

LCRO 19/2016

CONCERNING

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

AND

CONCERNING

a determination of [AREA] Standards Committee [X]

BETWEEN

OW

Applicant

AND

PG

Respondent

DECISION

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

Introduction

[1] Mr OW has applied for a review of the determination by [Area] Standards Committee [X] to take no further action in respect of Mr OW's complaints about Mr PG.

[2] Mr OW's client, LMN Limited (LMN), was included by Mr PG as a plaintiff in "leaky building" proceedings. Mr OW and [LMN] assert that no authority had been provided to Mr PG for [LMN] to be included.

Background

[3] At the 2012 Annual General Meeting of the Body Corporate for [JC] Apartments in [Suburb], discussions took place about leaking issues. It was agreed that [AR & Co] would be instructed by the Body Corporate to issue proceedings on behalf of the Body Corporate and the residential owners.

[4] Following the meeting Mr [AR] wrote to the residential owners:¹

BODY CORPORATE [Number] ([JC] APARTMENTS) – HIGH COURT LITIGATION

1. We refer to the meeting on 18 September 2012, which was well attended by owners.
2. We have now received authority from your Body Corporate Secretary to issue the proceedings discussed at that meeting. The proceedings will claim the cost of repairs, interest, consequential costs (which we will quantify at a later date depending on whether owners/tenants need to move out), general damages for stress, anxiety and inconvenience and costs.
3. As discussed at the meeting, we will need from each owner their conveyancing file. This is the file from your solicitor who acted for you when you purchased your unit. To that end, would you please fill in the **enclosed** form and return it to [TP] of this office. Her email address is [\[tp@ar.co.nz\]](mailto:tp@ar.co.nz). Once we have the form completed by you, we will send it to you[r] solicitor and obtain your conveyancing file. You need simply fill in your unit number, the name of the law firm and the solicitor – do not worry if you cannot remember the solicitor's name. The law firm will be enough. Please then sign and date the enclosed form and return it to us.
4. Thank you for your assistance.

[5] The letter was sent to all the owners, including [LMN], by the Body Corporate secretary of XBC Limited (XBC) with a covering letter which said:²

As discussed at the Annual General Meeting, [AR & Co]. is to be instructed by the Body Corporate to issues proceedings on behalf of the Body Corporate and the residential owners. The purpose of the proceedings is to look to recover the costs that will be associated with bringing your complex up to the Building Code.

Please now find enclosed:

- a. Letter from [AR & Co]. in relation to this matter.
- b. An authority to uplift your purchase file from your former Solicitor.

As advised at the meeting as part of the discovery the defendants are entitled to sight and review your purchase file. The purpose of this is to see whether or not there was any step which may have made you contributory [sic] negligent in terms of your purchase. Please do not be concerned about the process but the process must be followed to enable you to remain in the proceedings as a second defendant [sic]. As much of the work will pertain to private property it is important that you execute the authority to uplift so that you are able to recover the costs involved.

Please note a separate authority to act is not required as the authority to uplift will be treated as the authority to act. The authorities can be returned to the writers [sic] PA, [\[br@xbc.co.nz\]](mailto:br@xbc.co.nz) (fax 09 524 9780) or alternatively direct to [AR's], [contact details included].

¹ Letter AR to "the owners [JC] Apartments Body Corporate [Number]" (20 September 2012).

² Letter BBCL to [LMN] (25 September 2012).

[6] Three months later Ms MT (the director of [LMN]) signed and returned the form without question. Mr PG filed the proceedings including [LMN] as one of the group named as the second plaintiff.

[7] Ms MT disputed liability for the Body Corporate levies issued in connection with the building work and for work carried out by [AR & Co]. It was apparent from emails sent by Ms MT to [XBC] in September 2014, some of which were copied to Mr PG, that Ms MT had engaged Mr OW to assist her in connection with issues arising out of this matter, but it was not absolutely clear that Ms MT wanted [LMN] withdrawn from the proceedings.

[8] Ms SE, the solicitor assisting Mr PG,) wrote to Ms MT on 24 September 2014 seeking instructions. The email read:

Dear MT

We understand that you do not wish for [AR & Co] to act for you in the building defects claim which is currently underway for the [JC] Apartments.

Please advise whether:

- a) You would like a different solicitor to represent you in the proceedings against those responsible for the construction; or
- b) You would like us to discontinue your claim.

If you would like a different solicitor to represent you, please let us know who that may be so that we may discuss the handover to them.

We have tried to call you over the past few days to discuss this. Please feel free to contact us using the details below if you have any questions.

[9] Ms MT responded via email on 26 September 2014 at 2.03am:

Hi [GH]

There is nothing to handover. No written authority was given to [AR's] to act for me. Mr OW is my lawyer.

Regards

MT

[10] Ms SE responded to that email on 26 September 2014 at 9.29am and copied it to Mr OW:

Good morning [MT],

Proceedings were issued in your name with other unit owners and the Body Corporate. As a result you are a plaintiff in the proceedings.

We require explicit instructions from you as to what you want to do going forward.

If we discontinue your claim and you later want to join the proceedings or to issue proceedings individually against the parties involved in the construction you may run into limitation concerns.

Please provide us with instructions as to whether you want to claim against the parties involved in the construction but to use different representation, or whether you wish us to discontinue the claim.

[11] Mr PG advises:³

In the light of Ms MT's email, Mrs [TL] then contacted Mr OW on the same day to discuss matters and in particular to discuss whether [LMN] wished to discontinue its claim.

[12] There is some dispute as to what Mr OW's responses to Ms SE were, but no clear instructions to [AR & Co] were provided.

[13] Subsequently, Mr OW wrote to Ms SE, raising the issues that were the subject matter of his complaints.

Mr OW's complaints

[14] Mr OW's complaint in the first instance was presented as a complaint on behalf of his client that [AR & Co] had issued proceedings in which his client was included as a plaintiff but without his client's knowledge or consent. His complaint expanded into a concern expressed in the following manner:⁴

There appears to be a pattern of behaviour developing around some professional managers of body corporates and law firms that regularly act for them rather than for the body corporate itself which have unattractive features, though it appears BBC for whom [AR's] may act have had at least some authority to instruct them. It should be of concern that what has happened in this instance may have happened on more than one occasion, and in more than just this matter.

[15] Mr OW subsequently raised further matters⁵ which were summarised by the Standards Committee in the following manner:⁶

- that Mr PG failed to provide information in writing on the principal [sic] aspects of client service in breach of rules 3.4 and 3.5 of the RCCC

³ Letter PG to Lawyers Complaints Service (20 October 2015) at [13]. Mrs [TL], referred to by Mr PG, was previously known as Ms [SE].

⁴ Letter OW to Lawyers Complaints Service (30 July 2015) at [16].

⁵ Letter OW to Lawyers Complaints Service (11 November 2015).

⁶ Standards Committee determination (25 August 2016) at [50].

- that Mr PG failed to exercise independent judgement and provide objective advice in breach of rules 5, 5.1, 5.2 and 5.3 of the RCCC
- that Mr PG failed to promptly disclose to [LMN] all information relevant to the matter and ensure that [LMN] understood the nature of the retainer and keep [LMN] informed of progress on the retainer in breach of rules 7 and 7.1 of the RCCC.
- that Mr PG acted for the Body Corporate [Number] and [LMN] in litigation in circumstances where his duties conflicted in breach of rules 6.1 and 13.6 of the RCCC
- that Mr PG may have breached rule 14.4 of the RCCC as he is not properly instructed in terms of the intervention rule

The Standards Committee determination

[16] The Standards Committee issued a single determination in respect of the complaints against Mr PG and Mrs [TL]. The questions posed by the Committee and its deliberations on each are set out here:

Did Mr PG issue proceedings in the name of [LMN], without its knowledge or consent?

20. The Committee considered that while it was not necessarily the most transparent way to instruct [AR & Co], the authority to uplift included an email from Mr [RA] to [LMN] which advised that a separate authority to act was not required as the authority to uplift would be treated as authority to act. All unit owners, including [LMN] were provided with the opportunity to opt into the proceedings by completing the necessary authority. The Committee did not accept that Ms MT or [LMN] were not aware of the proceedings being issued or that [LMN] did not consent to the proceedings being issued. Ms MT engaged in further communication with [AR & Co] regarding the proceedings, including discovery, and Mr PG was able to act until Mr OW was instructed by [LMN].

21. While the Committee acknowledged that an individual client service letter was not provided to YFGI, the Committee understood that a letter was provided to the Body Corporate and that the information contained in the client service letter were discussed in some detail with the unit owners at the AGM.

22. Accordingly, the Committee decided in accordance with section 138(2) of the [Lawyers and Conveyancers Act 2006] to take no action on this aspect of the complaint on the basis that any further action was unnecessary and inappropriate.

Did Mr PG attempt to ratify his actions by seeking “further” instructions?

...

24. The Committee did not accept that Mr PG was attempting to override [LMN's] protests or that he was seeking further instructions. Mr PG was attempting to explain why he believed that Ms MT did consent to being a plaintiff. In the Committee's view it was entirely appropriate for Mr PG to attempt to clarify the instructions from [LMN] and in circumstances where it became apparent that Ms MT did not wish [LMN's] to be a plaintiff, seek instructions to discontinue [LMN's] claim.

25. Accordingly, the Committee decided in accordance with section 138(2) of the Act to take no action on this aspect of complaint on the basis that any further action was unnecessary and inappropriate.

Did Mr PG attempt to justify the issue of the proceedings on specious or suspect grounds?

...

27. The Committee did not consider that Mr PG was attempting to justify the proceedings on specious or suspect grounds for the reasons already discussed above. Mr PG was properly instructed by [LMN].

28. Accordingly, the Committee decided in accordance with section 138(2) of the Act to take no further action on this aspect of the complaint on the basis that any further action was unnecessary and inappropriate.

Did Mr PG continue to assert that he had authority to act, and claim to have properly included [LMN]? If so, did he do so knowing he did not have such authority to act and did not properly include [LMN] in the proceedings?

...

30. ... The Committee agreed that Mr PG was properly instructed and that he had therefore properly included [LMN] in the proceedings.

31. Accordingly, the Committee decided in accordance with section 138(2) of the Act to take no action on this aspect of complaint on the basis that any further action was unnecessary and inappropriate.

Did Mr PG fail or refuse to remove [LMN] from the proceedings and to meet Mr OW's reasonable costs in raising the matter?

...

35. The Committee did not consider that Mr PG failed or refused to remove [LMN] from the proceedings. He attempted to obtain instructions to discontinue the proceedings on behalf of [LMN]. Those instructions were not forthcoming. Mr OW was then instructed to act and it was incumbent on him to take the necessary steps in accordance with the High Court Rules to discontinue the claim.

36. Accordingly, the Committee decided in accordance with section 138(2) of the Act to take no action on this aspect of the complaint on the basis that any further action was unnecessary and inappropriate.

Did Mr PG fail to resolve the issue with Mr OW and attempt to abrogate responsibility?

...

38. ... the parties reached what can only be described as an impasse as to the way forward ...

39. Accordingly, the Committee decided in accordance with section 138(2) of the Act to take no action on this aspect of complaint on the basis that any further action was unnecessary and inappropriate.

The application for review

[17] With the application for review Mr OW included a six-page commentary on the Standards Committee determination. The header on the first page has the two Standards Committee file numbers allocated by the Complaints Service to the complaints against each of Mr PG and Mrs [TL]. A line has been drawn through the line referring to the complaint against Mrs [TL]. The application for review is therefore an application for a review of the decision as it relates to Mr PG and has been processed in this manner.

[18] Mr OW summarised his reasons for the review:⁷

The complaint [sic] and his client LMN Limited[LMN] are not satisfied with the decision.

The general description of the situation/procedures which led to [LMN] be [sic] included as a party in proceedings without its authority or knowledge at the time have not been addressed by the committee. The procedure followed by the plaintiff to obtain authority from its members should not have been allowed by [AR's]. They had a conflict of interest having acted in many legal matters involving the plaintiffs manager who was the instructing agent.

[LMN] disputes the findings of certain critical facts in her separate resume identifying the findings challenged and the reasons in the attached statement. The evidence supports a finding of unsatisfactory conduct. [LMN] should not have been there. [AR's] on learning what had happened should have withdrawn [LMN] from the proceedings with or without agreement on the basis.

The technique or approach or [sic] the committee is flawed as well. It is clear the [AR's] were required to follow the RCCC in the various respects referred to in para 50 of the decision as ancillary to the main complaint and not having sufficient weight to warrant further consideration, yet is clear that had those steps been as mandated by the RCCC [AR's] would never have assumed it had instructions from [LMN]. In fact it never communicated with M/s MT the company's proprietor. Their failure to send a conduct and client care letter is similarly dismissed in para 21 and that too would have immediate effect.

Review

Delegation

[19] The review progressed by way of an applicant-only hearing in Wellington on 13 July 2017 attended by Mr OW. Mr PG was not required to attend and did not exercise his right to do so.

[20] The hearing was conducted by Mr Vaughan acting as a delegate duly appointed by the Legal Complaints Review Officer (LCRO) pursuant to cl 6 of sch 3 of

⁷ Application for review (1 February 2016) Part 7.

the Lawyers and Conveyancers Act 2006 (the Act). The LCRO has delegated Mr Vaughan to report to me and the final determination of this review as set out in this decision is made following a full consideration of all matters by me after receipt of Mr Vaughan's report and discussion.

A bigger picture?

[21] At the commencement of his comments at the review hearing Mr OW referred to what he called a "bigger picture". He asserted that [AR & Co] frequently acted for [XBC] and that the director of that company was a former lawyer who had been struck from the roll of barristers and solicitors. He made allegations about the director that have no relevance to this review. Mr OW's comments gave the impression to Mr Vaughan that his concerns were not so much the issue that Mr PG had joined [LMN] to the proceedings without its knowledge or consent, but the means by which [AR & Co] were instructed.

[22] The assertions by Mr OW referred to above have no relevance to the issues presented by Mr OW as the reasons for his complaint.

[23] Mr OW's complaint was against the firm "[AR's]". Following receipt of the complaint, the Lawyers Complaints Service requested Mr OW to advise which lawyers in the firm his complaint related to. Mr OW identified Mr PG and Ms SE.

[24] However, in the application for review, Mr OW again refers to the conduct of the firm "[AR's]", rather than to the conduct of Mr PG. This reinforces the impression that Mr OW's complaint is an objection to the relationship between [AR & Co] and the Body Corporate manager which has no relevance to this complaint.

A puzzle

[25] When considering an overview of Mr OW's complaint, it is difficult to understand why Mr PG would continue to assert, in the face of clear opposition, that an individual owner was to be, or remain, joined as a party to the proceedings. It is understandable however, that a lawyer would wish to be sure that a person was to be removed. An individual owner who was not a party to the proceedings would not receive a share of any damages awarded. In those circumstances a unit owner who had been incorrectly removed from the proceedings, or not included in the first instance, would be considerably aggrieved, potentially resulting in adverse consequences for the lawyer.

Ms MT's engagement with Body Corporate issues

[26] Ms MT did not attend the meeting of the Body Corporate in September 2012 where issues with the building were discussed. Mr OW advises that matters relating to the claim and the engagement of [AR & Co] were not on the Agenda for the meeting.

[27] Ms MT disputes the validity of the steps taken by [XBC] and the body corporate committee. Mr PG cannot unilaterally determine the validity of the actions taken by the Body Corporate and it would seem that all other owners have no issues in this regard. Those disputes have been, or are being, dealt with elsewhere. It would seem that these issues are at the heart of Mr OW's complaint.

[28] The communications between Ms MT and [AR & Co] are set out in paragraphs [8] to [11] above. A reasonable inference from these communications is that [LMN] wished to be included as a plaintiff in the proceedings and that was done. Subsequently, there was insufficient clarity as to whether or not [AR & Co] were to remove [LMN] as a party and at a later date Mr OW imposed conditions which were unacceptable to Mr PG. Mr PG did not have to accept the conditions imposed by Mr OW and ultimately Mr OW could (or should) have taken steps himself to withdraw [LMN] from the proceedings.

Did a solicitor-client relationship exist?

[29] In the context of a claim where some 32 owners were included as second plaintiffs, and given the fact that Ms MT had signed and returned the authority to uplift without questioning the basis on which the form was sent by [XBC] to her, (or the reasons for it), it was reasonable for Mr PG to proceed on the basis that the firm had sufficient authority to include [LMN] as a plaintiff.

[30] It was not until September 2014 that Mr PG became aware that Ms MT had consulted Mr OW, but the correspondence from Ms MT and Mr OW was obtuse and unhelpful, and Mr PG was unable to firmly establish what Ms MT's instructions were.

[31] There is no logic to the suggestion that Mr PG would spend significant time and resources in an attempt to retrospectively establish he had instructions from [LMN] to proceed.

[32] The evidence does not support Mr OW's allegations that Mr PG joined [LMN] without authority and the allegation that Mr PG tried to retrospectively establish that authority cannot be sustained.

Did Mr PG assume a separate duty to [LMN]?

[33] Mr OW asserts that Mr PG was obliged to communicate with, and advise, [LMN] directly. That would also mean that Mr PG assumed similar obligations for each of the individual apartment owners included as plaintiffs. Mr OW submits that Mr PG was required to issue a separate letter of engagement for each individual client.⁸

[34] Mr OW's submission disregards the nature of the proceedings issued in these circumstances. The first plaintiff in the proceedings was the Body Corporate. The individual owners were included as second plaintiffs. The second plaintiffs were represented as a group, rather than individually.

[35] Ms MT was in conflict with the Body Corporate. There was no conflict of interests for Mr PG to act for the Body Corporate and the group of owners against the defendants. Ms MT required to have separate advice in respect of any dispute with the Body Corporate and for any advice as to whether or not to join in to the proceedings. That was recognised by [XBC] when it advised the owners:⁹

... We would encourage all owners to seek their own advice if they have any doubts as to the benefits of joining the litigation. As indicated whether you choose to join the litigation or not you will be liable for your share of repair costs
...

Communications with [LMN]

[36] Mr PG points out that on 29 December 2012, [LMN] was provided with a copy of the proceedings as filed.¹⁰ The proceedings were issued in the name of the Body Corporate as first plaintiff and the second plaintiffs were included in the proceedings as "[X Investments Limited] & Ors as listed in Schedule 1 to this statement of claim". The Schedule included [LMN].

[37] There is no evidence as to what communications there were between Mr PG and [XBC] but it was reasonable for Mr PG to expect [XBC] to keep its members apprised of developments, whether or not they were part of the claim.

[38] The communications between [AR & Co] and [LMN] were sufficient in the circumstances, and, as discussed above, [AR & Co] did not assume a separate and individual duty to each proprietor. The duty was to the Body Corporate and to the

⁸ Letter OW to Lawyers Complaints Service (11 November 2014) at [14].

⁹ Memorandum XBC Limited (XBC) to owners (30 November 2012).

¹⁰ Email [XBC] to owners (29 December 2012).

proprietors joined as second plaintiffs as a group. [AR & Co] fulfilled its duties to the Body Corporate and the group to the required extent.

General comments

[39] Mr OW's complaint involves a consideration of a lawyer's duties to the group of unit owners who were joined as second plaintiffs to the action commenced by the Body Corporate. The interests of the Body Corporate and the individual owners coincided in that the defendants were the same and the causes of action arose out of the same set of facts. The difference between the first and second plaintiffs was that the second plaintiffs' causes of action and right to compensation or damages were derived from facts pertaining to each individual owner.

[40] In the main, however, the interests of the Body Corporate and the unit owners as a group coincided. It was only when each individual owner's particular circumstances were examined that different rights to compensation arose.

[41] Some apartment owners did not participate at all in the proceedings. This fact answers the allegation by Mr OW that [AR & Co] acted precipitously and without authority to join [LMN]. All owners were not joined and the inference from this is that [AR & Co] considered Ms MT's conduct meant she wished to be included.

[42] That was the view of the Standards Committee and this is confirmed on review.

Decision

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

DATED this 29th day of September 2017



D Thresher
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr OW as the Applicant
Mr PG as the Respondent
[AR] as a Related Person
[Area] Standards Committee [X]
The New Zealand Law Society