

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

[2020] NZLCRO 78

Ref: LCRO 002/2019

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

RCN and OCN as Trustees of the [Name] Trust

Applicant

AND

MA, JS, LB and GD

Respondents

DECISION

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

Introduction

[1] Mr and Mrs CN have applied for a review of the determination by [Area] Standards Committee X to take no further action in respect of their complaints about the respondents' advice in relation to the establishment of the [Name] Trust and the subsequent activities of the Trust, being the purchase of a plot of land at [Address] and issues arising out of the proposed development of the site.

[2] Mr and Mrs CN consider that the Committee's decision was inadequate and incomplete.

Background

[3] Mr and Mrs CN advise that in 2012 they instructed Law Firm A¹ to establish a Trust for them to be known as the [Name] Trust.

[4] The purpose of establishing the Trust at that stage was for it to complete the purchase of Lot X of a subdivision of land at [Address]. At that stage Mr & Mrs CN had signed the Agreement for Sale and Purchase for themselves 'or nominee.'

[5] The Trust was established in November 2014. There were three Trustees — Mr RCN, Mrs OCN and [Law Firm A Trustees Limited]. The directors of the company were the partners of [Law Firm A].

[6] The purchase of the land was completed, and Mr and Mrs CN proceeded with plans to develop a multi-story building on the property, the top floor of which was to be their personal residence.

[7] Mr and Mrs CN developed a relationship with [Company B] to act as project manager for development of the site. [Company B] was also acting as the project manager for the development of several of the other Lots in the subdivision.

[8] [Company B] prepared a letter of intent for the construction of the building by [Company C] which was signed by Mr CN on behalf of the Trust.

[9] Acting on the letter of intent, [Company C] proceeded with design work and acquisition of steel for the proposed building.

[10] In January 2016, [Company C] made a claim against the Trust pursuant to the Construction Contracts Act 2002, and at that stage Mr and Mrs CN again instructed [Law Firm A] to assist them. The matters in respect of which advice was sought by them is best described by recording the scope of the services to be provided by [Law Firm A] as set out in the firm's letter of engagement:

- (a) Advising the Trust as to settlement of [Company C]'s claim in the current on-foot adjudication under the Construction Contracts Act 2002;
- (b) Corresponding and/or otherwise negotiating with [Company C]'s lawyer for the purpose of settling its claim against the Trust;
- (c) Advising the Trust as to how to provide vacant possession so as to avoid prejudicing the settlement of the sale of [Address];

¹ The law firm of which the respondents were partners (in the case of Messrs GD and JS) and employees (in the case of Messrs LB and MA).

- (d) Advising the Trust as to how best defend [Company C]'s claim in the adjudication and/or mitigate against it;
- (e) Prepare all evidence and legal arguments, and the documents required to record them, that we think best serve the Trust's position and take all steps that we deem necessary to advance the Trust's best interests.

[11] The adjudicator appointed pursuant to the provisions of the Construction Contracts Act ordered the Trust to make payment to [Company C]. Mr and Mrs CN are dissatisfied with the conduct of the defence to the [Company C] claim by [Law Firm A] and lodged their complaints against the lawyers with the Lawyers Complaints Service.

Mr and Mrs CN's complaints

[12] In their email to the Lawyers Complaints Service dated 15 September 2017, Mr and Mrs CN expressed the following "concerns":-

We are concerned that [Law Firm A] has

- Not acted competently, with a strategic and all-encompassing oversight. Our Trust has unresolved partially completed legal matters, and been left with significant financial risk
- Not dealt with issues and not completed dealings in a timely manner
- Not been protecting our Trust interests.
- Not charged a fee that is fair and reasonable. (and hold to a quotation)
- Not provide us with notice/update to fee changes or overrun to quote.
- Not provided Timesheets and a breakdown of time when asked or after fee was challenged.
- Placed the Trust in a perilous and risking [sic] situation with a partially complete service
- Placed the Trust in a position where it has to re-start the whole legal process (at significant cost) with another Legal Firm to recover monies owed and secure interests of Trust.

[13] They also complain that at the time when the Trust was established [Law Firm A] did not provide:-

- clear instructions on the requirements on the day-to day running of the Trust to Trustees (RCN & OCN)
- instructions or requirements of the Trustees, when Trust interacted with development dealings e.g. where services by consultants were being provided to the Trust (Architect, Fire Engineer, or Structural Engineer etc.) – did all the Trustees need to sign those agreements?
- instructions for the Trustees to draft and sign resolutions on the above

[14] They expressed the view that “in hindsight”, the advice provided by [Law Firm A] “appears not to have actually been in [their] interests” in that “some of the defence arguments put forward by [[Law firm A]] seemed unnecessary legalistic arguments (eg. jurisdictional arguments) and ... did not seek to resolve the issue in the fastest and most cost-effective way”.

[15] They note that the adjudicator was not influenced by the submissions made by [Law Firm A] on their behalf.

[16] As a result, they feel that [Law Firm A] “should have advised the Trust to accept the CCA claim against the Trust was essentially payable and this should have been made clear to the Trustees”.

[17] In their letter of complaint, they “suggest the approach should have been to accept liability under [the] contract as [they] didn’t dispute the core debt to the claimant, minimised legal expenses for the Trust, secure [their] position then allow the Trust to move on”.

[18] Their complaints also relate to the period after the adjudicator’s ruling against them and they complain that [Law Firm A] did not advise them to “secure the steel” which the Trust had been ordered to pay for. This issue arose when they sought to view the steel for on-sale purposes, as by that stage they had made a decision not to proceed with the development.

[19] In addition, Mr and Mrs CN complain that [Law Firm A] had not advised them to instruct [Company C] to cease work, thereby triggering their right to materials paid for, and other consequences flowing from the wording set out in the letter of intent.

[20] Finally, Mr and Mrs CN complain that [Law Firm A] had “left them in the lurch” by terminating their retainer because of a perceived conflict of interest.

[21] The remedies sought by Mr and Mrs CN were:-

- a) erasure of the current outstanding invoice with [Law Firm A] \$12,247.50
- b) compensation by way of repayment of all fees paid to [Law Firm A] relating to this matter \$28,482.05 (29 July 2016)
- c) compensation by way of reimbursement of \$3,000 being costs paid by us to [Law Firm D] for completing Construction Contracts Act Schedule ([Company C] \$692K claim schedule)
- d) compensation by way of reimbursement of \$18,525 being costs paid by us to [Law Firm E] for defending and defeating spurious Construction Contracts Act claim

- e) compensation by way of reimbursement of \$48,300 for money paid by TT to [Company C] for the steel. It is unreasonable that the Trust is out of pocket by \$48,300 because of the actions and omissions of [Law firm A].

[22] They also wished to recover the value of the steel which they have not been able to take possession of, because (they allege) of inaction on the part of [Law firm A]. In this regard, they suggest assigning what they term “the debt” owed to them by [Company C], to [Law firm A].²

The Standards Committee determination

Mr LB

[23] The Committee first addressed the complaints as they related to Mr LB. This was because he was the lawyer who had acted for Mr and Mrs CN when the Trust was established.

[24] The Committee noted:³

The complaint against Mr LB is with respect to the day-to day running of the Trust, instructions or requirements of the Trustees when interacting with third parties, and the need for resolutions.

[25] When providing Mr and Mrs CN with the draft Deed, Mr LB advised:⁴

The law requires that every decision made by the trustees be unanimous. It is not sufficient that a majority decide in favour of a certain course of action. We recommend that trustees’ decisions be recorded and signed by all trustees. If a trustee is temporarily unavailable through illness or overseas travel, that trustee may, if the circumstances permit, appoint an attorney to act in his or her stead.

[26] The Committee noted that “no advice appears to have been sought by the complainants regarding the Construction Contracts Act when the Trust was formed”.⁵ It further noted, that as one of the Trustees of the Trust was a company of which the firm’s partners were directors, it was reasonable for Mr LB to expect that Mr and Mrs CN would contact the firm to discuss any proposals that they intended the Trust to undertake. Accordingly, “there were a number of opportunities for Mr CN to seek advice from Mr LB” and Mr CN had not done so.⁶

² There will be no further reference to this proposal in this decision as this Office does not have jurisdiction to make such an order. In addition, the power to order compensation is limited to the sum of \$25,000.

³ Standards Committee determination, 13 November 2018 at [13].

⁴ Letter LB to CN, 18 November 2014.

⁵ Standards Committee, above n 3, at [18].

⁶ At [19].

Mr JS/ Mr MA

[27] “Mr JS was the Head of Litigation and Dispute Resolution at the firm. Mr JS along with Mr MA, acted in the adjudication proceedings. ... Mr CN suggests that Mr JS effectively took control of the matter. The Committee disagreed. ... The Committee wished to emphasise that a lawyer is an adviser and not a decision maker”.⁷

[28] Mr CN instructed Mr JS on the basis of his advice and the question is whether or not Mr JS’ advice was competent.

[29] Mr and Mrs CN’s complaint in this regard was that the technical arguments put forward by Mr JS were not the best approach and they would have been better advised to try and achieve a settlement of [Company C]’s claim.

[30] The Committee noted correspondence on the file that confirms Mr JS did in fact seek to pursue settlement at the first opportunity but was constrained by Mr and Mrs CN’s requests for further information.⁸

[31] [Company C] sought, and obtained, orders against the Trust before any settlement could be achieved.

[32] The Committee commented that it was not its role to “closely analyse and second guess every move of counsel during each piece of litigation”.⁹

[33] In summary, the Committee considered “there were few options available to defend the matter”.¹⁰

[34] The Committee’s conclusion was that Mr JS had “acted competently” and in the light of this determination it followed “that Mr MA’s and Mr GD’s conduct [could not] be said to be incompetent”.¹¹ The Committee also noted that:¹²

Mr MA assisted with the adjudication proceedings under the supervision and direction of Mr JS. He was not responsible for making any decisions on strategy. Mr GD was responsible for oversight of the litigation and attended to all background Trust matters during the dispute.

⁷ At [20].

⁸ At [22].

⁹ At [26].

¹⁰ At [28].

¹¹ At [30].

¹² At [30].

Timeliness

[35] The Committee addressed possible events giving rise to Mr CN's complaints about timeliness but concluded that no findings could be made against the lawyers in this regard. This included Mr GD's involvement.

[36] The Committee noted, however, a more specific concern with regard to "Mr MA and his conduct in the recovery of steel which was allegedly owned by the Trust but in [Company C]'s possession".¹³

[37] This related to the requirement in the letter of intent to terminate work by [Company C].

[38] Notwithstanding that Mr MA did not respond for eight days after instructions were given by Mr CN to attend to this, the Committee determined this was reasonable, given that more time was required to attend to the work Mr CN had instructed Mr MA to do.¹⁴

Recovery of steel

[39] This issue arose in the context of promoting the interests of the Trust. It related to Mr JS, Mr MA and Mr GD. In this regard, the Committee did not agree with the position adopted by [Company C] that the steel could only be recovered if a cease work notice had been issued. Consequently, the Committee did not consider that there were any shortcomings on the part of Mr MA whom Mr CN had instructed to issue the cease work notice if he considered it necessary at any stage.¹⁵

[40] The Committee did not accept any of the allegations made by Mr CN with regard to this issue.

Fees

[41] At the time of the complaint, there was an outstanding invoice in the sum of \$12,247.50 due to [Law firm A]. Invoices that had been paid amounted to approximately \$28,000. The Committee viewed the firm's time records and noted that Mr GD's time had not been invoiced. It considered the hourly rates of the lawyers were "fair and reasonable in the circumstances".¹⁶

¹³ At [37].

¹⁴ At [38].

¹⁵ At [44].

¹⁶ At [53].

[42] Notwithstanding the additional time taken to deal with the issues following Mr JS' strategies, the Committee considered that nevertheless there were benefits resulting, and that overall, the fees rendered were fair and reasonable.

[43] The Committee also considered Mr CN's complaint that the firm had not advised that its initial estimates of \$15,000–\$20,000 were going to be exceeded. The Committee determined that Mr JS had complied with his obligations in this regard when he advised Mr CN on 5 August 2016 that the fees were likely to be at the upper end of the firm's estimate and that there were ongoing costs with regard to matters falling outside the original estimates.¹⁷

Termination of the retainer

[44] The partners of the firm terminated the firm's retainer when they formed the view that there was a potential conflict of interests arising when [Company C] issued its fifth payment claim against the Trust. It considered that if [Law Firm A Trustees Limited] was required to make any payments there was the potential for the directors of the firm to be sued and the firm would then have a counterclaim against Mr CN as he had entered into the letter of intent without consulting with the firm or including a limitation of liability in the letter of intent.

[45] Mr GD also formed the view that there was a potential conflict between Mr and Mrs CN and the firm could not fulfil its obligation to each of them.

[46] In considering this issue "the Committee considered that the lawyers had good cause to terminate the retainer".¹⁸

Further issues

[47] The Committee formed the view that it would be impossible to refer to each and every aspect of the complaint in the present written decision. Nonetheless, the Committee wished to emphasise that it had careful regard to all of the numerous allegations made by the complainants, including those ancillary to or otherwise related to the principal allegations. Accordingly, pursuant to its discretion in section 138(2) of the Act, the Committee decided to take no further action on any other issues raised by the complainants as in the course of the Committee's investigation it appeared that any further action was unnecessary and/or inappropriate.¹⁹

¹⁷ At [60].

¹⁸ At [80].

¹⁹ At [85].

Summary

[48] Having considered all of the matters raised by Mr and Mrs CN, the Committee determined to take no further action in respect of any of Mr and Mrs CN's complaints.

The application for review

[49] Mr and Mrs CN have applied for a review of the determination by the Committee as they consider there are a "significant number of errors ... evident in [the Committee's determination]", including:-

- incorrect interpretation and review of the evidence and facts provided.
- cross-contamination and confusion of issues that are independent to each other.
- incorrectly stating key dates and statements."²⁰

[50] They consider that the Committee "has an obvious favourable bias towards [Law Firm A] despite acknowledging [Law Firm A] failures" and that the Committee has "not dealt with or addressed all components of [the] complaint...".

[51] They then provide detailed comments on each of the paragraphs in the Committee's determination. In this regard it is important to assure Mr and Mrs CN that all of their comments have been considered, but it is not possible (or necessary) to address each comment in detail.

[52] The parties are referred to the section of this decision headed "Nature and scope of review" to assist them in comprehending the process followed in the conduct of this review.

Outcomes sought

[53] Mr and Mrs CN primarily seek compensation on a number of fronts, including repayment of fees and other costs incurred as well as significant sums for personal compensation.

[54] Compensation to the extent sought by them is not possible in the context of this review. The maximum amount of compensation that can be ordered by this Office

²⁰ Application for review – supporting reasons.

(and by a Standards Committee) is limited to \$25,000.²¹ Mr and Mrs CN will need to seek recourse through the courts if they wish to pursue claims to that extent.

[55] Consequently, there will be no detailed discussion of the claims for compensation in this review. This includes the complaint as to the quantum of the fees invoiced by [Law firm A], as the complaint about fees arises out of the complaints about the work undertaken by the firm, and if there were to be a finding against the firm in this regard, it would (may) follow that the fees invoiced were unjustified.

Nature and scope of review

[56] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Lawyers and Conveyancers Act 2006 (the Act):²²

... 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.

[57] More recently, the High Court has described a review by this Office in the following way:²³

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.

[58] Given those directions, the approach on this review has been to:

²¹ Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, reg 32.

²² *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

²³ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

- (a) consider all of the available material afresh, including the Committee's decision; and
- (b) make an independent decision based on those materials.

Procedure

[59] After considering the file, I formed the view that the best way to proceed was to conduct an applicant-only hearing in the first instance with a view to clarifying and isolating the issues to be addressed. The respondents were advised they would be entitled to attend that hearing but would not be expected to respond to any of the issues raised.

[60] That hearing took place on 31 October 2019 with Mr and Mrs CN. Mr MA attended in an observatory role. A letter was sent to all parties on 1 November 2019 and rather than attempt to summarise that letter, a copy is attached to this decision. Notwithstanding that Mr MA is no longer employed by [Law firm A], Mr GD addressed the issues raised in that letter on behalf of all respondents.

[61] That response was forwarded to the Mr and Mrs CN who responded with comments on Mr GD's letter on 20 February 2020.

[62] On 4 and 5 March 2020, the parties were advised that this decision would be completed on the basis of all the material to hand.²⁴

Mr GD's response

[63] The letter from Mr GD on behalf of all respondents following the October hearing provides a comprehensive response to the issues raised by Mr and Mrs CN's complaints. The letter is of considerable assistance in completing this review and I trust that, as a result, Mr and Mrs CN are able to understand and accept the outcome of this review.

[64] The essence of Mr and Mrs CN's complaints arise from the unsuccessful defence of the payment claim by [Company C]. At the hearing on 31 October 2019, they say they consulted with Mr LB about this, who referred them to Mr JS who was the leader of the firm's litigation team. They say they wanted to settle the claim by [Company C] and did not want to "spend thousands of dollars in legal fees".

²⁴ The material to hand comprises all of the material provided to the Lawyers Complaints Service together with the material provided in the course of this review.

[65] Mr GD argues that, in this situation, a lawyer's role is to examine the validity of the claim, to raise any legal defences available and then to use this as the basis for negotiating a settlement. If Mr and Mrs CN had wanted to merely endeavour to negotiate in a commercial sense, there would have been no purpose engaging a firm of lawyers to assist.

[66] Mr GD says that [Law Firm A] undertook what would be expected of a lawyer, namely, to consider the legal basis for the claim and to mount any possible legal challenge to the validity of the claim. This was met with a defence from [Company C]'s lawyers and [Company C] was not prepared to negotiate.

[67] Mr GD concludes that the respondents cannot be held responsible for the response by [Company C] and its approach to the Construction Contracts Act claim. There can be no criticism of the conduct and competence of the lawyers — they adopted a legitimate strategy in an attempt to establish a basis from which to negotiate.

Review

[68] The fundamental issue that must be emphasised at the commencement of this review is that the complaint necessarily involves a Standards Committee, and this Office on review, in determining whether or not there has been “unsatisfactory conduct” on the part of a lawyer.²⁵

[69] The term “unsatisfactory conduct” is defined in s 12 of the Act as being:

- (a) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; or
- (b) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including—
 - (i) conduct unbecoming a lawyer or an incorporated law firm; or
 - (ii) unprofessional conduct; or
- (c) conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm, or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 7); or

...

²⁵ Charges of misconduct are referred to the Lawyers and Conveyancers Disciplinary Tribunal.

[70] It is only following a finding of unsatisfactory conduct against a lawyer that orders can be made and, notwithstanding a finding against a lawyer, it is often the case that no orders for compensation are made, as the Standards Committee or the Review Officer must be satisfied, on a balance of probabilities²⁶ that the conduct of the lawyer caused the loss which the complainant seeks to be compensated for.

[71] It seems that Mr and Mrs CN are pursuing their complaint, and now this review, largely in an attempt to recover some of their losses. However, the function of the complaints and disciplinary process is to maintain professional standards and that is the basis on which this review proceeds.

Mr LB

[72] Mr and Mrs CN “disagree with the conclusion of the Committee, and maintain that the Trust was not provided with adequate guidance and advice”.²⁷

[73] The Standards Committee noted that an information sheet about Family Trusts was sent to Mr CN by Mr LB by email on 4 November 2014. In addition, when Mr LB sent the draft Trust Deed to them on 18 November 2014, he provided a detailed commentary on many of the aspects of the document. In particular, on page 4 of the letter, he specifically included a paragraph relating to decision making by the Trustees, the first sentence of which reads:-

The law requires that every decision made by the Trustees be unanimous.

[74] On the following day, Mr LB sent Mr CN (seemingly following a request from Mr CN) further information about “administering a Trust”. This included a paragraph relating to decision making which included:

The Trustees need to confer and be fully agreed on all decisions which are made;

Decisions of the Trustees need to be recorded in the Trust minute book.

[75] Mr CN’s complaints about the lack of advice about administration of a Trust are unwarranted and Mr LB is, in fact, to be commended for the comprehensive information provided to his clients.

[76] Mr and Mrs CN say they consulted Mr LB for advice as to the appropriate entity through which to complete the purchase of the [Address] property and to

²⁶ *Sandy v Khan* LCRO 181/09 (25 February 2010) at [6]; *Z v Dental Complaints Assessment Committee* [2008] NZSC 55 at [118].

²⁷ Supporting reasons for application for review para 16.

undertake the proposed development. Mr LB says he is not sure who suggested a creation of a Trust to undertake this role.

[77] Mr CN says this was the first Trust that he and his wife had established and they needed advice as to whether or not a Trust was the appropriate entity to be used. At that stage, however, the only matter on which the firm had been instructed, was with regard to the purchase of the land.

[78] Ownership of the land and completion of the development did not have to be undertaken by the same entity. Ownership of the property following completion of the development presented different considerations as the owner of the property would ultimately be accruing significant income from the property.

[79] It seems, however, that Mr and Mrs CN did not ask for advice relating to the overall project. In their complaint, Mr and Mrs CN say that “they requested a Trust ([Name] Trust) be set up”. This implies that they went to Mr LB with a specific request.

[80] In his response to the letter from this Office following the hearing, Mr LB says he was not asked for advice about the development entity and does not recall any specific discussions regarding the overall development.

[81] It is also noted, that there was a significant time period between the date when [Law Firm A] was instructed to act on the purchase of the property in November 2014 and when the firm was next consulted in July 2016 following service on the complainants of the Notice of Adjudication by [Company C]. By that stage, the Letter of Intent had been signed without any legal advice being sought or provided.

[82] Mr LB was only consulted intermittently in the intervening period with regard to various funding proposals for the construction of the building. It was not until difficulties arose with the claim by [Company C] that the series of events giving rise to the complaints were triggered.

[83] In the application for review, the applicants refer to correspondence between them and [Law Firm A] in 2018, some 6 years after the establishment of the Trust, and the applicant(s) committing the Trust to [Company C] without reference to [Law firm A].

[84] The [Company C] claim was founded on the Letter of Intent which Mr CN had signed without taking advice, and none of the [Law Firm A] lawyers had the opportunity to discuss in detail how the development should be structured.

[85] Taking an overview of Mr CN's engagement with Mr LB, I confirm that Mr LB has provided Mr CN with appropriate and competent advice on the matters on which he had been consulted.

The dispute with [Company C]

[86] Mr CN signed the Letter of Intent with [Company C] that had been prepared by the project manager. However, the CNs were unsuccessful in securing finance to fund the development and eventually [Company C] withdrew from the project. It then invoiced the Trust for steel that it had committed to purchasing for the development. This was prior to any formal contract documentation being concluded.

[87] [Company C] issued a payment claim for \$129,425.60. The Construction Contracts Act 2002 provides that if a payment schedule is not issued in response (if the claim is disputed) then the amount claimed becomes payable.

[88] It was only at that stage that Mr CN approached [Law Firm A] to assist, and Mr LB introduced Mr CN to Messrs MA and JS in the litigation department of the firm.

[89] They developed a strategy to mount a legal challenge to the claim with a view to establishing a basis for settlement. This is not an uncommon litigation strategy to pursue, even if ultimately the arguments do not succeed if the dispute proceeds to court, or, in this case, to adjudication pursuant to the Construction Contracts Act.

[90] The adjudicator appointed pursuant to the Act determined that the Trust was liable for the payment claim made by [Company C]. However, the adjudicator did not accept the argument advanced by the lawyer for [Company C] that the Letter of Intent in itself constituted a contract for the full project. To that extent, the [Law Firm A] arguments succeeded.

[91] The adjudicator also accepted that it was debatable that the design work referred to in the Letter of Intent did not constitute "construction work" as that term was defined in the Act current at the time.²⁸ However, he ultimately determined that the Letter of Intent itself constituted a construction contract in terms of the Act and determined that the claim was payable by the Trust.

[92] Other arguments pursued by [Law Firm A] before the adjudicator, related to the form, and service of, the payment claim. In general terms, it is not the role of this Office to comment on or determine the validity of any particular strategy and

²⁸ Adjudicator's decision, 10 August 2016, at [29].

submissions in litigation and I decline to consider these matters in any depth. Suffice to say, that it cannot be said that the lawyers lacked competence or diligence in pursuing these arguments.

[93] Part of the difficulties which arose in defending the claim was that Mr CN did not consult with [Law Firm A] in time to enable a “payment schedule” to be issued following receipt of the payment claim. Whilst Mr MA did not agree with the adjudicator’s decision, Mr and Mrs CN did not wish to incur more costs to pursue an appeal and requested that the amount ordered to be paid be paid from funds held by the firm.

[94] Difficulties continued in that [Company C] claimed ownership of the steel and the steel could not be found.

[95] Subsequently, [Company C] made another payment claim and Mr and Mrs CN instructed another law firm to act for the Trust. Their new solicitors also submitted there was no jurisdiction for the adjudicator to become involved, again on the grounds that there was no construction contract between the Trust and [Company C].

[96] In this instance, the adjudicator determined that to be the case.

General comments

[97] Mr CN has largely been the author of his own difficulties. He signed the Letter of Intent which had been prepared by the agents ([Company B]) without consulting [Law firm A]. He then did not consult the firm in time for a payment schedule to be provided in answer to the payment claim and the grounds for challenging the claim became limited.

[98] The [Law Firm A] lawyers pursued the only grounds open to them to dispute liability. Otherwise there were no grounds on which liability for the claim could be disputed and there would have been no option but to pay the full amount claimed.

[99] In any litigation there will generally be what could be termed a “winner” and a “loser”. It would be untenable for this decision to support the principle that it necessarily follows that there would be a finding of unsatisfactory conduct against the lawyer for the “loser” in any litigation.

[100] With regard to the Construction Contracts Act claim it can be said that the defence was in fact partially successful in that the claim for interest by [Company C] was not upheld. In addition, the adjudicator did not award costs to [Company C] which

would usually follow a successful claim. In this regard, the adjudicator acknowledged to some extent the merits of the submissions made by [Law firm A].

The conflict of interests

[101] Mr GD became involved with the claim by [Company C] as a director of [Law Firm A] Trustees 14 Ltd, one of the trustees of the [Name] Trust. The firm held the proceeds of sale of the property in its Trust account and Mr CN had requested that the total amount be paid to the [Name] Trust. Mr GD noted that even if this was done, the Trust would still have the funds and could not argue it had no assets to pay the [Company C] claim.

[102] It seems, that it was Mr CN's intention to distribute the funds to beneficiaries of the Trust and Mr GD advised that [Law Firm A Trustees Limited] would not agree to this as he had concerns that the partners of the firm could be sued personally if they agreed to this proposal. His advice was that the Trust needed to defend the claim and negotiate a settlement if possible.

[103] At the end of his email, he advised Mr CN to seek independent advice because the firm had a conflict of interest in that it would not agree to the steps Mr CN wanted to take. Mr GD's advice cannot be considered to fall within any of the definitions of unsatisfactory conduct.

Decision

[104] Having considered all of the information provided during the course of this review and for the reasons discussed above, I confirm, pursuant to s 211(1) of the Lawyers and Conveyancers Act, the determination of the Standards Committee to take no further action in respect of Mr and Mrs CN's complaints about Messrs GD, JS, LB and MA.

DATED this 27th day of May 2020

O Vaughan
Legal Complaints Review Officer

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

Mr and Mrs CN as the Applicant
Messrs MA, JS, LB and GD as the Respondents
Mr TK as the Related Person
[Area] Standards Committee X
New Zealand Law Society