

CONCERNING An application for review pursuant to
Section 193 of the Lawyers and
Conveyancers Act 2006

AND

CONCERNING A determination of the Wellington
Standards Committee No 2

BETWEEN **COMPLAINANT P** of Upper Hutt

Applicant

AND **LAWYER H** of Lower Hutt

Respondent

DECISION

Background

[1] This matter concerns the conduct of Lawyer H in respect of relationship property proceedings between Complainant P and her former husband. Lawyer H acted for the complainant's husband in those proceedings. The proceedings were ultimately settled. As a consequence of agreement between the parties Judge Ullrich made consent orders on 2 July 2008. Those consent orders were made on the basis of a joint memorandum submitted to the Court. That memorandum was signed by both parties and their counsel. Annexed to the memorandum was a draft Consent Relationship Property Order. That draft Order was amended in the course of the hearing and in its amended form became the Order of the Court. It is the content of that Order along with the signed memorandum which forms the basis of this complaint.

[2] The complaint relates to a relatively narrow aspect of the Order. In particular Complainant P complains that although the Order states that it is made on the basis that proper disclosure of all relationship property has been made, this is not the case. In particular she considers that the financial accounts of "Company X" were not properly disclosed and she was prejudiced accordingly. Part of the relationship property which, under the consent order, went to her husband was "one ordinary share in Company X".

[3] The issue for determination therefore is whether Lawyer H was in breach of professional standards in preparing the Consent Order and/or in warranting by his signature on the memorandum that proper disclosure of all relationship property had been made.

[4] Complainant P complained to the New Zealand Law Society who referred the matter to the Wellington Standards Committee 2. On 2 December the parties were advised that the Standards Committee had met and dismissed the complaint as vexatious.

[5] I observe that in the application to this Office of 8 January 2009 Complainant P asserts the decision of the Standards Committee is wrong in substance. She does not complain in respect of the process adopted by the Committee. In light of that, and in light of the fact that there is no indication on the file provided to me that the procedure of the Standards Committee was other than robust, I will consider the substantive issue only.

[6] The parties have consented to this matter being considered without a formal hearing and therefore in accordance with s 206(2) of the Lawyers and Conveyancers Act this matter is being determined on the material made available to this office by the parties and the file of the Standards Committee.

The Nature of a Vexatious Complaint

[7] In dismissing the complaint the Standards Committee found that the complaint was vexatious and therefore dismissed it pursuant to s 138(1)(c) of the Lawyers and Conveyancers Act 2006. That section provides that a complaint may be dismissed where it is found to be frivolous or vexatious or not made in good faith. Complainant P objects that the complaint was not vexatious. In so objecting she notes that the dictionary definition of vexatious is “designed to annoy”. She sates this was not her intention.

[8] Vexatious has assumed a specific meaning in the law which departs somewhat from the way in which it might be used in ordinary language. In *NZCYPS v B* [1996] NZFLR 385 Judge Moss had occasion to consider the meaning of vexatious and concluded that “in a legal context the word ‘vexatious’ has come to mean ‘not having sufficient grounds’”. In that case his honour was considering whether a certain application in respect of care and protection proceedings in relation to a child should be struck out as “frivolous or vexatious or an abuse of the procedure of the Court”. His honour also observed that a high threshold must be reached before making such a

finding. Clearly any tribunal should be cautious before finding that a litigant's action (or complainant's complaint) is vexatious. A similar approach was taken by Tipping J the Supreme Court in *Murray v Morel & Co Ltd* [2007] 3 NZLR 721 where it was held that where a claim is clearly barred as outside a limitation period it will be considered vexatious (or frivolous or an abuse of process).

[9] In *Dyson v Attorney-General* [1911] 1 KB 410, 418 (CA), Fletcher Moulton LJ was considering the power of the Court to strike out an action as vexatious and observed that:

The Court has a right to stop an action at this stage if it is wantonly brought without the shadow of an excuse, so that to permit the action to go through its ordinary stages up to trial would be to allow the defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless.

Importantly his honour did not consider that the action must be brought with the intention of "vexing" or annoying the defendant. However where a claim is baseless the effect of it is simply to cause inconvenience to the defendant. It is the fact that it is clearly baseless and therefore has the sole effect of annoying the defendant that makes it vexatious. The intention of the plaintiff (or in this jurisdiction the complainant) are therefore not relevant to this question. Where a complaint is brought which is in fact wholly groundless it may be vexatious even though the complainant mistakenly thinks it has merit.

[10] I note also that in s 138(1)(c) the word vexatious can properly be read along with the accompanying phrases of "frivolous" and "not made in good faith". Although the sentence uses the disjunctive "or" between the concepts, there is considerable overlap in these terms: *Cameron v Masters* [1998] NZFLR 11. One aspect of this complaint is that Complainant P does not accept that the consent order was properly made. She does not consider the issues in relation to the relationship property to be finally closed and has sought to have further disclosure in respect of the company and to reopen the matter. This is the case notwithstanding an unsuccessful application to the Family Court to vary the consent order (of 21 July 2008).

[11] It is legitimate (at least under the provisions of the Lawyers and Conveyancers Act 2006 which are now in force) to seek compensation for loss caused by the actions of a lawyer through the complaints process. However, it is improper to use the complaints process as 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. This is further recognised in s 138(1)(f) of the Lawyers and Conveyancers Act which states that a Standards Committee may resolve to take no further action where there is an adequate right of appeal that the complainant could exercise. Where proceedings are brought for a collateral purpose this will weigh in favour of them being found to be vexatious: *L v W (No 3)* [2003] NZFLR 961 per Heath J at para 55 (upheld on appeal [2004] NZFLR 429).

[12] The question of whether it is proper for a Standards Committee to find that a matter is vexatious or frivolous or not made in good faith must also be considered against the wider background of the purposes of the Lawyers and Conveyancers Act 2006 and the objectives of the complaints process. The general purposes of the Act are set out in s 3 and include the protection of consumers of legal services and to maintain confidence in the provision of legal services. Clearly a robust complaints system is part of achieving those purposes. This requires both the efficient dealing with complaints, and that complaints should not be lightly turned away.

[13] Section 120 of the Act provides further guidance on the purposes of the complaints and discipline system and provides that complaints must be processed and resolved expeditiously. It is on this basis that Standards Committees are given the power to dismiss a complaint without further investigation under s 138 of the Act. It is of note that s 138 also refers to other grounds upon which the complaint may be summarily dismissed. Those grounds include triviality and the existence of more appropriate remedies. The legislature has attempted to strike a balance between a comprehensive complaints process, and ensuring that that process is not clogged by undeserving complaints. It is also proper to recognise in the existence of the power to dismiss trivial, frivolous and vexatious complaints the fact that it is proper that lawyers not be inconvenienced by complaints which are wholly without foundation.

[14] I also take into account the fact that finding that a complaint is vexatious or frivolous or not made in good faith is a significant finding that should not be made lightly. In particular, it deprives the complainant of a full investigation of the complaint. Such a finding should therefore only be made where there are clear grounds: *Ongley v Brdjanovic* [1975] 2 NZLR 242 at 244.

This complaint

[15] In this matter Complainant P complains that there was no adequate disclosure of relationship property. This is not the case. There is no asset which was not disclosed.

The existence of the interest in the company was well known. What was in fact in issue was the value of that asset. It is for this reason that Complainant P complains that she did not have information relating to the company accounts. However, a future dividend which might be payable from a company to a shareholder is not a present asset.

[16] In any event, no party to the Consent Order was misled in any way by the absence of financial information in respect of the company. While the parties negotiated the final form of the order without final accounts of the company, they were aware of that gap in their knowledge and reached agreement on that basis. What is more the parties explicitly struck from the Consent Order clause 3(h)(i) which made provision for adjustment of amounts payable if the final accounts of the company varied from those provided. It is also of note that clause 3(h)(i) referred back to clause 1(c) which provided for a payment of \$120 000 to be made to Complainant P. That clause was also varied by the addition of a note stating that "a further \$3500 will be deposited into the applicant's solicitor's trust account". It is clear therefore that the parties effectively agreed to a trade off whereby a future possible adjustment was forgone in return for an immediate agreement to an additional payment. In hindsight Complainant P is unhappy with that arrangement.

[17] It is important to note that Lawyer H owed his primary duties to his client and not to Complainant P. He also of course owed fundamental obligations to the Court.

Conclusion

[18] In light of the foregoing I conclude that the complaint against Lawyer H is wholly without foundation.

[19] I do not consider that this complaint was made with the motive to harass or annoy Lawyer H, however it undoubtedly had that effect. This complaint was at least in part brought to undermine the consent order that was made in the relationship property proceedings. The reasons of the Standards Committee for deciding to take no action on this complaint might have been expressed by using the wider words of section 138(1)(c), namely that the complaint is frivolous, or vexatious, or not made in good faith. In particular, I consider that this complaint was motivated by a collateral purpose and not made in good faith. The complaint itself was also wholly without foundation. On this basis the decision of the Committee was the proper one and while I would have expressed it somewhat more broadly, it was the appropriate decision to make.

Result

[20] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act the application for review is declined and the decision of the Standards Committee is upheld.

DATED this 20th day of March 2009

Duncan Webb

Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act this decision is to be provided to:

- Complainant P as applicant
- Lawyer H as respondent
- Firm A being a related entity
- The Wellington Standards Committee 2
- The New Zealand Law Society