LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2021] NZLCRO 009

Ref: LCRO 20/2019

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of [City] Standards Committee
BETWEEN	**OT** Applicant
AND	**GA** Respondent

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

Introduction

[1] Mr OT has applied for a review of the determination by [City] Standards Committee to take no further action on his complaints.

Background

[2] Mr OT was the principal shareholder of [XYZ (NZ) Limited] [(XYZ)], a specialist [XX] business. The company also had the New Zealand exclusive rights to distribute and maintain [TUV] under licence from [Country].

[3] On 24 December 2014, [XYZ] entered into an agreement with [QRS] International Limited ([QRS]) whereby QRS would purchase the assets (as defined in the Agreement) of [XYZ] for the sum of $5 million plus stock at 50 per cent of its value to be

determined in accordance with a comprehensive process set out in Schedule 2 to the Agreement. "[QRS] [was] a company ultimately controlled and owned by … Mr LS."[1]

[4] Clause 21.1 of the Agreement provided:

> **Guarantee:** In consideration of the Purchaser entering into and executing this Agreement at the request of the Covenantor, the Covenantor hereby irrevocably and unconditionally guarantees to the Purchaser the due and punctual performance, observance and compliance by the Vendor (at the times and in the manner agreed upon) of all of its obligations under this Agreement (the "**Guaranteed Obligations**").

[5] Clause 21.3 of the Agreement required Mr OT as covenantor, to remedy any default by [XYZ] in performing its obligations under the Agreement.

[6] Clause 20.4 of the Agreement provided:

> **Amendments:** No amendment to this agreement will be effective unless it is in writing and signed by all the parties.

[7] Completion of the Agreement was set for 1 February 2015 or the date on which the parties fulfilled their respective obligations under the Agreement.

Judgment of Gendall J

[8] Following completion, a dispute arose between the parties and ultimately proceeded to the High Court. The matter was heard before Gendall J on [Date] 2018. Quotations from His Honour's judgment explain the nature of the dispute:

> [19] The ASP was a comprehensive document negotiated between the parties and their respective legal (and accounting) advisers. The purchase price payable by [QRS] under the ASP was again recorded at $5 million (apportioned as to $4.3 million for goodwill, including "Business Contracts", and $700,000 for fixed assets and plant) and 50 per cent of the determined stock value.
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> [20] The business was sold as a going concern for GST purposes. The ASP also provided specifically for the detailed treatment of both ongoing sales, uncompleted "Business Contracts" and "Pre-Payments" which had been made by purchasers.
>
> [21] Essentially, the ASP included uncompleted doors and supply contracts as part of the goodwill and assets of [XYZ]. The definition of "Business Contracts" in para 1.1 of the ASP makes this clear.
>
> > "Business Contracts" means deeds, contracts, arrangements, agreements and understandings relating to or connected with the Business to the extent that those contracts, arrangements or agreements are in existence and have not been fully performed at the completion dated including those listed in Schedule 6 but excluding:

[1] *[QRS]International Ltd v [xxxxx] Ltd* [20XX] NZHC XXX at [2].

1.1.8 Related party loans or advances;

1.1.9 Lease(s) of the leasehold property; and

1.1.10 Any insurance policies.

…

[24] It is not disputed that the ASP envisaged an apportionment process by which, after completion, various payments or credits to be made by both [QRS] and [XYZ] would be dealt with in a wash-up arrangement. [XYZ]'s stock on hand at completion was also to be valued. Various other payments were envisaged including, for example, sums due by [QRS] under licences to occupy various commercial premises previously occupied by [XYZ].

[25] It seems that post-completion, the parties discussed and sought to agree these various matters to an extent. Documents were produced in the course of that reconciliation exercise headed "Reconciliations Between the Parties".

…

[27] According to [this] June 2015 reconciliation, the net amount owing to [QRS] by [XYZ] was recorded at a figure of $383,676.

[28] [QRS] maintains that in response to this June 2015 reconciliation [XYZ], through Mr OT, raised the allegation of the oral agreement varying the ASP (for the first time). He suggested that, rather than [XYZ] owing a significant wash-up sum to [QRS], [QRS] actually owed [XYZ] a substantial amount.

[29] A later detailed reconciliation document followed from [QRS] which simply adjusted the $383,676 figure upwards to an amount of $417,104. The difference was largely due to further sums which it seems had been paid to [XYZ] and arguably it should have held these in trust and then paid them to [QRS].

[30] [XYZ] and Mr OT, however, did not accept either of these reconciliations and, although a number of minor matters that had been referred to in the reconciliation documents have now been resolved, the principal issue affecting matters concerning the claim to the oral variation of the ASP remains outstanding.

…

[32] The claim by [XYZ] and Mr OT to an oral variation of the ASP is described in para [57] of the defendants' pleading as follows:

> 57. [The defendant] denies para 57 and says further that in or around mid-January 2015, Mr LS (on behalf of [QRS]) and Mr OT (on behalf of [XYZ]) orally agreed that all Pre-Payments to [XYZ] for sales with respect to [TUV] sales and [xx] invoices would be retained by [XYZ] without the need for payment to be made to [QRS].

[33] Effectively, therefore, the defendant's position is that [XYZ] and not [QRS] retained both the benefit and burden of these uncompleted sale contracts.

[34] The amount at issue relating to this oral variation was conceded at $438,006.26. Thus, the parties agreed that, if the Court determines that no such enforceable oral variation of the ASP was reached, then this payment of $438,006.26 is due from [XYZ] to [QRS].

[35] As I have noted above, Mr OT contends that the oral variation was initiated by Mr LS out of concern for possible exposure to [QRS] under extended

> warranties, which Mr OT says were required for some of the doors sold pre-completion.

[9] Mr GA's task therefore was to prove both that the January meeting did take place and what was agreed at that meeting.

[10] His Honour's judgment was that Mr OT's "claim to an oral variation of the agreement must fail".[2] His reasoning for this is set out in the Review section of this decision.

[11] Mr OT was unsuccessful in other matters dealt with in the judgment, but they are not addressed in this decision as his complaints relate to the failure of his claim relating to the oral variation.

Mr OT's complaints

[12] Mr OT is critical of various matters arising during the conduct of the litigation and particularly, the 'failure' (as he sees it) of Mr GA to convince the Court of the fact that the agreement was varied by an oral agreement between Mr LS[3] and Mr OT.

[13] He refers to aspects of the defence conducted by Mr GA:

- Mr GA overlooked the fact that one of the persons ([Mr DB]) who Mr OT says could have given evidence to support his claims, was unavailable to come to [City B] at the time the hearing was scheduled.
- Mr GA failed to subpoena a reluctant witness.

Mr OT refers to these two people as 'key witnesses'.

- Mr GA did not cross-examine Mr LS or any of the witnesses called by the plaintiffs.
- Mr GA had not appreciated the impact of cl 20.4 on Mr OT's assertions until a few days prior to the hearing.

[14] Mr OT summarises his complaints as being:

> 1. Not reading the sale and purchase agreement and being unaware of clause 20.4 until almost the week before trial;

[2] At [66].
[3] Mr LS was the owner of [QRS]

2. Forgetting or overlooking that DB would not be available to give evidence;

3. Failing to subpoena HP when GA was aware that he was a key witness;

4. Failing to call TY, WR, or DB to give evidence that LS had attended a meeting in my office; and

5. Allowing the [ABC] case to get mixed up with the [QRS] v [xxxx] case.

Mr GA's response

[15] Mr GA's response was comprehensive and there is no need to record this to any great degree. Suffice to say, that Mr GA does not accept the validity of Mr OT's complaints. Mr GA also advised that Mr OT had not paid any of the fees rendered by him over an extended period,[4] which by February 2018 amounted to $44,083.35.[5]

The Standards Committee determination

The issues

[16] The Standards Committee identified four issues to be addressed:[6]

(a) Not identifying the importance of clause 20.4 of the Agreement for Sale and Purchase ("ASP") until one week before the hearing.

(b) Forgetting or overlooking that DB ("DB") would not be available to give evidence.

(c) Failing to subpoena HP ("HP") when Mr GA was aware that he was a key witness.

(d) Failing to call TY ("T"), WR ("W") or ADC that LS ("L") director of [QRS] had attended a meeting in Mr OT's office when the oral variation was allegedly agreed.

It addressed each in turn.

[4] Mr GA had commenced acting for Mr OT in April 2017 and the High Court hearing took place in [month] 2018.
[5] JK & ML statement dated 10 August 2018.
[6] Standards Committee determination (20 December 2018) at [5.5]. A fifth issue was not relevant to the claim by QRS against Mr OT on which Mr GA was acting and is excluded from consideration in this Review.

Clause 20.4[7]

[17] This clause provided that no amendment to the agreement would be effective unless it was in writing and signed by all parties. Mr OT was claiming that there had been an oral variation to the agreement.

Mr DB

[18] The Committee noted that Mr DB had told Mr GA in December 2017 that he would not be available to give evidence at the hearing in February 2018.

[19] On the day before the hearing, Mr GA had sent an email to Mr OT advising that it was necessary to have Mr DB in person as it was too late to organise a video link.

[20] Mr DB eventually gave evidence by way of a written statement which Mr GA considered to be ambiguous. In discussions between Mr DB and Mr GA, Mr GA says that Mr DB "was adamant he had not heard the oral discussion and he wanted nothing to do with the court case".[8]

Mr HP

[21] Mr GA expressed doubt that Mr HP would appear at the hearing but when he passed this on to Mr OT and suggested a subpoena, Mr OT assured him that Mr HP would attend.

Others

[22] Mr GA provided reasons why other potential witnesses were not suitable.

Decision

[23] The Standards Committee determined:[9]

> … that Mr GA did discharge his fiduciary duty to Mr OT. Mr GA was placed in a position where he could not withdraw, notwithstanding the failure by Mr OT to pay JK & ML's outstanding fees. He attended the trial in [City B], represented Mr OT, and under difficult circumstances put forward a proper defence. The High Court was not persuaded that there was an oral variation as Mr OT alleged. The case largely turned on Mr OT's credibility. Gendall J accepted the Plaintiff's version of events overwhelmingly. Mr GA identified the difficulties with the other evidence Mr OT now says should have been given greater prominence, but the essential

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[7] See above at [16].
[8] Mr GA, response to complaint (11 July 2018) at [54].
[9] At [7.1].

> problem with the case was that Mr OT was not able to give convincing evidence of the alleged oral variation.

[24] The Committee resolved to take no further action on Mr OT's complaints.

The application for review

[25] Mr OT is dissatisfied with the decision of the Standards Committee. In his application for review he repeats much of the detail of negotiations for the sale of the business, the dispute with QRS and Mr LS, and how it came about that Mr GA was instructed.

The requested outcome

[26] The outcome Mr OT seeks is:[10]

> I want GA held accountable for b******** up my case and b******** up my witnesses and leaving me all by myself on the stand and getting completely scr**** by a very clever QC. I was left with a $700k plus bill which could of been settled to nil balance had he bothered to do his job properly. He can pay the bill and I want to be discharged from bankruptcy.

[27] Mr GA responded in detail to Mr OT's application. Again, there is no need to record Mr GA's response in any detail as it will be addressed to the extent necessary in the Review section of this decision.

Review

[28] Some preliminary comments are necessary at the outset of this decision.

[29] The outcome Mr OT seeks from this Review is set out above.[11] . This Office does not have jurisdiction to make orders to the extent sought by Mr OT.[12] There is obviously no jurisdiction to make an order annulling Mr OT's bankruptcy. The complaints process is no substitute for an action in negligence.

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[10] Application for review (30 January 2019) at part 8 (expletives removed).
[11] See [26].
[12] That is, that Mr GA pay the amount due by Mr OT. The maximum amount of compensation that this Office may order be paid is $25,000. See reg 32 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committee) Regulations 2008.

Conduct of the litigation

[30] Comments made in another decision of this Office[13] are applicable to this review.

> [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.

[31] In addition, it is not appropriate for this Office to 'second-guess' a lawyer's strategy in the conduct of litigation, particularly to the extent that there is a finding made against a lawyer.[14]

[32] Mr GA has given his reasons why he did not pursue the witnesses that Mr OT suggested. Before a witness is called to give evidence he or she needs to be fully briefed by the lawyer, and the lawyer must be absolutely certain that the witness will support their client's contentions.

[33] Mr GA says that Mr DB was adamant that he had not heard the discussion between Mr OT and Mr LS that Mr OT asserted took place. Mr GA says:

> There would have been no point in calling him to give evidence anyway, as he couldn't give corroborating evidence regarding the oral variation discussion, and in fact his evidence went the other way.

[34] Mr GA also had his doubts about the veracity of the brief of evidence provided by Mr HP. Mr GA formed the view that Mr HP "had reasons for not wanting to appear to give evidence on oath and be cross examined."[15]

[35] The evidence of the witnesses that Mr OT suggested, would not have supported Mr OT's assertions.

[36] Mr OT was the principal witness. His Honour's summary of Mr OT's evidence is damning:[16]

> … the only evidence advanced by the defendants in support of their oral variation contention is that of Mr OT. There is no documentary or other corroborative evidence of any kind to support this. In his evidence too, I find that, Mr OT proved to be significantly evasive and inconsistent at times. In many respects he was conveniently forgetful and even in denial of matters which were unequivocally supported by both written contemporaneous and independent evidence before the Court. Where Mr OT's evidence differed from that of Mr LS and Mr NV, I prefer their evidence to his by some margin.

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[13] *RCN v MA* [2020] NZLCRO 78, LCRO 2/2019 (27 May 2020).
[14] *Auckland Standards Committee No 3 v Castles* [2013] NZLCDT 53 at [177].
[15] Above n 8 at [55].
[16] Above n 1 at [65](k).

His Honour had this to say about the law relating to oral agreements to vary a written contract:

> [39] It is clear that in New Zealand a contract, once made, can be varied by agreement between the parties by way of adding, omitting, or altering specific terms. However, a variation of a written contract is only to become operative when it contains all the elements necessary in the particular circumstances for formation of an enforceable contract.
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> [40] A key enquiry in determining whether there is an enforceable oral variation of a contract is always the intention of the parties. The burden of proof in establishing an enforceable oral variation rests on the party alleging that variation, in this case [XYZ].
>
> [41] To establish an oral variation, the evidence of it in the factual matrix of the contract and all other surrounding circumstances must be clear and unambiguous.
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> [42] Clause 20.4 of the ASP is an important feature of the factual matrix in this case. It sets out the intention of the parties in reaching their agreement that "no amendment to the agreement will be effective unless it is in writing and signed by all parties."

[37] Mr OT's argument failed on legal grounds. Nothing Mr GA could have done would have altered the outcome of the proceedings.

[38] Mr OT complains that Mr GA had not alerted him to the provisions of cl 20.4 of the Agreement. Mr GA had not acted for Mr OT when the Agreement was negotiated and signed. The Agreement related to the sale of a business that Mr OT had established and built up over a period of 14 years to the stage where the company's annual turnover was in excess of $9 million. The Agreement comprised some 50 pages of detailed provisions. Mr OT was assuming a significant liability by personally guaranteeing the obligations of the vendor.

[39] The sale price of the business was $5 million plus stock. On completion there was to be a cash payment of $2.5 million. The balance of the purchase price was to be 'paid' by way of [QRS] issuing shares equating to 12.5 per cent of the company's share capital to [XYZ]. The value of the shares to be issued was agreed at $2.5 million. There was a very detailed process to be followed to value stock.

[40] Mr OT was entering into a contract to sell a business which he had established and built up to the stage where it was worth $5 million. He had no doubt invested a significant amount of 'himself' into this business. It would be expected that he would pay close attention to every clause in the Agreement and it is difficult to accept that he signed the Agreement without having made sure that he had read and fully comprehended all

of the terms of the Agreement. If he had not, then he was neglecting the fiduciary obligation that a director has to the company of which he is a director.

Settlement

[41] Mr OT argues that if he had been aware of cl 20.4 of the Agreement, then he may have been more inclined to settle the litigation. A settlement offer had been made before Mr GA commenced acting, but Mr OT's lawyer at the time had expressed reservations that acceptance of the offer might adversely affect the claim in negligence that Mr OT was pursuing against the lawyer who had acted for him when the terms of the Agreement were negotiated.

[42] Mr OT says that Mr GA had encouraged him to continue with the proceedings rather than look at settling at the early stages. This is answered by Mr GA in his letter of response to Mr OT's complaint.[17] He says:

> The central issue was an attempt by Mr OT to avoid one of the consequences of the written contract for the sale of his business that he had entered into by claiming that there was an oral variation to that written agreement prior to settlement. This claim had some initial credibility, particularly based on his claim that he had independent witnesses to back up his claim. On closer examination it became clear that the oral variation claim was very unlikely to succeed. It was pointed out to Mr OT that because of the difficulties with his claim, and his failure to put in place a satisfactory cost payment arrangement, our recommendation was that he concede the claim. Notwithstanding this he insisted on proceeding to a defended hearing and that I appear. It was a difficult decision but I agreed to appear to allow Mr OT to put his claim to the Court.

[43] I have not found a denial by Mr OT of this statement.

Non-payment of fees

[44] Mr GA acted for Mr OT from March 2017. He proceeded on the basis that Mr OT assured him he had the means to pay the firm's fees. Notwithstanding these assurances, he did not pay any of the invoices rendered, and Mr GA continued to act for Mr OT contrary to pressure being extended by the firm to terminate the retainer.

[45] In the face of non-payment of fees, it is understandable that Mr GA limited his attendances to those that were essential, so as to lessen the firm's exposure to unpaid fees. That is not intended to imply that Mr GA did not give the matter the required degree of attention to endeavour to achieve a positive outcome, but it is understandable that the

[17] Response to complaint, above n 8 at [3] and [5].

priority afforded to Mr OT's file was less than afforded to the files of fee paying clients. If this was the cause of Mr GA not identifying problems with witnesses and the impact of cl 20.4 any sooner, Mr GA may regret not terminating the retainer, as he was entitled to do.[18]

[46] If Mr GA had terminated the retainer, Mr OT may have found himself in the situation of not being able to engage any lawyer to continue acting for him. Rather, therefore, than complaining about Mr GA in an abusive manner (as he has), Mr OT should reflect on the fact that Mr GA proceeded to represent him in Court against the wishes of his firm.

[47] Having considered all of these issues, none of Mr OT's complaints can be sustained.

Decision

[48] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee to take no further action on Mr OT's complaints is confirmed.

Comment

[49] Mr OT's comments about members of the [City] Standards Committee are absolutely rejected. Members of Standards Committees undertake their obligations diligently and voluntarily and if any member of the Committee would have been influenced by a friendship with Mr GA, he or she would have recused themselves. In addition, Mr OT needs to be made aware that at least one member of the Committee must be a lay person[19] who cannot be accused of "looking out for one another".[20]

[50] Mr OT should retract his derogatory comments.

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[18] Rule 4.2.1 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
[19] Above n 12 reg 13.
[20] As alleged by Mr OT in his supporting reasons for application for review at p8.

Anonymised publication

[51] Pursuant to s 206(4) of the Act, this decision is to be made available to the public and the profession with names and identifying details of the parties removed.

DATED this 25TH day of JANUARY 2021

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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 OT as the Applicant
Mr GA as the Respondent
Ms CL as a Related Person
[City] Standards Committee
New Zealand Law Society