LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2020] NZLCRO 223

LCRO 24/2020

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	**TN** Applicant
AND	**[AREA] STANDARDS COMMITTEE [X]** Respondent

DECISION

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

Introduction

[1] Mr TN has applied for a review of a decision by the [Area] Standards Committee [X] which concluded pursuant to s 152(2)(b) of the Lawyers and Conveyancers Act 2006 (the Act) that there had been unsatisfactory conduct on his part pursuant to ss 12(b) and (c) of the Act.

[2] The Committee recorded a single finding of unsatisfactory conduct and imposed a fine of $3,000 and costs of $2,000 pursuant to s 156(1) of the Act.

Background

[3] Mr TN acted in litigation between Associate Professor DL and his then-wife Dr DL. Dr DL was vocal on her own account, and instructed her own lawyer to represent

her, Mr KN. Dr DL made a series of complaints about Mr TN's professional conduct, one of which resulted in the Committee issuing a notice of requirement to Mr TN pursuant to s 147 of the Act (the requirement).

[4] Mr TN did not provide the information the Committee required.

[5] The Committee commenced an inquiry of its own motion into that conduct on the part of Mr TN pursuant to s 130(c) of the Act. That process concluded with the decision that is under review.

The Standards Committee decision

[6] The decision records that one aspect of Dr DL's complaints was that "Mr TN had sent a misleading letter to the Family Court on 23 November 2017 [the letter]" (the allegation). It documents the Committee's three attempts to obtain a copy of the letter from Mr TN (but not from Dr DL), Mr TN's response of 14 May 2018 with which he did not provide the letter, extensions of the deadline for him to provide the letter, and his continued failure to do so.

[7] Reference is made to Mr TN's reply of 6 August 2018, after the last extended deadline for complying with the requirement had passed, in which he advised the Committee of his client's position that the letter was "privileged and his client refused to waive privilege".

[8] The decision also refers to Mr TN's application to this Office of 21 August 2018 for a review of the Committee's decision to commence an own motion inquiry,[1] the determination of that process, and the Committee's subsequent resumption of its process in April 2019. The Committee's decision records that in the meantime:

> On 24 August 2018, Judge VH released a copy of the 23 November 2017 letter following an earlier request by [the Committee].

[9] Mr TN did not take the opportunity offered by the Committee to file further submissions after the own motion inquiry resumed, and the decision recording that there had been unsatisfactory conduct on his part was issued on 11 December 2019.

[10] The Committee referred to the allegation as "an inherently serious one", and considered it unfortunate that Dr DL had been unable to supply the Committee with a copy of the letter. The Committee noted that Mr TN had not addressed the allegation or provided it with a copy of the letter. The Committee considered it was under a statutory

[1] *LCRO 157/2018* (25 February 2019).

obligation to investigate the allegation, and that it could not do so without first seeing the letter; hence the requirement.

[11] The Committee noted it was "common ground that Mr TN did not comply" with the requirement, and considered it was left with no option but to request a copy of the letter from the Family Court so it could complete its investigation. The Committee noted Mr TN's explanation, that the letter was subject to his client's claim to privilege which his client had refused to waive. It noted s 271 of the Act which says that nothing in part 7 of the Act limits or affects legal professional privilege, and observed that it "cannot compel production of a genuinely privileged document unless the holder of the privilege has waived privilege".

[12] The Committee recorded that Mr TN had not explained himself, and it could not understand how the letter could reasonably be classified as a privileged communication. The Committee expressed the view:

> That privileged communications are those exchanged between lawyer and client. Such correspondence normally relates to the provision of, or seeking of, legal advice. [The Committee] did not consider that the letter… fell into that category. It was a letter which Mr TN sent to the Family Court Registry for subsequent consideration by Judge VH. The letter contained a request for permission to release psychological reports commissioned under section 133 of the [Care of Children Act 2004, "COCA"] to a third-party psychologist. It was not marked as being privileged, or even as being confidential.

[13] The Committee expressed surprise that Mr TN "would take the position that privilege could possibly reside in an open communication to the Family Court". The Committee's view was that if Mr TN considered that the letter was "genuinely privileged, [he] would not have sent it to the Family Court". It observed that "lawyers do not share privileged correspondence with Judges" and Mr TN would have been aware that the Family Court Registry would place a copy of the letter on the Court's COCA file, which "Dr DL, as a party to the COCA proceedings, was entitled to inspect … at any time".

[14] The Committee considered Mr TN was professionally obliged by r 13.2.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) to provide a copy of the letter to Mr KN, and neglecting to do so did "not have the effect of rendering open correspondence to the Family Court privileged". It concluded that the claim to privilege was without foundation and considered whether Mr TN's non-compliance warranted a disciplinary sanction. The Committee emphasised that "an information request under s 147(2)(a)(i) of the Act is a mandatory requirement", and that if a practitioner "feels they have a valid reason for not complying, they should communicate their reasoning to the Standards Committee" making the request, bearing in mind the practitioner's duty to cooperate.

[15] The Committee took a dim view of Mr TN's attitude, forming the view that he had "simply disregarded" the requirement, had "simply ignored" the Committee's correspondence, and his failure to engage with the requirement signalled contempt for the Committee's discharge of its statutory obligations. The Committee considered it was left with "no choice but to commence an own motion investigation into his conduct" in that regard. The Committee noted that, as Mr TN would have known, the "letter was in fact exculpatory to the extent that it showed Mr TN had not misled the Court". The Committee considered Mr TN had "made a conscious effort to frustrate its investigation of Dr DL's complaints", had provided no meaningful response to Dr DL's complaints and instead had "made insulting remarks" about her.

[16] The Committee noted Mr TN had engaged for the first time with the requirement when he advised the Committee that his client's position was that the letter was privileged. The Committee found it difficult to understand why Mr TN had not simply advised the Committee that was the position when he first received the requirement, and had not participated further, after this Office completed its review, by filing any further evidence or submissions.

[17] The "bare assertion" of privilege did not satisfy the Committee, and was considered "unsustainable…after the decision by Judge VH to release" the letter. The Committee could see no justification for Mr TN's failure to comply with the requirement. It considered his conduct was a clear breach of s 147(2)(a)(i) of the Act, and constituted unsatisfactory conduct pursuant to s 12(b) and (c) of the Act. As mentioned above, the Committee imposed a fine of $3,000 and costs of $2,000 pursuant to s 156(1)(i) and (n) of the Act.

Application for review

[18] Mr TN applied for a review. He says:

(a) The Committee's decision is wrong in fact and in law;

(b) It failed to follow the principle set out by Cooke J in *Allied Finance Limited v Haddow & Co* [1983] NZLR 22 (CA) that a lawyer's duty is owed to his own client alone and he does not have a duty of care to an opposition litigant (see LCRO 007/2020); and

(c) In pursuing this enquiry the Committee has exceeded its jurisdiction.

[19] Mr TN requested a "direction that the Committee has exceeded its jurisdiction", and "cancellation of the orders as to culpability, unsatisfactory conduct and …penalty".

[20] The Committee signalled early on that it did not wish to comment on Mr TN's application for review, and later confirmed, having considered the submissions Mr TN filed after the review hearing that it had:

> decided not to provide any submissions in response. It considers that the written determination speaks for itself and clearly articulates why, in the view of the Standards Committee, Mr TN's 23 November 2017 letter to His Honour Judge VH was not a privileged communication.

Review Hearing

[21] Mr TN attended a review hearing in Auckland on 7 October 2020. The Committee did not exercise its right to attend.

Further evidence and submissions

[22] As mentioned in a Direction of 14 October 2020:

> [6] … at the review hearing, Mr TN repeated what he had told the Committee, namely that he was not obliged to produce to the Committee a letter he had sent on his client's instructions to the Family Court Registry dated 23 November 2017 (the letter). He claims the letter is privileged. His client has not waived his claim to privilege over the letter.
>
> *New Evidence*
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> [7] Mr TN explained at the review hearing that he sent the letter to the Family Court in reliance on Family Court Rule 429,[2] and did not send a copy to opposing counsel or directly to the opposing party because FCR 429 did not oblige him to do so. Although there were no live applications before the Family Court at the time, Mr TN says he had instructions from his client to progress matters but not to fuel the opposing party's sense of grievance by providing her with further information. Mr TN says that producing the letter to the Committee, expecting it would send it on to the opposing party who was the complainant in the complaint process in which the Committee issued the requirement, would have gone against his client's instructions.
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> [8] Mr TN did not explain any of the foregoing to the Committee either in the course of the complaint process or in the course of the Committee's own motion inquiry.
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> [9] However, Mr TN has applied to this Office for reviews of both decisions and the review hearings were consecutive. Although she had signalled an intention to be present, the complainant did not attend the review hearing in which the Committee's decision on her complaint was discussed.[3] While there are features that are common to both applications for review, Mr TN's application for a review of the Committee's decision on the complaint can be disposed of independently of this application for review.
>
> [10] Mr TN's evidence in this review is completely new evidence, and is relevant to the Committee's own motion inquiry.

[2] A copy of FCR 429 is attached to this Direction.
[3] LCRO 7/2020.

[23] Authorities were also referred to in that Direction:

> [11] It is noted that a claim to privilege must be established before privilege is unqualified and absolute,[4] that privilege is a strict and narrow doctrine founded on the wider concept of confidence, and that privilege will attach only to communications which are themselves confidential.[5] The High Court's discussion in *J v LCRO*[6] is topical. There may be other recent, relevant authorities.

[24] Mr TN filed submissions dated 29 October 2020 and supporting documents which were primarily focussed on emphasising the point that Dr DL was an uncommonly vocal participant in both the litigation and the complaint processes she invoked. The supporting documents tend to reinforce the proposition that Dr DL sought to argue more or less every point personally or through Mr KN, and that Mr TN's communications were channelled through Mr KN as the Rules require.[7] He also attached a copy of Ms ST's opinion (no longer privileged) dated 12 June 2019, which referred to her having considered the s 133 reports, and to her brief as covering:

(a) The likely effect on the children if Associate Professor DL did not resist their relocation to Country A, where they would be dependent on [Dr] DL; and

(b) If he did continue to resist their relocation, to provide "further professional expertise to assist such as, commentary from the literature and/or reviewing [Dr] DL's affidavits".

[25] Mr TN:

(a) Says his instructions from [Associate Professor] DL were to not respond to excitable and unreasonable correspondence from Dr DL;

(b) Says he was not subject to a court order to disclose the letter, and he was and is under no duty to do so, the complaint was spurious and the taint of that carried over into the associated complaint and own motion processes;

(c) Submits with reference to the Committee's obligation to apply the principles of natural justice and to consider the complaint in its wider context, the Committee made no reference to "the quality of the allegation or the motivation of the person making that allegation";

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[4] *B v Auckland District Law Society* [2003] UKPC 38.
[5] *Ventouris v Mountain* [1991] 1 WLR 607, 611; [1991] 3 All ER 472, 475 per Bingham LJ.
[6] *J v LCRO* CIV-2018-404-1958 [2019] NZHC 2089.
[7] Rule 10.2 and following.

(d) Submits the letter is a legitimate request made pursuant to r 429 of the Family Court Rules 2002 (the FCRs), the propriety of which has been suborned by Dr DL; experienced members of the Committee should have been well aware of that rule and in any event the Family Court dealt with the letter and the requests it contained;

(e) Says Dr DL pestered the NZLS Complaints Service, the Committee "gave in" to Dr DL, took umbrage at the way in which Mr TN participated in the complaints process and failed in that process to acknowledge that Mr TN owed Dr DL no duty of care and allowed itself to become a party to Dr DL's harassment of Mr TN (and other counsel);

(f) Describes Dr DL as "a raucous and vitriolic campaigner against the Family Court and those who work in it" (including Mr KN who struggled to retain his equilibrium), who "played games" to undermine the Family Court process and Mr TN's part in that, has "psycho-sociopathic issues", "psychological issues", is "disputatious" and has a reputation around the Family Court Bar for "making trouble" and is vexatious;

(g) Submits, in reliance on the Privy Council's decision in *B v Auckland District Law Society* [2004] 1 NZLR 326, that as [Associate Professor] DL has made no complaint, he is absolutely entitled to maintain his privilege and intellectual property rights against the complaint process;

(h) Submits that the Committee failed to observe s 271 of the Act, which expressly preserves legal professional privilege as paramount over the power to requisition documents;

(i) Disputes the Committee's exercise of discretion in commencing the own motion inquiry, says there is no proper basis for that decision, contends that all that followed is tainted by the wrongful exercise of that discretion;

(j) Says there is duplication/double jeopardy in the decision; and

(k) Submits the Committee exceeded its statutory authority and acted ultra vires.

Nature and scope of review

[26] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[8]

> … 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.
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> 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.

[27] More recently, the High Court has described a review by this Office in the following way:[9]

> 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.

Discussion

[28] Mr TN, on behalf of his client, claims privilege and intellectual property in the letter.

[29] It is not necessary to address the latter. It is the former that is difficult to make sense of without going back to Mr TN's conduct immediately before the complaint was made, and following the progress of the complaint through the statutory process.

[30] Mr TN sent the letter to the Family Court in November 2017. It was an open letter. It was not marked as privileged or confidential. It was clearly destined for the Court file.

[31] Equally clearly the Court had a copy of the letter because Judge VH authorised its release in response to a request from the Committee in August 2018, which makes

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[8] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].
[9] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

the Registrar's earlier requests of Mr TN for a copy of the letter, and requests that he send a copy to Mr KN, difficult to comprehend. The Court had received the letter. The Registrar referred to it as being attached to the Memorandum that resulted in Judge VH authorising the release of the s 133 reports to Ms ST in December 2017.

[32] It is unfortunate then that Mr TN ended up on the defensive in the complaints process, and was left to draw upon his client's claim to privilege even though that would be difficult to sustain in the circumstances. The Supreme Court's decision in *Beckham v R* [2015] NZSC 98 helps to illuminate the problem with a claim to solicitor client privilege:

> [59] Solicitor/client privilege is dealt with in s 54 of the Evidence Act. Under s 54(1), a person who obtains legal services from a legal advisor has privilege "in respect of any communication between the person and the legal advisor" if the communication was intended to be confidential and made in the course of, and for the purpose of, obtaining professional legal services from the legal advisor or the legal advisor giving such services to the person.
>
> (emphasis added)

[33] The Supreme Court also discussed litigation privilege and all other privileges from ss 54-60 of the Evidence Act 2006, and how confidentiality is an essential element of such claims to privilege:

> [94] The requirement for confidentiality is consistent with s 65 which deals with waiver of privilege, and applies to all of the different types of privilege described in ss 54–60 and in s 64 of the Evidence Act. Under s 65(2), waiver occurs when the person claiming privilege voluntarily discloses or consents to production of the privileged communication "in circumstances that are inconsistent with a claim of confidentiality".
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> (emphasis added)

[34] As a party to the proceeding, Dr DL could access the Court file. As her lawyer, Mr KN could access the Court file. The letter was important to Dr DL. Her reasons for not obtaining a copy so she could produce that to support her complaint remain shrouded in mystery. It is difficult to avoid the sense that, like the Committee, Dr DL saw the letter was exculpatory for Mr TN.

[35] Dr DL, or Mr KN on her instructions, could and should have obtained a copy of the letter from the Court file, because the letter was (or had been) there and it was central to that key aspect of Dr DL's complaint, that Mr TN had misled the Court.

[36] It is not clear whether Dr DL's omission to obtain a copy of the letter from the Court, and send that to the Committee so it could further its inquiry, was intentional on her part. She had initiated the complaint. She was aware the Committee did not have the letter. Her omission in that regard is beyond puzzling. It was vexing. It is clear from

the complaint file that Dr DL had not simply moved on. She held fast to and expanded on the grievances she had laid before the Committee, including the misleading allegation. She appears to have been vehemently opposed to Ms ST's involvement.

[37] The Committee noted at paragraph 19 of the decision that Dr DL had not produced a copy of the letter, but simply described it as unfortunate that she had not supplied it. Dr DL's failure in that regard was beyond unfortunate. There is no basis on which to suppose that Dr DL was in some way incapable of obtaining a copy of the letter from the Court file herself. The materials suggest she was more than capable. Describing that as unfortunate glosses over the problem which appears to me to be a fundamental flaw, not just in the complaint but in the Committee's reasoning in relation to the s 147 requirement that it imposed on Mr TN obliging him to provide the letter, and in the subsequent own motion inquiry when he failed to do so.

[38] It is unfortunate that Mr TN did not refer to r 429 of the FCRs in the letter. On its face, r 429 did not oblige Mr TN to send a copy of the letter to Mr KN. The commentary to the Family Court Rules suggests that it is up to the registrar or judge to determine whether an application made under r 429 is an interlocutory application on notice (and therefore must be served on another party) or not.[10] It is not entirely clear why the Court was concerned that Mr TN had not sent a copy of the letter to Mr KN. There will have been reasons. Perhaps Mr TN's failure to mention r 429 in the letter was a part of that.

[39] Mr TN explained the connection between r 429 and the letter to the Court in his Memorandum to the Court in January 2018. Neither party provided a copy of that Memorandum to the Committee. But Committees need evidence. They cannot make decisions in an evidential vacuum. Saying nothing can be counterproductive.

[40] If Dr DL wanted evidence such as the letter taken into account, on the particular facts of this inquiry, she could and should have provided it to the Committee. What followed, by way of Mr TN's attempts to defend himself without producing a copy of the letter or his Memorandum, resulted in what is perhaps best described as a distorted claim to privilege and a decision that is unsustainable on the evidence that is available on review.

[41] On the basis of what was before the Committee at the time, I may have taken a similar view to the Committee. This is not a case where the allegation was not serious. It was. But the circumstances were such that Dr DL could and should have come up with the evidence to support her complaint. Perhaps she did not because when she

[10] Brookers Family Law – Family Procedure (online ed, Thomson Reuters) at [FC429.05].

eventually saw the letter she realised it was, as the Committee subsequently noted, exculpatory to the extent that it showed Mr TN had not misled the Court.

[42] Complainants cannot always obtain the evidence necessary to support a complaint, but Dr DL (if necessary with the assistance of Mr KN who was involved at the time the complaint was made) could and should have.

[43] Mr TN was faced with a prolific complainant. Saying less rather than more in the complaints process was not only consistent with Associate Professor DL's instructions, but may also have appeared the wisest choice at the time.

[44] On the evidence available to the Committee at the time, the own motion inquiry and its conclusion could have been warranted. However, having obtained a copy of the letter from the Court, and having noted that it was exculpatory of Mr TN, the Committee overlooked the significance of the fact that Dr DL could also have obtained a copy from the Court but was not asked to and did not choose to. In that sense I disagree with the Committee, without a copy from Mr TN, the Committee was not left with no option but to request a copy of the letter from the Family Court so it could complete its investigation. It could have asked Dr DL to obtain a copy from the Court file and produce it. That might well have brought at least that part of the complaint to a speedy conclusion without putting Mr TN in the position of having to justify and explain himself within the constraints of his obligations of confidence to, and instructions from, Associate Professor DL.

[45] The pressure on Mr TN to defend himself seems to have given rise to what might best be described as somewhat contrived arguments around privilege. It is indeed surprising, as the Committee says, that Mr TN "would take the position that privilege could possibly reside in an open communication to the Family Court", because "lawyers do not share privileged correspondence with Judges". No doubt Mr TN was well aware that the Family Court Registry would place a copy of the letter on the Court's COCA file, and that Dr DL was entitled to inspect that file at any time. It was not part of Mr TN's role to explain any of that to Dr DL or to encourage her in any way.

[46] It is not clear from r 429 that Mr TN was professionally obliged by r 13.2.2 to provide a copy of the letter to Mr KN, or that neglecting to do so had the effect of rendering open correspondence to the Family Court privileged. I agree with the Committee that the claim to privilege probably was without foundation.

[47] I also agree with the Committee in that "an information request under s 147(2)(a)(i) of the Act is a mandatory requirement", and that a practitioner should, wherever possible, communicate their reasons for not complying to the Standards Committee that makes the request, bearing in mind the practitioner's duty to cooperate.

[48] However, I do not share the dim view the Committee took of Mr TN's attitude to the requirement. While he may have appeared to simply disregard the requirement, ignore the Committee's correspondence, and appear not to engage with the requirement, I do not share the Committee's concern that Mr TN's approach signalled contempt for the Committee's discharge of its statutory obligations. Mr TN's response was, in its own way, meaningful. An alternative approach might have been for Mr TN to turn the Committee back towards Dr DL and suggest it obtain the letter, which would have been on the Court file, from her. Given Mr TN's instructions from his client, which were privileged, he was hamstrung by the instruction to minimise communications all round.

[49] The privilege claim could well have been a last ditch attempt to bring the complaint and any process associated with that to a halt, albeit a "bare assertion" of privilege was not terribly satisfactory or sustainable once Judge VH had released the letter.

[50] Although Mr TN's failure to comply with the requirement signals a failure to comply with a requirement issued under s 147(2)(a)(i) of the Act, figuratively speaking, in this instance, the Committee put the evidential boot on the wrong foot. Although Mr TN did not comply with the requirement, on the particular and somewhat unusual facts I am not satisfied that his conduct warrants an adverse disciplinary finding.

[51] The findings of unsatisfactory conduct are therefore reversed.

[52] The consequential orders fall away.

Decision

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

DATED this 30th day of November 2020

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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 TN as the Applicant
[Area] Standards Committee [X]
New Zealand Law Society