

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

[2021] NZLCRO 62

Ref: LCRO 113/2020

CONCERNING

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a decision of the [City] Standards Committee [X]

BETWEEN

SM

Applicant

AND

YL

Respondent

DECISION

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

Introduction

[1] Mr SM has applied to review a decision by the [City] Standards Committee [X] dated 4 May 2020, in which the Committee made findings of unsatisfactory conduct against his former lawyer Mr YL, but declined to make a compensation order.

[2] The focus of Mr SM's review application is narrow: it concerns the Committee's decision not to make a compensation order in his favour.

[3] Mr YL has not applied to review the findings of unsatisfactory conduct that the Committee made against him, nor the penalties and costs imposed. Those findings, penalties and orders, remain.

Background

[4] Because of the narrow issue that I am required to determine (compensation) it is not necessary for me to set out the background facts in any detail. The Committee has done so comprehensively in its determination (including its analysis of relevant correspondence and documents), and I am satisfied that its description of those facts is accurate. I respectfully adopt the Committee's summary of the relevant background, for the purposes of my decision.

[5] It suffices for me to say that in late 2018 Mr YL acted for the trustees of the T Trust, of which Mr SM was one of the two trustees, in the sale of a house located on a cross lease property.¹

[6] At the relevant time Mr YL was a lawyer employed by an incorporated law firm.

[7] Through their advisers, the purchasers raised an issue with Mr YL about the title; specifically that an updated flats plan had not been lodged with LINZ following building alterations in 1999. The title was formally requisitioned by the purchasers.

[8] Mr SM instructed Mr YL to cancel the agreement, on the grounds that the trustees did not agree to update and lodge a new flats plan.

[9] Mr YL did not advise Mr SM of the steps that the trustees were required to take under the agreement to cancel it.

[10] Instead, and contrary to Mr SM's instructions, Mr YL allowed the purchasers to declare the agreement unconditional, and agreed to holding a retention sum on settlement pending lodgement of an updated flats plan with LINZ.

[11] The Committee made the following findings against Mr YL:

- (a) He failed to act competently and in a timely manner consistent with the terms of his retainer and the duty to take reasonable care.
- (b) He failed to follow Mr SM's instructions.
- (c) He failed to protect and promote Mr SM's interests.

¹ Although Mr YL's clients were the two trustees of the T Trust, Mr SM was authorised to deal directly with Mr YL and instruct him on behalf of both trustees. For ease of reference in this decision I will simply refer to Mr SM as Mr YL's client.

[12] For these breaches, the Committee ordered Mr YL to pay a fine of \$5,000, costs of \$1,000 and to undergo relevant training or education.

Complaint

[13] Mr SM lodged his complaint against Mr YL with the New Zealand Law Society Complaints Service (Complaints Service), on 6 September 2019.² In relation to that aspect of his complaint in which compensation was sought, Mr SM said:

- (a) He wanted “the costs of ... correcting the defective title to be recovered from [Mr] YL.”
- (b) “I have changed solicitors and [have started] correcting the defective title.”
- (c) “To date Mr YL ... [has] cost me \$15,000 due to not acting on my instructions and in my best interests [and] I’m claiming that Mr YL ... need to cover my costs of \$15,000.”

[14] The Complaints Service emailed Mr SM on 9 September 2019 asking for copies of invoices from Mr YL or his employers, as well as “the invoice for correcting the defective title.”

[15] Mr SM responded and said that there were no invoices, because the sum of \$10,000 had been retained in Mr YL’s employer’s trust account, from the sale proceeds. He further said:

... Had we been given the correct information and [Mr YL] had followed instruction we would not be correcting the title. ... I’m currently getting another law firm to do the corrective title, just paid the first invoice to the surveyor ... signed contract and quote attached. ... Because of [the] failure to act on my instructions I have had to borrow a further \$10K which has a cost plus interest ... My extra [costs] are currently at \$25K.

[16] It appears to be the case that Mr YL’s employers wrote off legal fees in connection with this transaction.³

² Mr SM also made a complaint against the directors of that incorporated law firm. The Standards Committee’s decision or determination about that complaint does not appear to have been the subject of a review application.

³ In his letter to the Complaints Service dated 2 October 2019, responding to Mr SM’s complaint, Mr YL referred to a meeting he had with Mr SM on 7 February 2019, where amongst other things agreement was reached that legal fees and disbursements would be written-off for this transaction.

Response

[17] When responding to Mr SM's complaint and addressing the issue of compensation, Mr YL said that he rejected the suggestion that he caused any loss.

[18] Mr YL further said that "Mr SM caused the issue with his title some 20 years ago."⁴

Comment by Mr SM

[19] Mr SM provided brief comments on Mr YL's response to his complaint, in a letter to the Complaints Service dated 4 October 2019. He largely repeated what he had said in his complaint. However he added that "it's very clear that the [financial position in which he found himself] was created by Mr YL not following instructions and acting in [his] best interests."

[20] In a document which appears to have formed part of Mr SM's complaint against Mr YL's employers, Mr SM quantified the \$25,000 loss that he said he had suffered, as follows:

Extra loan to cover [the agreed retention]	\$10,000
Correcting the defective title:	
Surveyors costs	\$5,000 plus GST
Council costs	\$2,750 including GST
New solicitors' costs	\$4,000 plus GST
Additional interest	\$3,725.36

Standards Committee decision on compensation

[21] The Committee said the following about compensation:⁵

Mr SM sought an order for compensation for the costs of correcting the defective title. The Committee did not consider that an order for compensation was appropriate. An order for compensation can only be made where the loss suffered is by reason of any act or omission of Mr YL. The amount is also limited to \$25,000. On the evidence before the Committee, it is not possible to quantify Mr SM's loss. While Mr SM complains that he has been required to correct the flats plan at considerable expense, he may still have been required to do that in order to sell the property to another purchaser.

⁴ It appears to be the position that Mr YL (and his employers) first became involved with this property when instructed by Mr SM to act on the sale in November 2018.

⁵ Standards Committee decision at [41].

Review Application

[22] Mr SM filed his application for review on 11 June 2020. He said:

- (a) Mr YL had failed to act in his best interests.
- (b) Mr YL's conduct "removed [Mr SM's] opportunity to control [his] next course of action."
- (c) The Disputes Tribunal found that Mr YL had given poor advice.

[23] Expanding upon that, Mr SM said:

- (a) The Committee was wrong to say that Mr SM would have been required at some point to correct the defective title.
- (b) "Currently there [are] over 260,000 defective titles in the Auckland area. Defective titles are traded daily without being corrected. There were other options available to me without correcting the defective title."

[24] In an email to the Case Manager dated 29 October 2020, Mr SM the said that there are "over 130 defective titles traded per month." He submitted that this was a proper basis for directing Mr YL to pay for the costs incurred in having the title corrected.

[25] Mr SM attached a copy of an invoice from lawyers he instructed during 2019 to deal with the defective title. Their invoice (including GST and disbursements) was \$3,897.10.

Response

[26] Mr YL's brief response to Mr SM's review application was that he accepted the Committee's description of his involvement in the transaction and its decision about that. He said that he agreed with the Committee's conclusion that Mr SM did not suffer any loss "as he was always required to remedy his defective title."⁶

Review on the papers

[27] This review has been undertaken on the papers pursuant to s 206(2) of the Lawyers and Conveyancers Act 2006 (the Act), which allows a Legal Complaints Review

⁶ Email from Mr YL to the LCRO (23 July 2020).

Officer (LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[28] In anticipation of that process being followed, on 7 October 2020 the parties were given an opportunity to make submissions as to whether they wished Mr SM's review application to proceed by way of a hearing in person, or a hearing on the papers.

[29] In emails to the Case Manager dated 7 October 2020 and 29 October, Messrs YL and SM respectively indicated their consent to the hearing proceeding on the papers.

[30] I record that having carefully read the complaint, the Committee's decision and the submissions filed in support of the application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party.

[31] On the basis of the information available, I have concluded that the review can be adequately determined on the papers and in the absence of the parties.

Nature and scope of review

[32] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:⁷

... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" ...

... the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[33] More recently, the High Court has described a review by this Office in the following way:⁸

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

⁷ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

⁸ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[34] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

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

Discussion

[35] The single issue for me to consider and decide is whether Mr SM is entitled to compensation as a result of Mr YL's inadequate representation.

[36] Mr SM's claimed loss is the costs associated with the preparation and lodgement of an updated flats plan.

[37] It is plain that the failure to lodge an updated flats plan in 1999, when the building alterations were done, was not Mr YL's fault: he did not act for Mr SM then.

[38] I understand Mr SM's argument to be that he had given Mr YL instructions to cancel the agreement, as he did not want to be troubled by the process of updating and lodging the flats plan.

[39] And, as the Committee has held, Mr YL did not advise Mr SM how to accomplish that (a vendor's notice), and moreover acted against Mr SM's interests by ignoring those instructions and allowing the purchaser to declare the agreement unconditional; not to mention agreeing to a retention of \$10,000 pending correction of the title.

[40] However, assuming for the moment that the agreement was properly cancelled as Mr SM had instructed Mr YL to do, at some point in the future the property would almost certainly have been sold. This much is evident by the fact that Mr SM had initiated a sales process in 2018.

[41] It is reasonable to conclude that another purchaser would have discovered the same issue, namely that the title was defective (assuming that Mr SM had not by then corrected it).

[42] Indeed, I would venture to suggest that the proposed sale of a property with a defective title (such as an outdated flats plan) is likely to result in a purchaser doing just

what Mr SM's purchasers did in this transaction: requisitioning the title – i.e. requiring that settlement proceed with transfer of a title without defects; or, as happened here, agreeing to a retention until the title was corrected.

[43] The fact that Mr SM was obliged to undertake that process sooner, does not mean that he has suffered any loss (noting here that he did not pay any legal fees for this transaction). Certainly, he has had to pay money sooner rather than later to fix a problem: but that does not equate to a loss.

[44] A loss is something more than a cost. A loss is a cost which, ordinarily, would never have been incurred, and was only incurred because of someone else's conduct.

[45] Mr YL's conduct meant that Mr SM paid a cost sooner than he might otherwise have done so, but it is not a cost that was never going to arise.

[46] This is what the law recognises as causation: a person's conduct must be the cause of another's loss.

[47] In my view Mr YL did not cause Mr SM's loss. Mr YL's conduct caused Mr SM to incur a cost sooner than he would have liked.

[48] I therefore agree with the Committee's conclusion about Mr SM's claim for compensation from Mr YL.

[49] Mr SM has also argued that properties are regularly transferred with defective titles. His argument appears to be that he could well have sold this property on a future occasion, assuming Mr YL had properly cancelled the agreement in question, without the future purchaser requisitioning the title in connection with the flats plan, or seeking a retention.

[50] It is impossible to say why a property might be sold with a defective title. Perhaps the purchaser was not troubled by the defect; perhaps the purchaser did not notice the defect; perhaps it was a transfer to settle a property on trustees of a family trust.

[51] The fact that defective titles may be transferred is not evidence that this would, or even might, have happened in the case of Mr SM's property. Nor is it something over which Mr SM would have had any control. As mentioned earlier, it is likely that a prospective purchaser of Mr SM's property would have identified the defective title and, assuming they still wished to purchase the property, requisitioned the title.

[52] None of the above condones Mr YL's conduct, for which he has been appropriately disciplined. But a proper loss analysis leads inevitably to the conclusion that the costs incurred by Mr SM were not a loss caused by Mr YL.

Decision

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

Anonymised publication

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

DATED this 7th day of May 2021

R Hesketh
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 SM as the Applicant
Mr YL as the Respondent
Mrs and Mr JT Related Persons
[City] Standards Committee [X]
New Zealand Law Society