

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

[2021] NZLCRO 112

Ref: LCRO 69/2020

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

CX

Applicant

AND

DW

Respondent

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

Introduction

[1] Ms CX has applied for a review of the determination by [Area] Standards Committee [X] to take no further action on her complaints.

Background

[2] Mr DW accepted a legal aid assignment from Ms CX to pursue Mr EV for her share of earnings generated by her as an escort, which Mr EV had facilitated.

[3] Mr DW succeeded in obtaining judgment against Mr EV for the sum of \$190,091.03.

[4] Mr EV did not pay.

[5] Mr DW's instructions were to enforce the judgment. That was a difficult task because, as Mr DW says:¹

...Mr EV indicated that he had no assets. Mr EV was not concerned by the prospect of bankruptcy. Ms CX had always said that Mr EV operates in cash and that he was always very careful not to have assets registered in his own personal name. Ms CX is aware of the difficulty that Mr EV would always pose for the enforcement of any judgment. She knew Mr EV and his character better than anyone.

[6] Ms CX's frustration at the fact that she has not received payment of the judgment debt, has given rise to her complaints against Mr DW.

Ms CX'S complaints

[7] Ms CX's complaints are:²

DW has been working on my case for 7, 8 years now. I have won my case & still have not been paid what I am owed, \$220,000. I won my case nearly 2 years ago. DW is doing nothing to get my money from EV's estate. I feel that he has tired of my case & has put in the to hard basket. DW is rude to me on the phone & cannot be bothered with me. I feel that he is not looking after my welfare.

[8] She adds:³

I have told DW that I want action, there is always a excuse. No money, legal aid, he lets it laps, not enough time, he is busy & more.

Mr DW's response

[9] Mr DW traverses the steps taken by himself, assisted by Mr FU,⁴ to obtain satisfaction of the judgment debt for Ms CX.

[10] Mr DW denies being rude to Ms CX. He says:⁵

I have not been rude to Ms CX, on the phone or at any time. Whenever she has contacted me, I have explained what is happening, despite in recent times, recently receiving personal threats from Ms CX. I believe I have been patient and courteous towards Ms CX at all times.

[11] He concludes his response in the following manner:⁵

... I do not accept that I failed to act competently and in a timely manner to enforce the judgment against Mr EV. I also deny that I failed to keep Ms CX informed

¹ Mr DW, letter to Lawyers Complaints Service (28 November 2019).

² Part 3.

³ Part 4.

⁴ Mr FU was a law clerk employed by Mr DW who, following admission to the Bar, became a barrister employed by another law firm.

⁵ Above n 1.

about progress of the matter. I have always responded to Ms CX's enquiries in a timely manner and I have always treated Ms CX with respect and courtesy.

The Standards Committee determination

[12] The Committee determined the following issues to be addressed:⁶

- Did Mr DW fail to act competently and in a timely manner?
- Did Mr DW fail to keep Ms CX informed about progress on enforcing the judgment?
- Did Mr DW fail to promptly respond to enquiries from Ms CX?
- Did Mr DW fail to treat Ms CX with respect and courtesy?

Competence / timeliness

[13] When addressing this issue “the Committee concluded that Ms CX’s circumstances were not due to any professional failing of Mr DW”.⁷

[14] Having summarised the steps taken by Mr DW to endeavour to enforce the judgment, the Committee determined that “... Mr DW took diligent steps over quite a lengthy period”.⁸

[15] The Committee considered that obtaining an attachment order “appeared to be a reasonable first enforcement step for Mr DW to take”.⁹

[16] The Committee did not consider that Mr DW had failed to act competently.

[17] When addressing Ms CX’s complaints about a lack of timeliness, the Committee noted the difficulties facing Mr DW, including difficulties in obtaining legal aid to fund further proceedings.

Reporting to Ms CX / responding to enquiries

[18] Taking note of matters discussed earlier in its determination:¹⁰

... the Committee did not find that Mr DW had failed in his duties to Ms CX in this regard. It appeared that, in the context of a busy caseload, Mr DW had kept Ms CX sufficiently informed and had responded to her enquiries.

⁶ Standards Committee determination (17 March 2020) at [13].

⁷ At [18].

⁸ At [20].

⁹ At [23]. An attachment order over Mr EV’s national superannuation payments was made by the Court.

¹⁰ At [30].

Respect and courtesy

[19] The Committee noted that at one point in her correspondence with the Committee, Ms CX had expressed the view that, “Mr DW, in person, at all court engagements, has shown me, the utmost respect, courtesy and professionalism”.¹¹

[20] This comment by Ms CX contradicted her complaints about Mr DW’s manner towards her, and the Committee saw nothing else in the materials that rose to the level of disrespect or discourtesy. Accordingly, the Committee determined to take no further action on that issue.

Determination

[21] The Committee determined to take no further action on any of Ms CX’s complaints.

Ms CX’S application for review

[22] Ms CX disagrees with the Committee’s determination. With respect to the problems arising with obtaining an order for sale of the property owned by Mr EV, she says:¹²

[A] lawyer should always ensure the best result especially if he spends weeks on researching its complexities.

[23] She considers that:¹³

Mr DW had significant time span to rectify & change course. He chose not too. Unfortunately, I have to say his inability to identify imperative information had led to a bewildering result. The attachment order should not have been recommended and lodged.

[24] Ms CX says she did not realise that the legal aid grant had been exhausted and this amounted to a lack of competence on Mr DW’s part.

[25] She asks why the Committee did not respond to her query as to why Mr DW had not lodged a caveat against the title to the property to prevent Mr EV transferring his interest in the property to others.

¹¹ Ms CX, email to Lawyers Complaints Service (2 January 2020).

¹² Ms CX, email to LCRO accompanying application for review with supporting reasons (13 April 2020).

¹³ Ibid.

[26] She accuses Mr DW of lying when he stated, in his response to the complaint, that she had told him she was engaging a debt collection agency to pursue the debt. She considers Mr DW's response to the complaint demeaned and belittled her.

Progress of the review

[27] Mr DW did not (and cannot be required to) respond to the application for review.

[28] I formed the view that it would assist to have Mr DW's files in order to verify issues raised by both parties. The files were requested¹⁴ by letter on 28 August 2020. Mr DW was somewhat dilatory in responding to this request. He should be aware that a lawyer is required to cooperate with the complaints process¹⁵ and a failure to do so could result in separate disciplinary proceedings against a practitioner. Nothing more needs to be said (or done).

[29] Mr DW's files were received in March 2021.

[30] This review has been completed on the material to hand.

Review

[31] Ms CX's complaints have been set out in paragraphs [7]–[8] above. Understandably, Ms CX has not complained that Mr DW has breached specific Conduct and Client Care Rules¹⁶ or provisions of the Act¹⁷. Rather than identifying relevant rules and sections at the outset of this review, it is appropriate to decide, in the first instance, whether Ms CX's complaints can be sustained.

Competence / timeliness

[32] Mr EV did not make payment to Ms CX as ordered by the Court. Ms CX's complaints relate to the work that Mr DW undertook to enforce the judgment.

[33] When addressing the issue of Mr DW's competence, it must not be overlooked that he had obtained a judgment against Mr EV for a significant sum. Mr DW pleaded four causes of action relying on constructive or resulting trusts. Success in such claims relies upon a lawyer convincing the Court to exercise its discretion to find in favour of the plaintiff. Mr DW succeeded in three instances.

¹⁴ Pursuant to s 147(2) of the Lawyers and Conveyancers Act 2006.

¹⁵ See GE Dal Pont *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2017) at [24.30].

¹⁶ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

¹⁷ Lawyers and Conveyancers Act 2006.

[34] Ms CX says:¹⁸

I want what is mine, what the court of NZ said was mine. I want what I am paying for my money.

[35] Mr DW cannot be held accountable for Mr EV's non-payment. It fell to Mr DW to endeavour to enforce the judgment against Mr EV and he took extensive action in his attempts to do so.

[36] In 2016 Mr DW recommended that Ms CX apply for a Financial Assessment Hearing, which resulted in an attachment order against Mr EV's national superannuation payments. This order was of minimal assistance to achieve payment of the debt. However, the hearing had another purpose, which was to ascertain what assets Mr EV had which could be pursued by Ms CX.¹⁹ Mr EV's financial statement included an interest in a "family home". That was the property at [Redacted].

[37] At some stage, Mr DW employed a law clerk, Mr FU.²⁰ Mr DW delegated the work to obtain a charging order over the property to Mr FU. Mr DW maintained a supervisory role in respect of the work undertaken by Mr FU and remained involved personally where necessary.²¹

[38] Delegation of work to an employed clerk, supervised by a principal of a law firm, is a common and logical use of the clerk's expertise. It is not indicative of a "loss of interest" in a matter, as described by Ms CX.

[39] Mr EV had entered into a relationship property agreement with his wife on 10 June 2016 which needed to be addressed before the charging order could be obtained.²²

[40] The charging order was granted by the Court on [date redacted].

[41] The order was then registered against the title to the property. A charging order acts in much the same way as a caveat, in that it prevents the transfer of the interest without the consent of the charge holder, or satisfaction of the debt secured by the charge.

¹⁸ Ms CX's complaint to the Law Society (20 August 2019) at Part 6.

¹⁹ Mr DW, letter to Ms CX (14 July 2018).

²⁰ Mr FU has a law degree and has subsequently been admitted to the Bar as a barrister and solicitor.

²¹ For example, the financial assessment hearing was reconvened and attended by Mr DW.

²² Section 47(1) of the Property (Relationships) Act 1976 provides for agreements between spouses intended to defeat creditors to be void.

[42] The next step, was to obtain an order for sale of the property. This necessitated removal of the charging order into the High Court. Mr DW himself reported to Ms CX.²³

[43] Mr FU liaised closely with the case officer at the High Court but it was not until a sale order had been obtained that court staff formed the view that a sale order could not issue at the same time as the attachment order was in place. Mr FU objected to this decision in a comprehensive email to the Court.²⁴ There is no direct indication that Mr DW was involved in compiling this response, but it is likely that his input was required.

[44] It was a logical use of the firm's resources to have Mr FU attend to the research and preparation of the response to the Court. This is a task which a law clerk (a law graduate) is well suited to attending to. This left Mr DW free to attend to matters that required his presence in court, or other matters which required his personal attention.

[45] Mr EV died in [date redacted]. This added a further complication. The property was owned by Mr EV and his wife jointly. Following Mr EV's death, the property passed to Mrs EV by way of survivorship. This would, on the face of it, render the Charging Order nugatory, and consequently no order for sale could be issued. That left the only option being to endeavour to pursue any assets held in Mr EV's estate. Negotiations with the executors of Mr EV's estate proved to be fruitless.

[46] There is no indication as to how Mr FU remained involved, but it is assumed that some arrangement had been reached between him and Mr DW. It was logical for Mr FU to remain involved, as he had carried out a significant amount of the research on the issues that had arisen.

[47] Mr DW says that Ms CX advised him in September 2018 that she had instructed a debt collection agency to pursue the debt. Ms CX denies this. However, there is no evidence on Mr DW's files relating to this and it is not possible to make a finding for either party in this regard.

[48] There is an apparent gap in progress on the file between the end of 2018 and September 2019.²⁵ There is no explanation for this. There is nothing on Mr DW's legal aid file to indicate that he had applied for a further grant of legal aid. The way forward was unclear, and there was nothing to support an application for a further grant.

²³ Mr DW, letter to Ms CX (12 October 2017).

²⁴ Mr FU, email to case officer (16 February 2018) to the Court objecting to the Court's view. The email mounts a comprehensive opinion in support of his [and Mr DW's] view that the case officer was incorrect in his interpretation of the High Court Rules and the law relating to orders for sale.

²⁵ The activity in September 2019 included an incomplete legal aid amendment form but this would appear to have been prepared following Ms CX's complaint.

[49] In these circumstances, Mr DW cannot be criticised for continuing with more straightforward matters, for which he would be paid.

[50] By that stage, it would seem that all options to progress the matter for Ms CX had been exhausted. If there is to be any criticism of Mr DW, it is that he did not advise Ms CX that he had 'come to the end of the road.'

[51] Ms CX lodged her complaint in August 2019. This effectively amounted to a termination of Mr DW's instructions.

Summary

[52] Mr DW achieved a good outcome for Ms CX by obtaining judgment against Mr EV. Ms CX ostensibly lays the blame for the fact that she did not receive payment of the debt, on Mr DW. That is far from being the case. Mr EV refused to make payment. His affairs were managed in such a way as to remove assets from personal ownership.²⁶ In the meantime, the charging order protected Ms CX's claim against the property.

[53] Ms CX suggests that Mr DW ought to have been alert to the fact, that the attachment order against Mr EV's national superannuation payments, would prevent an order for sale being granted. This is not, in fact, a decision that has been conclusively determined, and the uncertainty around the issue is evidenced by the fact that the court originally granted the order, but subsequently reversed it.

[54] "The duty of competence is, in reality, a duty not to be incompetent, and is aimed at ensuring minimum standards of service."²⁷ Mr DW has met this standard.

Other matters

[55] Other matters raised by Ms CX in her application for review²⁸ were not part of the complaint. They arose in the course of the investigation of the complaint and this review. They do not amount to matters that the Committee saw, or this Office sees, the need to investigate of its own motion. It is appropriate that no further action on these complaints be taken.

²⁶ For example, by entering into a property relationships agreement, establishing a trust to own property and his propensity for conducting all matters in cash.

²⁷ Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [11.3].

²⁸ Such as recording her views that Mr DW's response to the complaint demeaned and belittled her.

Decision

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

Publication

[57] Pursuant to s 206(4) of the Lawyers and Conveyancers Act 2006, I direct that this decision be published in anonymised format.

DATED this 21st day of July 2021

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:

Ms CX as the Applicant
Mr DW as the Respondent
[Area] Standards Committee [X]
New Zealand Law Society