

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

[2021] NZLCRO 61

Ref: LCRO 235/2020

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of [Area] Standards Committee

**BETWEEN**

**JT**

Applicant

**AND**

**PT**

Respondent

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

**Introduction**

[1] On 4 December 2018, the [Area] Standards Committee issued part one of its determination of the complaints by Mr JT<sup>1</sup> against Mr PT.

[2] Mr JT applied for a review of that (part of the) determination.

[3] Before completion of that review, the Committee issued its determination on orders (part two).

[4] Following receipt of the review decision relating to part one, the Committee then issued part three of its determination,<sup>2</sup> which is the determination now under review.

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<sup>1</sup> Throughout this decision, the applicant will be referred to as Mr JT. The respondent will be referred to as Mr PT.

<sup>2</sup> That decision made further findings against Mr PT.

## Background / Standards Committee determinations

[5] The background facts, and the issues arising out of those facts, are set out in my earlier decision<sup>3</sup> and do not need to be repeated.

[6] In part two of its determination,<sup>4</sup> the Committee made the following orders:

- S156(1)(c) Mr PT is ordered to send a written apology to Mrs KG. A copy of the apology is to be sent to the Standards Committee for approval by 2 April 2019.
- S156(1)(n) Mr PT is ordered to pay costs in the amount of \$750 to the New Zealand Law Society in respect of and incidental to the inquiry, investigation and hearing; and
- S156(1)(o) Mr PT is ordered to pay costs in the amount of \$750 to Mr JT for costs and expenses incurred by him in respect of the inquiry, investigation and hearing.

[7] In part three of its determination, the Committee made further orders, namely:

- S156(1)(c) Mr PT is ordered to send a further written apology to Mrs KG...
- S156(1)(l) Mr PT is ordered to pay a fine in the amount of \$1000.00 to the New Zealand law Society

[8] Mr JT has applied for a review of that determination, which necessarily means that this review must take account of the orders made in the part two determination.

### Mr JT's application for review

[9] In his application for review, Mr JT points out that the Committee had already issued its part two determination before the review of the part one determination was completed.

[10] He emphasises that he had "made it abundantly clear that the purpose of [his] complaint [was] to retrieve the costs **which [he has] incurred** due to [Mr PT]'s failure to inform K about the RG Family Trust ... her role within it and her precarious financial position as a discretionary beneficiary in the event that RG predeceased her or, as actually happened, the couple separated". His application for review is therefore, made with that objective in mind.<sup>5</sup>

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<sup>3</sup> YR v OS LCRO 3/2019 (20 July 2020).

<sup>4</sup> Dated 22 March 2019.

<sup>5</sup> To recover costs.

[11] Mr JT refers to the comment by the Committee that “it is not appropriate to address the 2006 issues because of jurisdictional and threshold issues. The 2006 matters are therefore not addressed”. He says, “this is a very weak argument”.

[12] Mr JT takes issue with the Committee’s statement<sup>6</sup> that his claim for reimbursement of legal fees flows from the adverse findings against Mr PT, not from Mr PT’s conduct.

[13] He also disputes the Committee’s statement that K would have “inevitably incurred [the fees] in resolving matters consequently upon her separation from Mr RG ”.<sup>7</sup> He is “confident that, on the balance of probabilities, only minimal legal costs would have been incurred if Mr JT had carried out the fiduciary duties he owed to K”.

[14] He advises that he was under the impression that compensation could only be awarded in respect of actual loss. The Committee confirmed [his] view by highlighting that point in the decision and Orders they subsequently made. Since that time, he has become aware that orders for payment on account of stress and anxiety can be made and therefore directs his submissions towards both actual costs and costs for stress and anxiety arising from each of the six scenarios<sup>8</sup> he has identified.

[15] Mr JT submits that the costs awarded to him by the Committee<sup>9</sup> should be increased as he had “spent substantially more time in relation to the whole complaint than just for the removal issue”.<sup>10</sup>

### **Mr PT’s response**

[16] Mr PT’s counsel, Mr LV, responded to the application for review. He refers first to the jurisdictional issue that arises when the conduct complained about occurred prior to the commencement date of the Lawyers and Conveyancers Act 2006.<sup>11</sup> This is the ‘threshold’ that is referred to, and not as understood by Mr JT. That issue is addressed in [20] of this decision.

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<sup>6</sup> Part three determination, at [8].

<sup>7</sup> At [8].

<sup>8</sup> See [21].

<sup>9</sup> \$750.

<sup>10</sup> I assume that the ‘removal issue’ Mr JT refers to is removal of K as a trustee and beneficiary of the Trust.

<sup>11</sup> Section 351(1) of the Lawyers and Conveyancers Act 2006 refers to conduct occurring prior to the commencement of that section. The Act came into force on 1 August 2008, not 2006 as referred to by Mr LV.

[17] Mr LV submits that the conduct in respect of which the findings against Mr PT<sup>12</sup> were made, are at the “lower end of the scale” and that Mr PT’s belief was that his retainer was purely transactional.<sup>13</sup>

[18] Mr LV argues that no further purpose would be served by additional penalties being imposed against Mr PT, and that the Committee’s determination should be confirmed.

## **Review**

### *The threshold test*

[19] Mr JT understands that the ‘threshold’ in question, is the amount that can be ordered by way of compensation by the Standards Committee.<sup>14</sup> The ‘threshold’ referred to by the Committee relates to the restriction on its jurisdiction to consider conduct occurring before 1 August 2008. Such conduct can only be the subject of a complaint if “proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982”.<sup>15</sup> Conduct that could have been the subject of disciplinary proceedings prior to the commencement of the Lawyers and Conveyancers Act, was conduct significantly more serious than conduct in respect of which complaints can be made under the Lawyers and Conveyancers Act 2006.

[20] Consequently, the ‘threshold’ referred to by the Committee does not refer to the limit of compensation that can be ordered by a Committee. Instead, it refers to a Committee’s jurisdiction to consider conduct occurring prior to 1 August 2008, which in this case, does not fall within the category of conduct in respect of which “proceedings of a disciplinary nature could have been commenced.”

### *No speculation*

[21] In his application for review, Mr JT has included a ‘synopsis of [six] possible scenarios’ and followed each scenario with a summary of what he considers would have been the impact that each scenario would have had.

[22] One of the earliest decisions of this Office addressed the issue of compensation in some detail, and it is relevant to note a comment by the LCRO in that decision:<sup>16</sup>

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<sup>12</sup> Mr LV, submissions (3 February 2021) at [16].

<sup>13</sup> At [17].

<sup>14</sup> The amount of \$25,000, per reg 32 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.

<sup>15</sup> Section 351 of the Lawyers and Conveyancers Act 2006.

<sup>16</sup> *Sandy v Khan* LCRO 181/2009 (25 February 2010) [orders decision].

[6] ... A lawyer who breaches his or her fiduciary duty may not speculate that the wronged client would have acted as he or she did and incurred the loss in any event (*Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83; *Sims v Craig Bell & Bond* [1991] 3 NZLR 535).

[23] Conversely, speculation by a complainant as to what would have happened had a lawyer fulfilled his or her professional obligations, must also be disregarded.

[24] Consequently, none of the possible scenarios advanced by Mr JT can be considered in this review. Although I accept that the costs incurred by K would have not 'inevitably' been incurred, conversely it cannot be said that, on a balance of probabilities, those costs would not have been incurred.

[25] There is no basis on which an order be made that Mr PT contribute towards the costs incurred by Mr and Mrs JT on behalf of K.

#### *The retainer*

[26] Mr LV, on behalf of Mr PT, submits that Mr PT's retainer was "purely transactional, limited simply to drafting the documentation required to appoint K as trustee."<sup>17</sup> The requirement for a lawyer to be proactive in offering advice, is addressed in some detail in LCRO 3/2019,<sup>18</sup> and is reiterated here, to provide the context that Mr LV submits ought to be taken into account when considering appropriate orders.

#### *Stress and anxiety*

[27] Although Mr JT has emphasised that his complaint and application for review is pursued for the purpose of recovering costs incurred by way of legal fees, he has frequently referred to the stress and anxiety that he, his wife, and K have experienced.

[28] In the review decision referred to in [22] above, the LCRO made a number of comments in relation to a claim for compensation for stress and anxiety. A number of those comments are relevant to the claim by Mr JT. The LCRO said:

[28] I note that the ability to compensate for anguish and distress in the lawyer client relationship has been recognised in a number of cases, most recently *Heslop v Cousins* [2007] 3 NZLR 679 (where \$50,000 was awarded to each client). Given the purposes of the Lawyers and Conveyancers Act (which in s 3(1)(b) includes the protection of consumers of legal services) it is appropriate to award compensation for anxiety and distress where it can be shown to have occurred. Such an order will be particularly appropriate where the client is not a sophisticated person and looks to the lawyer to relieve the stresses that might accompany legal matters. ...

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<sup>17</sup> Mr LV, submissions (3 February 2021) at [17].

<sup>18</sup> At [47]

[29] There is of course no punitive element to an award of damages for anxiety and distress. Such an award is entirely compensatory: *Air NZ Ltd v Johnston* [1992] 1 ERNZ 700; [1992] 1 NZLR 159 (CA). It is accepted that such orders should also be modest (though not grudging) in nature.

[29] The LCRO did not refer to any particular evidence provided by Ms Sandy but was “satisfied that the conduct of Mr Khan caused Ms Sandy anxiety and stress”.

[30] After discussing awards made by the courts in the judgments referred to by the LCRO, an award of \$2,500 was made to Ms Sandy by way of compensation for stress and anxiety. Although that decision was issued in 2009, there has been no adjustment of the maximum amount that can be awarded by way of compensation.

[31] In the present instance, absent speculation as to what K would have done if Mr PT had provided her with the appropriate information, she was nevertheless, deprived of the opportunity to make an informed decision as to what steps, if any, she should take. The situation K (and her parents) found themselves in would, without doubt, have caused them considerable stress and anxiety for some time. Mr PT’s conduct, as referred to in LCRO 3/2019, would have contributed to that stress and anxiety.

#### *Mitigating factors*

[32] Mr PT has accepted the findings of the Committee and on review, and has not himself, sought a review of the Committee’s determination. Mr LV advises that Mr PT has complied with the Committee’s orders and specifically, has tendered appropriate apologies to K.

[33] The findings of the Standards Committee, confirmed and extended by this Office, will be an unfortunate blemish for Mr PT to take into retirement after a long and distinguished career.

[34] The events giving rise to Mr JT’s complaints occurred some time ago.

#### **Order**

[35] Viewed objectively, none of the mitigating factors referred to above, detract from the impact that the events have had on K and her parents. This calls for an acknowledgment, in principle, that Mr PT has contributed to the issues faced by K, and the impact on her parents. I refer to the payment as being “in principle” because, as distinct from the facts in *Sandy v Khan* and other reviews, it can not be said with the required degree of certainty<sup>19</sup> that K, and her parents, would not have suffered the same

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<sup>19</sup> On a balance of probabilities.

stress and anxiety as eventuated in this case. It bears repeating here, that the person primarily responsible for that stress and anxiety, was RG.

[36] The acknowledgement in principle, is represented by this order, namely that, pursuant to s 156(1)(d) of the Lawyers and Conveyancers Act 2006, Mr PT is to pay the sum of \$1,000 to Mr JT by way of compensation for the stress and anxiety suffered, primarily by K, but also by her parents through their involvement on both a personal and financial level.

### **Decision**

[37] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the part three determination by the Committee is confirmed, but modified by the order in [36] above.

[38] To facilitate the payment ordered, Mr JT is requested to provide this Office with an account number into which the payment is to be made. This will be forwarded to Mr PT and payment is to be made within two weeks of the date on which the account number is provided.

### **Costs**

[39] It is usual, where an adverse finding against a practitioner is confirmed on review, that there be an order that the practitioner contribute towards the costs of the review.<sup>20</sup> The need for this review has arisen because the Committee proceeded with the part two determination before the review of part one had been completed.

[40] There is no order for payment of the costs of this review.

[41] In the part two determination, the Committee ordered Mr PT to make payment of the sum of \$750 to Mr JT on account of costs. Mr JT submits that “[on] a *pro-rata* basis, the matter of costs awarded to [him] should have been addressed by the Committee and increased accordingly, as [he has] spent substantially more time in relation to the whole complaint than just for the removal issues”. The additional time expended by Mr JT has not been caused by Mr PT. It would be unfair to impose any further order for costs on him.

[42] There will be no order for payment of additional costs to Mr JT.

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<sup>20</sup> See the LCRO Costs Orders Guidelines at [5].

**Publication**

[43] This decision will be published in an anonymised format on the website of this Office as it emphasises the need for lawyers to be acutely aware of potential conflicts and the need to volunteer advice outside of the specific retainer.

**DATED** this 6th day of MAY 2021

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**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:

Mr JT as the Applicant  
Mr PT as the Respondent  
Mr LV/Mr BK as the Respondent's Representatives  
Mr NC as a Related Person  
[Area] Standards Committee  
New Zealand Law Society