of the Te Ture Whenua Maori Act 1993. The Trust administers and manages rural land leased to [KLM] (the headlease). At the relevant time, Mr ND, was a director of [KLM], and acting chairperson of the Trust.

[3] From 1 June 2014 [KLM] sublet, for a term of 15 years, part of the land to [ABJ] for dairy farming (the sublease).

[4] During the first half of 2017, matters between [KLM] and [ABJ] were in dispute. The disputes resolution mechanism, contained in clause 48 of the sublease provided, in effect, that disputed matters which could not be resolved would be decided by an independent registered farm management consultant appointed by both parties, but if they could not agree who to appoint, then [HH] would do so.

[5] As set out in detail in my later analysis, on 11 May 2017, Mr OE, a registered farm consultant, informed (letter sent by email) [ABJ]'s director, Mr PF, and Mr ND that he had been asked by the Trust to "undertake a mediation on four issues" the following day, 12 May 2017 at 10 am.[1]

[6] Mr ND responded (letter sent by email) to Mr OE that day expressing his view clause 48 was "an arbitration agreement", not an agreement to mediate. He said [ABJ] was "concerned" about "some influence" the Trust "appear[ed] to have" over Mr OE, and for "that (and other) reasons", [ABJ] did not agree to Mr OE being appointed to mediate or decide the disputes.

[7] Importantly, for the purposes of this review, Mr ND explained [ABJ]'s concern was "not intended" as a "general reflection on [Mr OE's] integrity", but if Mr OE"purport[ed] to make any binding decision at or following [the 12 May] meeting", then [ABJ] would "have no choice but to challenge any such decision in the High Court".

[8] Three and a half months later, on 25 August 2017, Mr OE forwarded (by email) a copy of clause 48 to [HH]. He said he had received "some serious threatening letters" from Mr ND before the "planned meeting" on 12 May 2017.

[9] On 29 September 2017 Mr ND informed (letter sent by email) Mr OE that [ABJ] and Mr PF did not agree to Mr OE's appointment. He said his 11 May 2017 letter was not intended as "a threat or threats", but Mr OE had assumed the role of a mediator, not a registered farm management consultant.

[10] In response (letter sent by email) to Mr ND on 5 October 2017, Mr OE declined the proposed appointment.

Complaint

[11] [KLM] lodged a complaint with the Lawyers Complaints Service (LCS) on 15 May 2020 alleging Mr ND's 11 May 2017 letter to Mr OE contained threats which led

[1] Mr OE of [XYZ Consultants].

to (a) Mr OE declining to act as mediator in the disputes between [KLM] and Mr ND's client, [ABJ], and (b) the disputes being referred to arbitration.

Response

[12] Following an initial assessment by the LCS, [KLM]'s complaint was dealt with through LCS's Early Intervention Process which I refer to later in this decision.

Standards Committee decision

[13] The Standards Committee delivered its decision on 20 July 2020, and 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.

(1) Non-client

[14] The Committee stated that subject to his overriding duties to the Court, Mr ND's professional duties were owed to his client, [ABJ], not to [KLM], the party with whom [ABJ] was in dispute.[2]

[15] For that reason, the Committee explained Mr ND had a duty to protect and promote the interests of his client, [ABJ], and his professional duties were "to provide advice" to, and "then take instructions from" [ABJ] "on how to proceed".

(2) Threats

[16] The broad issue identified by the Committee was whether Mr ND "breached his professional obligations" when sending letters to Mr OE. In particular whether, as alleged by [KLM], those letters contained threats of action [ABJ] would take against Mr OE if Mr OE took the role of mediating, or interceding in disputes between [KLM] and [ABJ].

[17] The conclusion reached by the Committee was that no evidence had been produced that suggested Mr ND, in writing those letters, was "doing otherwise" than "acting on [ABJ's] instructions". The Committee noted Mr ND's 29 September 2017 letter "specifically state[d]" [ABJ] "d[id] not agree to Mr OE's appointment and expresses reasons for this".

[18] In the Committee's view, although the other expert Mr ND suggested to take Mr OE's place was conflicted, it did not follow Mr ND "had deliberately sought to frustrate the dispute resolution mechanism" in the sublease.

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[2] The Committee cited *Allied Finance and Investments Ltd v Haddow & Co* [1983] NZLR 22 (CA) at p24.

[19] Finally, the Committee noted although Mr OE had told (by email) [HH] on 25 August 2017 Mr ND had sent him "some serious threatening letters", Mr ND, in his 29 September letter to Mr OE had explained that [ABJ]'s objection to [Mr [OE]] acting as mediator was not intended as "a threat or threats".

Application for review

[20] In its application for review filed on 31 August 2020, [KLM] says it "fail[s] to accept that one has the right to threaten any individual", and from the commencement of the lease, [KLM] had been subjected by [ABJ] to "th[at] type of behaviour", namely, "threats, litigation, [bullying]".

[21] [KLM] repeats its view that the disputes resolution provision in clause 48.1 of the sublease is not an arbitration clause, and says when, at Mr ND's request, an arbitrator was appointed, [KLM] challenged the appointment in the High Court.

[22] [KLM] refers to the Judge's comments in those proceedings that practical matters on farms such as "drainage", and "culverts", are "best handled by a farm consultant", and a lawyer "could only be helpful in terms of reading the lease" and advising "who is responsible for costs interpreting the lease".[3]

Response

[23] In his response, Mr ND says he agrees with the Committee's decision and does not have much to add with the exception of providing, with [ABJ]'s permission, an explanation of [ABJ]'s concern "about Mr OE's impartiality".[4]

[24] Mr ND submits "[n]othing done by [him] or [his] client", [ABJ], "derailed the dispute resolution process under the lease". He explains that [KLM] and [ABJ] were unable to "agree on an independent farm management consultant to appoint", and, as provided in the sublease, [HH] was asked, but declined to make an appointment.

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[3] *[KLM] Ltd v [ABJ] Ltd* HC Auckland CIV-2018-XXX-XX, [DATE] 2019 (submissions before the Court) at pXX, lines XX-XX.
[4] Mr ND, email to LCRO (4 September 2020).

Review on the papers

[25] Mr ND has informed the case manager he has no objection to the review being dealt with on the papers. [KLM] has not responded to the case manager's letter stating I had formed the view this matter could be appropriately dealt with on the papers.[5]

[26] 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.

[27] 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

[28] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[6]

> … 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.

[5] Mr ND, email to LCRO (4 September 2020); LCRO (case manager), letter to [KLM] (5 January 2021).
[6] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

[29] More recently, the High Court has described a review by this Office in the following way:[7]

> 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.

[30] 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 consider all of the available material afresh, including the Committee's decision, and provide an independent opinion based on those materials.

Preliminary

[31] The LCS dealt with [KLM]'s complaint through its Early Intervention Process (EIP). This involves a Standards Committee conducting an initial assessment of a complaint and forming a preliminary view as to outcome.

[32] If the Committee's preliminary view is that the complaint lacks substance, a Legal Standards Officer (LSO) will inform the lawyer concerned of the Committee's preliminary view, inviting response. Any response is noted in a file note and provided to the Committee, which then completes its inquiry into the complaint.

[33] The Committee's file note produced in respect of [KLM]'s complaint states that on 20 July 2020 an LSO spoke with Mr ND on the telephone and invited him to respond to [KLM]'s complaint. Mr ND told the LSO he denied [KLM]'s allegations against him, and would provide any further information required by the Committee. In response, the LSO said the Committee's view was it had sufficient information to make its decision.

[34] That day, the LSO informed [KLM] on the telephone that the Committee's decision was being finalised and would be sent to [KLM] shortly. The Committee's file note also records that in response to [KLM]'s question whether it had provided sufficient information to the Committee, the LSO stated that the Committee had not requested any additional information.

[35] Neither the LCS nor the Committee appear to have informed [KLM] that Mr ND denied [KLM]'s allegations.

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

[36] Standards Committees must comply with the rules of natural justice which, in broad terms, require (a) matters be heard by an impartial decision-maker independent of the parties, (b) the right of the party against whom an allegation has been made to respond, and (c) the parties' right to be informed of the opposing party's submissions.[8]

[37] A breach by a decision-maker of one of these rules may result in the matter being reconsidered by another decision-maker. It is to be emphasised that even though a person against whom an allegation has been made may respond by denying the allegation without further explanation, the decision-maker must provide the response and any submissions to the other party.[9]

[38] Even in cases such as this, where a denial without further explanation is provided, and it may be appropriate for the decision-maker not to seek comment from the other party, that does not relieve the decision-maker from communicating the response to the other party.

[39] It follows that a copy of the LSO's file note which records Mr ND's denial ought to have been provided to [KLM].

[40] As noted earlier, a Review Officer has "all such powers as are reasonably necessary or expedient to enable the …Review Officer to carry out his or her functions under th[e] Act", and can exercise the powers that could have been exercised by the Standards Committee on the matter and by so doing consider the matter afresh.[10]

[41] It appears [KLM] did not receive, or was not informed of the LSO's file note before the Committee made and issued its decision. However, I do not consider any prejudice was caused to [KLM] for the reason that there was little if anything [KLM] could have said in reply to Mr ND's denial other than repeat its allegations.

[42] In reaching that conclusion, I take into account that in his 11 May 2017, and 29 September 2017 letters to Mr OE, produced by [KLM] with its complaint, Mr ND had explained his position which he has summarised in his response to [KLM]'s review application.

[43] In conclusion I emphasise only for that reason, in these particular circumstances, that little would be served by me directing [KLM]'s complaint be reconsidered by another Standards Committee.[11] The framework "in relation to

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[8] Section 142(1) of the Act.
[9] *LCRO 201/2020* (22 March 2021) (unpublished) at [47] and [66].
[10] Sections 202 and 211(1)(b).
[11] Section 209(1).

complaints" established by the Act is for complaints to "be processed and resolved expeditiously".[12] However, that can "never be at the expense of careful and meticulous observance of the rules of natural justice, or other procedural requirements relevant to decision-making".[13]

Issues

[44] The issues I have identified for consideration on this review are:

(a) Did Mr ND owe [KLM] any professional duties, and if so, what were those duties, and did Mr ND contravene them?

(b) Did Mr ND, in his letters to Mr OE, in particular his letter dated 11 May 2017, make a threat which led Mr OE to decline acting as mediator, and the disputes being referred to arbitration? If so, did Mr ND contravene any professional obligations or duties?

Analysis

(1) Context

[45] To provide context for discussion of these issues, I first set out in more detail the events leading up to, and following Mr ND's 11 May 2017 letter to Mr OE.

[46] As noted in the introduction, [KLM], the lessee of land owned and administered by the Trust, from 1 June 2014, sublet part of the land to [ABJ] for dairy farming.

[47] During the first half of 2017 a number of issues arose between [KLM] and [ABJ] which were disputed. The disputes resolution provision in clause 48 of the sublease provides:

> **48 Dispute resolution**
> 48.1 If discussion between the [sublessor] and the [sublessee] fails to reach agreement in any dispute (including but not limited to the review of rent) the matter shall be decided according to the decision of an independent registered farm management consultant agreed to by both parties whose decision shall be binding. If neither party can agree on a consultant then one will be appointed by Federated Farmers of New Zealand.
> 48.2 The costs of referring the dispute to an independent registered farm management consultant shall be shared equally between the parties

[12] Section 120(2)(b).
[13] *LCRO 201/2020* (22 March 2021) at [72] and [73]: "There can be no compromise to that efficient disposal, if the details of a Call Log are provided to the parties before a [Standards] Committee finalises its decision on a complaint."

[48] In summary, [KLM] and [ABJ] agreed if they could not resolve any difference between them, the matter would be decided by an independent registered farm management consultant appointed by both parties, or in default, by [HH].

[49] On 11 May 2017, Mr OE, a registered farm consultant, informed [ABJ]'s director, Mr PF, and Mr ND that he had been asked by the Trust to "undertake a mediation on four issues" – two raised by each party – the following day, 12 May 2017 at 10 am.[14]

[50] Mr OE explained he had "previously acted as a mediator" on another issue between the parties in December 2016.[15] He said although Mr PF had told (by telephone) him "earlier that week" that Mr PF would not attend the mediation, to resolve matters he "strongly advise[d]" that "both parties attend" so they could "move on".

[51] He said Mr ND, the chairperson of the Trust, had "requested that [he] proceed with the mediation" because "most of the…issues have come from [ABJ]". He said Mr PF was entitled to send a representative, but it was "far more preferable" for Mr PF to attend.

[52] In his response to Mr OE that day, Mr ND said the two issues raised by [ABJ] were "relatively minor", but those raised by the Trust were "far more fundamental topics".

[53] He explained that mediation was "an entirely voluntary process", and because Mr PF's agreement to attend mediation was "contingent" on the availability of another person who could not attend, Mr PF would not attend.[16] Irrespective, Mr ND said [ABJ] was "not in a position meaningfully to discuss" the early termination of the sublease which the Trust had raised.

[54] Mr ND also expressed his view that clause 48 of the sublease, would "almost certainly be construed by a court as an arbitration agreement", not an agreement to mediate. He said by not limiting the "decision-making powers" of the person appointed, it was open to that person to make rulings on "questions of legal liability, making binding interpretations of the lease and resolving disputed issues of fact" which was "consistent with the quasi-judicial role of an arbitrator", not that of an expert.

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[14] Unless otherwise stated, all communications were by letter and/or email; issues requested by [ABJ]: (a) costs relating to servicing/repairing vacuum pump, (b) liabilities re: repair to farm access tracks following recent flood damage; issues requested by the Trust: (c) the relationship between the Trust and [ABJ], (d) the ability to mutually agree on early termination.

[15] Fencing of waterways on waste areas on the land.

[16] The person referred to by Mr ND was Mr QG.

[55] He said Mr OE had "not been appointed to arbitrate anything" and to "avoid any doubt" [ABJ] withdrew "any referral" of a dispute under the sublease to Mr OE. He said [ABJ] opposed Mr OE "purporting to insist" the mediation include the Trust, the head lessor, not [KLM] the sublessor.

[56] Mr ND said although "not intended" by [ABJ] as a "general reflection on [Mr OE's] integrity", [ABJ] was "concerned" the Trust "appear[ed] to have some influence" over Mr OE who "may have been involved in ex parte communications" with the Trust.

[57] For "that (and other) reasons", Mr ND said [ABJ] would "not agree, in the future, to [Mr OE] being appointed to mediate or decide other disputes under the [sub]lease". He added if Mr OE "purport[ed] to make any binding decision at or following [the 12 May] meeting", then [ABJ] would "have no choice but to challenge any such decision in the High Court, naming [Mr OE] as a defendant and seeking costs against [him]".

[58] On 25 August 2017 Mr OE forwarded a copy of clause 48 to [HH] whom he reminded had "twice" previously recommended him to help resolve disputes between the Trust and [ABJ].

[59] He explained both parties had paid him on the first occasion but he had received "some serious threatening letters" from Mr ND before the "planned meeting" on 12 May 2017. He said "despite ruling in [ABJ's] favour", [ABJ] "d[id not] want him to help but the Trust di[d]". He asked [HH] to advise the Trust "what [it] should do".

[60] A month later, on 29 September 2017, Mr ND informed Mr OE that in Mr ND's view, Mr OE had assumed the role of a mediator, not a registered farm management consultant as provided in clause 48, and [ABJ] and Mr PF did not agree to Mr OE's appointment.

[61] He repeated [ABJ]s position was "not a challenge to [Mr OE's] integrity", but [ABJ] and Mr PF were "concerned that any decision" made by Mr OE would be "coloured" by Mr OE having told Mr PF "it would be best" for the sublease "to be ended early" because "the parties [we]re unable to get along with each other".

[62] On 5 October 2017, Mr OE declined the proposed appointment. Between 11, and 13 March 2018, Mr ND endeavoured to have another registered farm management consultant appointed by [HH] to resolve "a number of issues" that were in dispute between [KLM] and [ABJ].

(2) Another lawyer's client – issue (a)

[63] Because Mr ND did not act for [KLM], I refer first to some circumstances when a lawyer's professional duty owed to an opposing party in a dispute (or in a transaction) may apply.

(a) Professional standards – unsatisfactory conduct

[64] Before doing so, it is to be noted that if a determination is made that a lawyer's conduct warrants a disciplinary response a finding can be made of either (a) unsatisfactory conduct pursuant to s 12 of the Act; or (b) misconduct pursuant to s 7.[17]

[65] Of the categories of unsatisfactory conduct which concern the conduct of a lawyer (or incorporated law firm) when providing regulated services, the second category concerns "conduct … that would be regarded by lawyers of good standing as being unacceptable including— (i) conduct unbecoming …; or (ii) unprofessional conduct".[18]

(b) Professional rules

[66] The professional duties contained in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), as the name suggests, concern the way in which lawyers must conduct themselves, and act for their clients, and fall into three broad categories.[19]

[67] First, those duties which directly concern the provision of legal services by lawyers to their clients;[20] secondly, duties which concern lawyers' dealings or interactions with other lawyers, and third parties; and thirdly, duties which concern the rule of law and administration of justice, and lawyers' overriding duties to the High Court.[21]

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[17] A misconduct finding can only be made by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

[18] Section 12(b). Section 6 provides the definition of "regulated services", and the inter-related definitions of "legal services", legal work", and "reserved areas of work". The first category is conduct that "falls short of the standard of competence and diligence…of a reasonably competent lawyer": s 12(a). The third category is "… a contravention of [the] Act, or of any regulations or practice rules made under [the] Act that apply to the lawyer … [when] …provi[ding] regulated services …": s 12(c). The fourth category concerns conditions or restrictions to a lawyer's practising certificate: s 12(d).

[19] See the Schedule to the Rules at Notes about the Rules: the Rules are not "an exhaustive statement of the conduct expected of lawyers", but "set the minimum standards that lawyers must observe and are a reference point for discipline".

[20] See also s 4 for lawyers' fundamental obligations: (b) "be independent" when acting for their clients; (c) "…act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients"

[21] Also, s 4: (a) "uphold the rule of law and facilitate the administration of justice in New Zealand"; … (d) "protect [clients'] interests" subject to "overriding duties as officers of the High Court".

(c) Non-clients

[68] As noted above, there may be times when a lawyer, such as Mr ND, owes a duty, other than a professional duty, to persons for whom the lawyer does not act. For example, a duty of care in negligence. However generally, a lawyer acting for a client would not owe a duty to a person who was an opposing party in litigation, or on the opposite side of a transaction.[22]

[69] For that reason, "the existence of a duty" owed to a non-client has been described as "exceptional".[23] Where a lawyer acts for a party to a transaction, the different interests possessed by each party explains the Courts' reference to policy considerations as a reason why that lawyer does not owe a professional duty to the opposing party.[24]

(d) Duties owed to clients

[70] This position can be contrasted with the professional duties lawyers owe their clients which are included in the first category of the Rules noted above.

[71] To illustrate, the duties owed by Mr ND to his clients, [ABJ] and Mr PF, would have included the duties to act competently (r 3); to treat them with respect and courtesy (r 3.1); to respond to their inquiries promptly (rr 3.2, 7.2); to provide them with information on the principal aspects of client service and client care at the commencement of the retainer (rr 3.4, 3.5);[25] to be independent (r 5); to protect and promote their interests to the exclusion of third parties' interests (r 6); to consult with them (r 7.1); to hold their information in confidence (r 8); and to charge them fees that are fair and reasonable (rr 9, 9.1).

(e) Broader duties

[72] As also noted above, there are professional duties and obligations of a broader nature included in the second category of the Rules which concern lawyers' dealings or interactions with other lawyers, and third parties.

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[22] Unless, for example, where a lawyer acting for a client on a transaction provides an undertaking, say, to pay rates, or water charges, or a certificate for e-dealing purposes in Landonline, or to a bank: see rr 2.5 and 2.6 of the Rules.

[23] Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [5.4.3], referring to *Burmeister v O'Brien* [2010] NZLR 395 (HC) at [234].

[24] At [5.4.3].

[25] Rules 3.4A and 3.5A apply to barristers sole.

[73] Duties in the third category include to use legal processes only for proper purposes (r 2.3); not threaten to make accusation against, or disclose something about another person for an improper purpose (r 2.7); and when acting in a professional capacity conduct dealings with others, including self-represented persons, with integrity, respect, courtesy (r 12).

(3) Mr ND's letter – issue (b)

(a) Parties' positions

[74] [KLM] alleges Mr ND's 11 May 2017 letter to Mr OE contained a threat which led to Mr OE declining to act as mediator in the disputes between [KLM] and [ABJ], and the disputes being referred to arbitration.

[75] Mr ND says [KLM] and [ABJ] could not agree on an independent farm management consultant to resolve the issues between them, and [HH] declined to make an appointment. He says clause 48 did not provide for mediation, and [ABJ] was concerned Mr OE may make a binding ruling.

(b) Legal processes

[76] In the context of Mr ND's 11 May 2017 letter to Mr OE, I refer to r 2.3, which requires lawyers to use legal processes for proper purposes:

> A lawyer must use legal processes only for proper purposes. A lawyer must not use or knowingly assist in using, the law or legal processes for the purpose of causing unnecessary embarrassment, distress, or inconvenience to another person's reputation, interests or occupation.

[77] The rationale for r 2.3, which "constrains lawyers to use legal processes more broadly only for proper purposes", has been described as the "public interest in the due administration of justice [which] necessarily extends to ensuring that the court's processes do not lend themselves to oppression and injustice".[26]

[78] In that sense, the likely meaning of the word "proper" means "genuine", "conforming to recognised social standards or etiquette, seemly, decent, decorus", "respectable, correct, [especially] excessively so".[27]

[79] Because r 2.3 contemplates the possibility of more than one purpose, the observation has been made that "[i]f there was a second purpose and this was the

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[26] *BU v DG* LCRO 276/2011 (17 September 2013) at [43]; GE Dal Pont *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2017) at p585 and fn 244.
[27] Oxford English Dictionary <www.oed.com>. Conversely, "improper" means "[u]nbecoming, unseemly, indecorous".

predominant purpose then, if such purpose was improper, there would be a breach of [r] 2.3".[28] It follows that "where the predominant purpose is improper, [r] 2.3 is breached. That reasoning must apply equally to the situation where there is only one purpose, and that is improper".[29]

[80] For example, if a lawyer "uses the law for a purpose which is quite contrary to that for which it was intended, the lawyer will be guilty of using the law for an improper purpose".[30] On the other hand, in circumstances where the intention is not "to affect any legal rights, but to achieve some collateral purpose the action is inappropriate and an abuse of legal process".[31]

[81] It may be difficult for a client to "objectively" discern the difference between using a legal process "to one's advantage" on the one hand, and "to gain an illegitimate advantage" on the other. For that reason, it falls to the client's lawyer "to determine the client's intentions and objectives", and if "the purpose is improper, the lawyer should refuse to assist".[32]

[82] Examples of the application of r 2.3 provided in the footnote to the rule include unjustifiably issuing a statutory demand under the Companies Act 1993, registering a caveat where there is no caveatable interest, and serving documents in a way that causes unnecessary embarrassment or damage to a person's reputation, interests, or occupation.

[83] For the purposes of this review, previous circumstances in which the lawyer concerned has been held to have contravened r 2.3 include where a lawyer's "unwarranted threats" of contempt proceedings against another law firm "which would not in any way further [the] position" of the lawyer's client.[33]

(c) Threat to make an accusation, or disclosure

[84] Rule 2.7 prohibits lawyers from threatening to make accusations against, or disclose something about another person for an improper purpose:

> A lawyer must not threaten, expressly or by implication, to make any accusation against a person or to disclose something about any person for any improper purpose.

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[28] *Alloa v Ullapool* LCRO 159/2009 (10 June 2010*)* at [19].
[29] *BU v DG*, above n 26 at [44].
[30] Webb, Dalziel and Cook, above n 23 at p350.
[31] Webb, Dalziel and Cook at p352.
[32] Webb, Dalziel and Cook at pp352–353.
[33] *GZ v TE* LCRO 17/2011 (17 February 2012) at [79].

[85] Because r 2.7 could apply whether or not the lawyer concerned was acting in a professional capacity, it similarly falls into the first and third category of rules referred to above.

[86] The elements of the prohibition in r 2.7 are (a) a threat by a lawyer, whether expressly or by implication, (b) to (i) make any accusation against a person, or (ii) to disclose something about any person, for any improper purpose.[34]

[87] In this sense the word "improper" means "unbecoming, unseemly, indecorous". Whether a lawyer's purpose was "improper" is to be determined objectively on the particular facts of each matter. [35]

[88] Similar to the approach with r 2.3, if the lawyer has a secondary, or "ulterior" purpose in mind in order to gain leverage, or a strategic advantage, either for the lawyer, or the lawyer's client, then the lawyer's purpose may be improper.

(d) Third parties – duty of integrity, respect, and courtesy

[89] Rule 12 requires that "[a] lawyer must, when acting in a professional capacity, conduct dealings with others, including self-represented persons, with integrity, respect, and courtesy".[36]

[90] The duty in r 12 is qualified by providing it applies when a lawyer is acting "in a professional capacity".

[91] By being concerned with lawyers' dealings with "others", r 12 differentiates itself from those rules which contain lawyers' duties and obligations owed to their clients, and other lawyers. The duty in the rule could extend to a lawyer's communications with persons other than the lawyer's client, or the opposing lawyer.

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[34] "Threat" includes "press, urge, try to force or induce", "threaten" means "make a threat or threats to do" something: *Shorter Oxford English Dictionary* (5th ed, Oxford University Press, Oxford, 2003) at p3251. Further definitions include that threat means "a communicated intent to inflict harm or loss and another or on another's property, esp. one that might diminish a person's freedom to act voluntarily or with lawful consent": *Black's Law Dictionary* (9th ed, Thomson Reuters, St Paul, Minnesota, 2009) at p1618; "accuse" is to "charge [another person] with a fault; blame", an "accusation" is "the act of accusing; the state of being accused": *Shorter Oxford English Dictionary* at p16; to "disclose" something in the sense used in r 2.7 is to "make known, reveal": *Shorter Oxford English Dictionary* at p693; "disclosure": "the act or process of making known something that was previously unknown; a revelation of facts": *Black's Law Dictionary* at p531.

[35] *Shorter Oxford English Dictionary* at p1335; also see *Black's Law Dictionary* at p826 where improper is defined as "incorrect; unsuitable or irregular" or, "fraudulent or otherwise wrongful"; *SC v JT* LCRO 382/2013 (June 2017) at [35]–[37].

[36] In this context, "integrity" means "[s]oundness of moral principle; the character of uncorrupted virtue; uprightness; honesty; sincerity": *Shorter Oxford English Dictionary* at p1394.

[92] Concerning "self-represented persons", because "lawyers should not take unfair advantage of them", the suggestion has been the duty "is potentially more onerous than were that person legally represented, which may be accentuated where he or she represents a party experienced in litigation".[37]

[93] Illustrations of adverse findings made against lawyers who have contravened r 12 include a lawyer "stat[ing] something as fact without independently verifying the veracity of the statement".[38]

(e) Discussion

[94] As noted earlier, the essence of [KLM]'s complaint is whether, in his 11 May 2017 letter, Mr ND breached any professional obligations or duties by informing Mr OE that [ABJ] would challenge in the High Court any decision Mr OE "purport[ed] to make" at, or following the meeting proposed by Mr OE the following day.

[KLM]

[95] [KLM] asks whether Mr ND, by sending that letter, had acted inappropriately. It states since 2015 it, and the Trust, had been subjected by [ABJ] to "threats, demands and litigation, bullying, mediation, determination, and arbitration".

[96] [KLM] contends the disputes resolution provision in clause 48 of the sublease was "not an arbitration clause", but "a determination clause". It claims Mr ND's letter to Mr OE prevented the disputes resolution process occurring.

[97] In support of that position, [KLM] refers to Mr ND's 13 March 2018 email to the farm consultant, Mr RH, suggested by Mr ND on behalf of [ABJ], and approved by [HH].[39]

Mr ND

[98] Mr ND explains it wasn't until "the eve of the arbitration hearing", three years after the events of May 2017 that [KLM] made its complaint about him, and is surprised [KLM] considered he acted inappropriately. He says [KLM] filed its application for review following the arbitrator's decision in [ABJ]'s favour.

[99] He says that although Mr OE refers, in his 11 May 2017 letter to Mr PF, to a mediation, [ABJ]'s concern was that Mr OE "might …purport to issue a binding ruling" if

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[37] Dal Pont, above n 26 at p731.
[38] *FU v UN* LCRO 244/2010 (October 2011) at [44].
[39] In that email, Mr ND asked Mr RH to "remain appointed" notwithstanding Mr RH's statement (by email) to [HH], and Mr ND earlier that day that he may be conflicted because one of [Mr RH's] partners worked with [ABJ].

Mr PF did not attend the mediation. He says this is why, in his reply letter to Mr OE that day, he "explain[ed] the nature of mediation" to Mr OE.

[100] In support of [ABJ]'s concern that Mr OE "was sympathetic" to [KLM], Mr ND says Mr OE did not send to [ABJ] his 28 August 2017 email to [KLM] in which Mr OE forwarded his 25 August 2017 email to [HH].

[101] In his 29 September 2017 letter to Mr OE, Mr ND said (a) early termination of the sublease was not a matter in dispute, (b) the "current disputes" between [ABJ] and [KLM] did not include "the day-to-day farming of the property", and (c) instead of responding to his questions about clause 48, Mr OE's 19 September 2017 letter "suggest[ed]", Mr OE "intend[ed] to act as an arbitrator".[40]

[102] He said if Mr OE "perceive[d]" Mr ND's 11 May 2017 letter "contain[ed] a threat or threats", that was "not the intention". He explained if a person, such as Mr OE, "purport[ed] to act as an expert" beyond the person's areas of expertise, then without the statutory protection of an arbitrator, that person may be liable for doing so.

[103] Mr ND says in the end the parties agreed to refer the disputes to arbitration which is "a consensual process" and was not "forced" on [KLM] as it claims.

Consideration

[104] To recap, [KLM] and [ABJ] were lessor and lessee respectively of the sublease which provided, in clause 48, for the resolution of disputes by reference to a registered farm management consultant who was independent of, and agreed by the parties, and failing agreement to be appointed by [HH].

[105] [KLM], through the Trust, wanted to appoint Mr OE, who says he had previously acted as a mediator on an issue between the parties, to resolve further issues in dispute between them.

[106] [KLM] complains by stating in his 11 May 2017 letter to Mr OE that [ABJ] would challenge any decision Mr OE purported to make as a mediator, Mr ND made a threat against Mr OE.

[107] In response to Mr OE's 11 May 2017 letter, Mr ND informed Mr OE that day (a) [ABJ] was concerned Mr OE may not be impartial, and for that reason [ABJ] would not

[40] Mr ND said the issues between the parties concerned (a) responsibility "in a legal sense, for repairing flood damaged infrastructure" on the land, and (b) whether, "as a matter of law, [ABJ] ha[d] a right to abatement of rent during a period when it is denied full use of the property because of unrepaired flood damage".

agree to that appointment, and (b) if Mr OE went ahead with a mediation the following day [ABJ] would "have no choice but to challenge" in the High Court any decision Mr OE made.

Rule 2.3 – proper purposes

[108] Mr ND's stated purpose or intention in sending his 11 May letter was to (a) explain to Mr OE and [KLM] that clause 48 of the sublease did not constitute an agreement by the parties to submit to mediation, and (b) place them on notice that if the mediation proceeded with or without Mr PF present any decision made would be challenged.

[109] On the assumption, for the purposes of this discussion, Mr ND's letter formed part of a legal process, it is my view, in the context of disagreement whether clause 48 was a mediation clause, or an arbitration clause, that Mr ND's purpose in his statement [ABJ] would issue proceedings to contest that issue was proper.

Rule 2.7 – a threat

[110] None of the required elements, referred to above, were evident in Mr ND's letter, and for that reason I do not consider r 2.7 applies.

[111] The context of Mr ND's statement that [ABJ] would challenge any decision made by Mr OE as a mediator was (a) a difference of opinion as to the meaning and effect of clause 48, and (b) Mr PF's refusal to attend a mediation planned by [KLM] for the following day. In those circumstances, Mr ND's letter gave notice of legal action [ABJ] intended if a mediation went ahead.

[112] In my view, his statement did not constitute a threat whereby, on behalf of [ABJ], he informed Mr OE of any harm or loss [ABJ] might attempt to inflict on [KLM]. Equally, the statement did not contain an accusation against Mr OE or [KLM], or describe a matter that would be disclosed.

Conclusion

[113] I make the observation that arbitration is a means by which "parties consensually submit", in an arbitration agreement, "a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures affording the parties an opportunity to be heard".[41]

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[41] *Williams and Kawharu on Arbitration* (2nd ed, LexisNexis, 2017) at [1.1.1].

[114] This can be compared to mediation, also "a consensus-based process", the crucial difference being that the parties "work with an independent third party to endeavour to resolve their differences" rather than have a decision imposed on them.[42]

[115] In support of its position, [KLM] produces the transcript of part of the High Court hearing of the parties' submissions which evidences a discussion of the meaning and interpretation of clause 48.

[116] However, I emphasise that the determination of whether a provision, such as clause 48, in a contract constitutes an agreement by the parties to submit to arbitration, or to mediate their differences, is a matter for the Courts, not for a Standards Committee or a Review Officer on review

[117] I make the further observation that with limited exceptions, a lawyer risks a complaint from a client with a prospect of a disciplinary response if the lawyer does not carry out the client's instructions.[43] In that regard, Mr ND, acting in accordance with [ABJ]'s instructions, as he states, informed Mr OE that if Mr OE proceeded with a mediation then [ABJ] would issue proceedings to challenge any decision made by Mr OE.

[118] Where two parties are in dispute with each other, I can appreciate that receipt by one party, or as in this case by Mr OE, of a letter from the other party's lawyer in which the lawyer states his or her client's intention to issue proceedings if a particular outcome is not achieved, may be perceived as confronting.

[119] However, from my analysis of Mr ND's 11 May 2017, and 29 September 2017 letters to Mr OE, the conclusion I have reached is that Mr ND's statements in those letters did not contain a threat, and assuming the letters formed part of a legal process his purpose in sending the letters was proper.

[120] For completeness, I do not consider the language adopted by Mr ND in his letters was disrespectful, or discourteous, or evidenced an unprincipled approach by Mr ND.[44] Nor do I consider his letters displayed he failed to promote and maintain proper standards of professionalism.[45]

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[42] At [1.1.5].
[43] Webb, Dalziel and Cook, above n 23 at p291.
[44] Rule 12.
[45] Rule 10.

Decision

[121] For the above reasons, pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

Anonymised publication

[122] 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 absent of anything as might lead to their identification.

DATED this 30th day of March 2021

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BA Galloway
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:

KLM, as the Applicant
Mr ND, as the Respondent
SJ as Related Person
[Area] Standards Committee [X]
New Zealand Law Society