LCRO 88/2011

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of Auckland Standards Committee
BETWEEN	**MR OR**
	Applicant
AND	**MS PL**
	Respondent

Introduction

[1] Mr OR has applied for a review of a determination by Auckland Standards Committee to take no further action in respect of a complaint by him that Ms PL provided a certificate to the Family Court that was incorrect.

Background

[2] On 30 September 2010 Ms PL was consulted by Mr OR's partner (Ms PJ) concerning alleged acts of violence by Mr OR. At the time Ms PJ approached Ms PL, Mr OR was overseas. He was due to return to New Zealand on Saturday 2 October 2010.

[3] Ms PL formed the view that Ms PJ should apply for a protection order and that it should be applied for ex parte. The application was lodged with the Court late on Thursday 30 September for consideration by the Court the following day. Ms PL had formed the view that she should apply for the protection order ex parte as she considered from what her client told her, that her client and daughter were at risk of

harm if the application was not sought on an ex parte (and urgent) basis.

[4] An ex parte application must be accompanied by a certificate from the lawyer pursuant to Rule 308 of the Family Court Rules 2002. The relevant parts of the certificate are contained within Rule 308(2) which provides that:

> **308 Certificate of lawyer to be included in certain applications without notice**
>
> (2) If this rule applies to an application, the documents required to be filed to make the application (see rule 20(1)(d) include a certificate signed by the party's lawyer certifying –
>
> (a) that the lawyer has advised the applicant that every affidavit filed with an application must fully and frankly disclose all relevant circumstances, whether or not they are advantageous to the applicant or another person for whose benefit the order is sought; and
>
> (b) that the lawyer has made reasonable enquiries of the applicant in order to establish whether the relevant circumstances have been disclosed; and
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> (c) that, to the best of the lawyer's knowledge, every affidavit filed with the application discloses all relevant circumstances; and
>
> (d) that the lawyer is satisfied –
>
> (i) that the application and every affidavit filed with it complies with the requirements of the Act and these rules; and
>
> (ii) that the order sought is one that ought to be made.

[5] Following a consideration of the application, the Court made a temporary protection order in favour of Ms PJ and directed that the order was to be served by the Police on Mr OR. The Police met Mr OR when he returned to New Zealand on 2 October at the airport and served him with the Order. He was also served with an interim parenting order and applications for tenancy and ancillary furniture orders.

[6] The ex parte orders were temporary, to be made final after the expiration of three months. On 8 October 2010, Ms OS applied on Mr OR's behalf to discharge the order and a hearing was scheduled for 22 November.

[7] On the date scheduled for the hearing Mr OR consented to the protection order being made final and to a temporary tenancy order being made in favour of Ms PJ which enabled her to remain in the house until 10 February 2011. Mr OR advises that he took this route due to the fact that he no longer wished to have any contact with Ms PJ. As a result, the grounds on which the application to discharge the order were not put before the Court.

[8] Ms PL advised at the review hearing that the grounds on which the application to discharge the order were made, involved essentially the same assertions as was the subject matter of Mr OR's complaint to the Law Society, namely that all relevant information was not before the Court when the orders were made.

[9] Mr OR remains aggrieved in this regard and is particularly aggrieved that Ms PL was aware that he had engaged counsel to represent him in connection with other matters concerning Ms PJ. He argues that Ms PL should have made contact with his counsel or at least advised the Court that he was represented by counsel.

[10] Information that Mr OR contends should have been put before the Judge was referred to in a letter from Ms OS to Ms PL sent in the week following Mr OR's return. This included:-

- That Ms PJ suffered from a mental disorder.
- That she had been physically and psychologically abusive of Mr OR and his children from a previous marriage.
- That she had ceased taking medication and engaging in therapy for her mental disorder.
- That she indulged in nightly alcohol abuse.
- That she had alternative accommodation available to her.
- That she had been referred to a psychiatrist because of suicidal tendencies.
- That she had until the night of Mr OR's departure shared a bed with him.
- That she had been in frequent communication with him whilst he was overseas.
- That the property in which she resided and from which Mr OR was effectively barred, was his place of work.
- That no attempt had been made to contact his lawyer with regard to service of the orders.

[11] During the course of the investigation Mr OR made a further complaint that Ms

PL was in breach of her professional obligations by providing the Standards Committee with a copy of the submissions which she had intended to put before the Court at the hearing of Mr OR's application to discharge the orders.

The Standards Committee determination and application for review

[12] Having considered all the material before it, the Standards Committee determined, pursuant to section 138(2) of the Lawyers and Conveyancers Act 2006, to take no further action in respect of the complaint. This section enables a Standards Committee to exercise a discretion to take no further action if, having regard to all the circumstances of the case, further action is unnecessary or inappropriate. The Committee determined that there was no evidence to indicate that the Court had been misled and was mindful of the fact that Ms PL's obligations were to her client.

[13] The Committee noted that it was for the Court to determine whether or not to exercise its discretion to make the orders sought on an ex parte basis, and that Mr OR had not pursued his application to discharge the orders.

[14] Mr OR has applied for a review of the Standards Committee determination. He considers that the Committee placed undue weight on the fact that the orders were made final, rather than focussing on Ms PL's obligation to the Court to ensure that all relevant information was before it. He considers that Ms PL withheld material information of which she was either aware or about which she failed to make due enquiry of her client. Mr OR also places considerable weight on the fact that Ms PL knew he was represented by Ms OS who was engaged in correspondence with Ms PJ at the time.

Review

[15] A review hearing took place in Auckland on 9 August 2012. Mr OR attended, as did Ms PL accompanied by Mr PK.

[16] At the review hearing, Mr PK provided written submissions on behalf of Ms PL. These contained in written form the matters that had been addressed at the hearing. Mr OR indicated that he did not require the opportunity to consider and respond to the submissions. However, following the hearing Mr OR sought permission to provide written submissions in response and these were provided on 13 August. I have not sought submissions in reply from them.

[17] The submissions provided by Mr OR respond to those provided on behalf of Ms PL but also include matters that were not referred to at the hearing. I have addressed all matters included in Mr OR's submissions in this decision.

[18] The essence of Mr OR's complaint to the Complaints Service is that information which he considers was relevant to Ms PJ's application was not put before the Court and that therefore the certificate provided by Ms PL pursuant to Rule 308 was incorrect.

[19] On the other hand, Ms PL says that all relevant information was before the Court and disagrees with Mr OR as to the relevance of the matters put forward by him.

Was this a proper issue to be considered by the Complaints Service?

[20] At the commencement of the review hearing I observed that, whilst acknowledging the importance of the certificate, what constituted relevant information to be before the Court was a judgment which the Court was best placed to make. Consequently, I observed that the matter was one which should be more properly addressed in that forum. A similar submission was also made by Mr PK.

[21] In his written submissions provided following the hearing, Mr OR expanded on his view in this regard. He notes that the essence of the complaints process is to enable people to avail themselves of a free process so that the conduct of lawyers is monitored and public trust in lawyers is maintained. He argues that if I were to find that he is unable to test the conduct of Ms PL because the Court was the correct forum in which to undertake that process, then people like him would be priced out of the complaints process, or indeed that the complaints process would thereby be redundant. He submits that this can not have been the intention of Parliament.

[22] This is an important issue, and one which is frequently raised with this Office. Parliament recognised that the complaints process is not the appropriate forum in which to address some complaints when it provided in section 138(1)(f) of the Lawyers and Conveyancers Act 2006 that a Standards Committee may determine to take no further action in respect of a complaint if "there is in all the circumstances an adequate remedy or right of appeal...that it would be reasonable for the person aggrieved to exercise."

[23] If the fact that a person would incur costs in pursuing that remedy (rather than making a complaint which is free) were a factor to be taken into account when

considering whether it was "reasonable" for the person aggrieved to take that course of action or not, then there would be limited, if any, circumstances when the Committee could have reference to this provision. Clearly, if the costs were likely to be out of all proportion to the remedy sought, then it may not be "reasonable' to determine the matter on that basis. However, neither the Standards Committees or the LCRO can be expected to engage in a consideration of the financial circumstances of complainants when considering whether section 138(1)(f) is applicable or not and in the majority of cases the fact that the alternative remedy will involve costs for a complainant, will not be considered to be relevant . The test is an objective test rather than one which is applied to the individual complainant.

[24] The issue for consideration is whether, by embarking on a consideration of a complaint, the Standards Committee or the LCRO is engaging in a process which is more properly a process that should be considered by the Court (or in another more appropriate forum). In this case, the certificate provided, was that Ms PL had provided certain advice to her client, and taken certain actions, and that to the best of her knowledge, every affidavit filed with the application disclosed all relevant circumstances.

[25] What constitutes "relevant circumstances" is determined by such matters as the nature of the application, the facts of the case, the allegations made and the orders sought. These are quite clearly matters which should be determined by the Family Court. Whether or not there should be an obligation to notify counsel where a lawyer is aware the other party is represented, is also a matter for the Family Court. It would be highly inappropriate for the complaints process to assume the role of the Court and become involved in these matters.

[26] As a general principle, the complaints process is not to be regarded as a substitute for court proceedings. If however, in the course of engaging in court proceedings, it becomes clear that a lawyer has not met his or her professional obligations, then at that stage it would be appropriate for the complaints process to be activated.

[27] This issue was addressed in a previous decision of this Office[1] which Mr PK has referred me to in which the principle I refer to is confirmed. That decision related to circumstances where a relationship property agreement had been entered into on the

[1] *Complainant P v Lawyer H* LCRO 02/2009.

basis that there had been full disclosure of all relationship property. In fact this was not the case and the complainant alleged that she was prejudiced by the non-disclosure. She alleged that the lawyer had breached professional obligations in preparing the consent order and/or warranting by his signature on the memorandum that proper disclosure of all relationship property had been made.

[28] In paragraph [11] of that decision the LCRO noted that "it is improper to use the complaints process as a means to undermine or attack a decision of another court or tribunal. The proper route for challenge of a decision of another tribunal is appeal." That option existed for Mr OR but he chose not to pursue it.

[29] I note that the case referred to by Mr PK was provided in support of his submission that the complaints process should not be used to undermine or attack a decision of the court. In his submissions, Mr OR refers to the specific facts of that decision to distinguish them from the circumstances relating to this complaint, but as noted, that decision does confirm the principle in respect of which it was provided.

[30] Ms PL advised that Mr OR's application to discharge the orders was founded on the allegation that the Court did not have all relevant information before it when the orders were made, and the opportunity to pursue that issue existed at the hearing scheduled for 22 November. That hearing did not proceed because Mr OR consented to the protection orders being made final. However, Ms PL advised that even though Mr OR consented to the orders being made final, he could still have pursued his contention that the court did not have all relevant material before it when it made the ex parte orders. Whilst this may have been possible it is difficult to comprehend why he would do so, given that the reason for the application no longer existed. Nevertheless, for whatever reason, Mr OR did not pursue the opportunity to have the Court determine whether the facts that he refers to were relevant to the proceedings. It is inappropriate that I should be drawn into making that determination.

[31] In addition to the matters considered in the previous paragraphs, Ms PL and Mr PK draw attention to the fact that some of the matters to which Mr OR refers were in any event before the Court. In particular, I note the following references in Ms PJ's affidavit dated 30 September 2010 which was before the Court in support of her applications:

- In paragraph 4.5, reference is made to a telephone call made by Mr OR to his lawyer. The Court was therefore aware that Mr OR did have a lawyer.

- In paragraph 4.6, Ms PJ refers to the fact that she and Mr OR were together immediately prior to his departure.
- In paragraph 4.26 she refers to Mr OR's view that she has a personality disorder.
- Paragraphs [11] and [12] of the affidavit refer to Mr OR's claims that he works from home.

Therefore, Mr OR's assertions that these matters were not before the Court is not correct.

Failure to communicate with Ms OS

[32] Mr OR's complains that Ms PL did not contact his lawyer prior to lodging the applications or at least to advise the court that he was legally represented. He also asserts that there was no need for the applications to be made on an urgent basis as he was away overseas. Ms PL's first contact with Ms PJ was on 30 September. She had not acted for her previously. Ms PJ instructed that she required protection from Mr OR immediately upon his return, which allowed two Court sitting days in which to obtain the orders. Ms PL formed a view from what she was told that the applications should be made without notice. She advises that if she had made contact with Ms OS then this would have effectively made the applications on notice and provided Ms OS with an opportunity to oppose the applications. This was not in the interests of Ms PL's client.

[33] Whilst I agree that Ms PL's overriding obligation is to the Court, her next obligation is to her client and that was to obtain the protection order. In doing so she considered that all relevant circumstances were disclosed to the Court, and certified accordingly.

Mr OR's submissions

[34] Various other matters have been raised by Mr OR in his written submissions which I now address. The first of these is that he considers Ms PL would have recorded her advice to Ms PJ in writing because the certificate provided by Ms PL is very serious. He considers that there was sufficient time available to Ms PL to send an email to Ms PJ to this effect.

[35] He submits that the only inference which can be drawn from the fact that Ms PL

has not provided evidence of any such written advice, or provided evidence from her client that she was so advised, is that she failed to provide the advice and therefore provided a false certificate. I do not accept this submission. Whilst it may be prudent for a lawyer to take the step of recording her advice in an email or other correspondence to her client, the truthfulness of the certificate cannot be challenged because such evidence is not available. Advice provided verbally to the client is no less appropriate, and the lack of written confirmation of the advice cannot be the basis for determining that the advice was not provided.

[36] Mr OR also refers to the statement made in the last sentence in para 4(b) of Mr PK's submissions, that "Ms [PL] was unaware that Ms [OS] was acting for Mr [OR] at the time the application was filed." In her response to the Standards Committee on 4 November 2010 Ms PL expressed this differently when she stated that "I had not dealt with Ms [OS] before and there had been no correspondence in relation to the issue of the protection order."

[37] Ms PL has also pointed to the fact that the Court was aware that Mr OR had legal counsel because Ms PJ referred to the fact at para 4.5 of her affidavit filed in the proceedings. She also acknowledged at the review hearing that she was aware that Mr OR was legally represented.

[38] He was not of course legally represented in respect of the proceedings in which Ms PL was instructed, but that is not the issue that Mr OR raises. He considers that Ms PL has been deceptive and misleading in this regard and that this conduct constitutes a breach of Rules 11.1 and 13.1 of the Conduct and Client Care Rules.[2] That is a new complaint and I refer to my comments below in [44] in this regard.

[39] The relevance for this review is that Mr OR contends that Ms PL had a duty to at least advise the Court that he was legally represented, if not to contact Ms OS directly and I have addressed that issue in [25] and [41].

[40] Mr OR describes as "peculiar" the submission by Ms PL that had the Court been concerned about the application being made ex parte it would have required it to be made on notice. He states that the Court had no reason to be concerned, because the facts provided by Ms PL gave the Judge no reason to consider that the matter should proceed on any basis other than an ex parte basis. I do not consider the

[2] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008

submission by Ms PL to be peculiar. It must be accepted by Mr OR that the Judge was the person best equipped and experienced to consider whether any questions should be raised as a result of the nature of the application. The application was focussed purely on whether Ms PJ required protection from Mr OR. The affidavit sworn by Ms PJ gave evidence of the alleged violence. If that was accepted, the basis for the order existed. It does not seem peculiar to me to suggest that the Judge was the person best equipped to question the evidence provided by Ms PJ. If the Judge considered that the evidence provided was insufficient or needed explanation, he would have called for it.

[41] Mr OR also contends that even though there may be no requirement to serve Ms OS with the proceedings, that there was an obligation to advise the Court of the fact that Mr OR was represented by her. In the first instance, that is not an assumption that Ms PL could make. Clearly Ms OS had no instructions in respect of the proceedings before the Court. However, this contention again involves an assessment of whether that was a relevant fact of which the Court should have been advised which is discussed at [25] of this decision.

[42] I would however observe, that the fact that Mr OR was out of the country is not a factor that differentiates his situation from any other party against whom an ex parte order is sought. If the Courts had decided that where a party is known to have legal representation, that either the court should be advised of this, or that counsel be notified when an ex parte order was applied for, it is to be expected that a practice note to this effect would have been issued. To my knowledge this is not the case, and the logic for it being so does not exist – there is no difference between a party who has legal representation and one who does not and the only question to be considered is whether the proceedings should be ex parte or on notice.

[43] The fact that Mr OR did have legal representation was before the Judge in any event.

[44] Mr OR raises further potential complaints. The jurisdiction of this Office extends only to review all aspects of an inquiry carried out by a Standards Committee and the final determination.[3] Consequently, as noted by Mr OR himself, these complaints will need to be lodged with the New Zealand Law Society Complaints Service for determination. They cannot be addressed by this Office before that process is complete.

[45] During the course of investigation by the Standards Committee, Mr OR raised another complaint that Ms PL had provided the Standards Committee with a copy of the submissions which she intended to put before the Court at the hearing scheduled for 22 November 2010. He clarified his objection at the review hearing as being that these were untested submissions and should not therefore have been provided to the Committee. This matter was not addressed by the Standards Committee in its determination and I have some difficulty in comprehending the basis on which the complaint was made. In any event, Mr OR advised at the review hearing that he withdrew that aspect of his complaint.

[46] A minor but relevant point does need to be corrected in the Standards Committee determination. In its determination, the Committee referred to violence by Mr OR on a number of occasions. He rightly points out that these incidents have only ever been alleged by Ms PJ and there have been no findings of fact that violence occurred. In the circumstances, the determination of the Standards Committee should be modified to refer to such matters as "alleged" violence rather than allowing the impression to remain that acts of violence did occur and that this was accepted as a matter of fact.

Conclusion

[47] Having considered all of the material provided and heard from the parties at the review hearing, I reach the same conclusion as the Standards Committee that no further action is required.

Decision

Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Standards Committee is confirmed, save that all reference to "violence" by Mr OR should be amended to "alleged violence".

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[3] Section 203 Lawyers and Conveyancers Act 2006

DATED this 20th day of August 2012

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Owen 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:

OR as the Applicant
PL as the Respondent
PK as Counsel for the Respondent
Auckland Standards Committee
The New Zealand Law Society