

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

[2021] NZLCRO 013

Ref: LCRO 26/2019

**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**

**ET**

Applicant

**AND**

**CG**

Respondent

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

**Introduction**

[1] Mr ET has applied for a review of the determination by [AREA] Standards Committee [X] to take no further action in respect of his complaint about Mr CG.

**Background**

[2] Mr ET had separated from his former partner, Ms YO.

[3] A temporary Protection Order had been issued by the court against Ms YO, which, inter alia, stipulated that "... she must not ... without the protected person's express consent, enter or remain on any land or building occupied by any protected person".<sup>1</sup>

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<sup>1</sup> Protection Order (10 July 2018) at Standard Condition 1(b)(iii).

[4] Mr CG acted for Ms YO.

[5] Ms YO wished to collect various personal items from the property which she had previously occupied with Mr ET, and where Mr ET continued to reside. Mr CG wrote to Mr ET's solicitors requesting that Mr ET allow her to do so.<sup>2</sup> Mr ET's solicitors responded:<sup>3</sup>

ET instructs that YO may attend the property with a friend to uplift her clothes, personal effects, personal papers and passport. If YO proposes two possible dates and times to do so, ET will then be able to confirm suitability with his own support person.

[6] Pending agreement as to when Ms YO could enter the property to collect her personal items, it was arranged that a friend of Ms YO's could collect her horse and related equipment from the property.

[7] When the friend went to the property for this purpose, he/she telephoned Ms YO and informed her that Mr ET was not present at the property. Ms YO contacted Mr CG and enquired if it was in order for her to enter the property to collect her personal items.

[8] Mr CG consulted other members of his firm and advised Ms YO that it was in order for her to do so, provided she was accompanied by her support person and that she should advise the Police after she had left the property so that the Police would know that a burglary had not taken place.

[9] Mr ET advises that Ms YO took more than her "personal items"<sup>4</sup> and had also damaged the property. As a result, Mr ET's ability to continue the farming operation on the property was compromised.

### **Mr ET's complaint**

[10] Mr ET has complained that Mr CG's advice to Ms YO that she could enter the property when he was not present has resulted in him not being able to recover the items taken and this has caused him stress and proven "injurious to the BHU partnership".<sup>5</sup> Mr ET wants action to be taken against Mr CG for his "illegal advice" provided to Ms YO resulting in her acting in breach of the Protection Order.

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<sup>2</sup> [Law Firm C], email to [Law Firm A] (20 July 2018).

<sup>3</sup> [Law Firm A], letter to [Law Firm C] (27 July 2018) at [2].

<sup>4</sup> For example – electric fences, stock feed bins, farm diaries.

<sup>5</sup> Complaint {23 August 2018}.

**Mr CG's response**

[11] Mr CG instructed Mr KN ([Law Firm B]) to act for him with regard to the complaint. In response to the complaint,<sup>6</sup> Mr KN advised that Mr CG acknowledged that the law relating to protection orders was not an area he was familiar with and that when Ms YO raised her query with him, he sought advice from his colleagues.

[12] Mr KN says:<sup>7</sup>

... As a result of his enquiries, Mr CG advised Ms YO that she may enter the property to uplift her personal items provided that Mr ET was not present, that she took a witness, and that she contacted the Police after leaving the property to notify them that there had not been a burglary. It is accepted on Mr CG's behalf that the advice he gave Ms YO was wrong and that it could have exposed her to possible Police action.

[13] He says that Mr ET had consented to Ms YO uplifting her personal items although specific arrangements for her to do so had not been finalised.

[14] Mr KN submits that no harm or loss was caused to Mr ET. He also notes that Mr ET was not Mr CG's client and that Ms YO herself has not complained.

[15] Mr KN continues:<sup>8</sup>

In the end, Mr CG gave advice that was incorrect. He acknowledges that this is not his area of expertise but at the time he gave the advice he himself believed it to be the correct advice. He now knows that is not so. He is mortified that this has occurred and that his client has been thereby potentially exposed to criminal proceedings. He apologises for this.

[16] Mr KN advises that:<sup>9</sup>

The Police initially told Mr CG that they were going to prosecute him but decided not to do so when they became aware of the full background. Understandably, this has shaken Mr CG.

[17] Mr KN's final submission is:<sup>10</sup>

... in the light of the fact that there was no potential for harm, that no-one has been harmed, that Mr CG's client is happy, and that Mr CG has suffered serious professional embarrassment already it is submitted that it is unnecessary for the NZLS to make any adverse findings against him.

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<sup>6</sup> [Law Firm B], letter to Lawyers Complaints Service (15 October 2018).

<sup>7</sup> Above n 6, at [14].

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

<sup>9</sup> At [26].

<sup>10</sup> At [28].

### The Standards Committee determination

[18] The Standards Committee noted that “the legal duties owed by a lawyer who is acting for a client on a matter, to another lawyer’s client in that matter are limited”<sup>11</sup> and included a reference to the judgment in *Burmeister v O’Brien*.<sup>12</sup> Although Mr CG acknowledged his advice was incorrect, the Committee accepted Mr KN’s submission that he was not responsible for the fact that Ms YO had taken more than her own belongings. It nevertheless, acknowledged that the consequences for his client and himself could have been serious.

[19] The Committee continued:<sup>13</sup>

It is the Committee’s view that Mr CG’s mistake, in all the circumstances specific to this case, does not warrant a disciplinary response and the Committee is assisted by decisions of the LCRO that have found “*an honest mistake is not a proper basis for disciplinary action*”.

Having considered all the material provided by the parties, the Committee has resolved to take no further action in respect of the complaint, pursuant to section 138(2) of the Lawyers and Conveyancers Act 2006, as further action is unnecessary or inappropriate.

### The application for review

[20] Mr ET has applied for a review of the Committee’s determination. He does not accept Mr CG’s contention that he had no expertise in the applicable law and refers to the fact that Mr CG claims to have experience in property relationship disputes.

[21] Mr ET considers that Mr CG made a deliberate decision to provide advice to Ms YO which resulted in her removing items other than those belonging to her.

[22] Mr ET asserts that for “Mr CG to say that he was not familiar with the law in regard to this means he is either incompetent or a liar”.<sup>14</sup>

[23] Mr ET seeks compensation for the financial stress and hardship he has suffered.

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<sup>11</sup> Standards Committee determination (18 December 2018) at [6].

<sup>12</sup> *Burmeister v O’Brien* [2010] 2 NZLR 395 (HC) at [234].

<sup>13</sup> At [10]–[11].

<sup>14</sup> Application for review, Part 7.

## Review

[24] Both parties consented to this review being completed on the material to hand, which includes the Standards Committee file.

### *Submissions for Mr CG*

[25] Mr KN submitted that it was unnecessary for the decision to be reviewed as Mr ET was relying upon the content of a Family Harm Investigation which had been available prior to the Committee's decision and should have been provided earlier. He submits "it is not fresh and should not be considered".<sup>15</sup>

[26] The Family Harm Report is not particularly relevant to the complaint and no reliance has been placed on it in reaching this decision.

### *A purposive approach?*

[27] Ms YO sought advice from Mr CG as to whether or not she could enter the property to collect her belongings. Mr CG says he sought advice from his colleagues as he does not have expertise in this area. This response ignores the fact that it was he who responded to Ms YO's query. Mr CG had also engaged with [Law Firm A]<sup>16</sup> to negotiate terms on which his client could retrieve her belongings from the property. In doing so, it would have been necessary to be familiar with the terms of the Protection Order and this decision turns on the fact that it was reasonable for Mr ET to expect that Mr CG would correctly advise Ms YO as to the conditions imposed in the Protection Order (which replicate the provisions of the Domestic Violence Act 1995).

[28] Standard Condition 1(b)(iii) of the Order provides:

... the respondent ... must not without the protected person's express consent enter or remain on any land or building occupied by any protected person ...

This mirrors the wording of s 19(2)(c) of the Domestic Violence Act 1995 and is absolutely clear in its meaning. No particular expertise is required to have an understanding of this provision.

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<sup>15</sup> [Law Firm B], letter to LCRO (28 February 2019).

<sup>16</sup> [Law Firm A] acted for Mr ET.

[29] Notwithstanding the clear meaning of this provision, Mr CG and his colleagues adopted a purposive approach to the interpretation of this requirement and proceeded on what they considered to be the purpose of the Order – viz – to prevent harm to the protected person.

[30] In forming this view, Mr CG discounted the possibility that confrontation could have occurred if Mr ET had returned to the property whilst Ms YO was there. The assumption that no one was at risk, was not necessarily correct.

[31] A lawyer must advise the clear meaning of relevant legislation, Court Orders, or documentation relevant to the matter in hand. A lawyer does not have a discretion to give advice based on what he or she considers to be the purpose of an Act or Court Order. This is something that is fundamental for any lawyer giving advice to a client, whether or not they have expertise in the particular area of law. The Act and the Orders must be strictly applied or complied with.

[32] It is not accepted that Mr CG's 'honest mistake' relieves him of this fundamental duty. A reasonably competent lawyer would not proceed on what he or she believes to be the purpose of an Order or relevant legislation.

*An honest mistake?*

[33] The Standards Committee has referred to decisions of this Office<sup>17</sup> in which Review Officers have found that "an honest mistake is not a proper basis for disciplinary action".

[34] The decisions referred to are distinguished from the circumstances arising in this review. In *CW v XB* LCRO 213/2010, the error made by the lawyer was quickly remedied and no adverse consequences followed. In addition, the error made was a minor slip which was also made by court staff. In the present case, the mistake did have adverse consequences for Mr ET and the advice given resulted from Mr CG's failure to take note of the clear wording of the Protection Order and of the Act.

[35] In footnote 17 of *KJ v VW* LCRO 54/2018, the Review Officer says:

In *CW v XB* ... at [16] — the Standards Committee accepted that an oversight, which had been remedied, had been made by the lawyer but decided to take no

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<sup>17</sup> *CW v XB* LCRO 213/2010 (15 June 2011) at [16] and cited in *KJ v VW* LCRO 54/2018 at [53].

further action. The complainant was neither the lawyer's client, nor a party to the proceedings, and had nothing to do with the matter.

[36] The Officer refers to the mistake as an oversight. In the present instance, Mr CG's advice was not an oversight. In addition, the complainant was neither the lawyer's client, or a party to the proceedings.<sup>18</sup> Mr ET was a person directly affected.

[37] I do not consider these decisions are on all fours with the facts relating to this Review.

#### *Duties to a non-client*

[38] The Standards Committee has referred to a passage in the text *Ethics, Professional Responsibility and the Lawyer*,<sup>19</sup> where the authors state that a practitioner's duty to another lawyer's client is limited and refer to the judgment in *Burmeister v O'Brien*.<sup>20</sup> The authors also note:

... the key issue is whether the lawyer has assumed some responsibility in respect of the third party's interests. Such a duty is likely to be found where:

- The interests of a party are likely to be adversely affected by any carelessness on the part of the solicitor;
- The solicitor can reasonably be expected to have that other party's interests in mind.

[39] The interests of Mr ET were likely to be adversely affected by Mr CG's advice and it was reasonable to expect that Mr CG should have had this in mind. However, the comments made by the authors relate to the duty of care to non-clients in negligence. Whilst there is some cross over between the elements necessary to prove negligence on the part of a lawyer to a non-client and a lawyer's professional responsibilities, it is not appropriate to treat negligence and professional responsibilities as being the same.

[40] The factors referred to in [38] above, are drawn from the *Burmeister* judgment. In that judgment, the Court also said:<sup>21</sup>

Caution must be exercised in imposing a duty on solicitors to those who are not only not the solicitor's clients, but who have interests essentially in conflict with those of the solicitor's direct client.

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<sup>18</sup> The complaint was another lawyer who had read a summary of the facts and outcome of the matter.

<sup>19</sup> Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at p161.

<sup>20</sup> Above n 12.

<sup>21</sup> At [234].

[41] It must be emphasised, that these comments were made in the context of an action in negligence against the lawyer. However, the Court made a number of obiter comments with regard to a lawyer's professional duties towards a non-client, which make it clear that the Court viewed these differently.

For example: (emphasis added)

- The fact that Mr Henley-Smith **may have breached the standards of proper professional conduct** does not in itself create a cause of action in negligence (at [224]).
- The fact that the transfer was signed in blank was not enough in my view to place a duty of care on Mr Henley-Smith to the Burmeisters (**as distinct from a duty to observe professional standards**) to follow up or refuse to act (at [231]).
- **His actions in this regard may be seen as reprehensible in a professional context** (at [240]).
- **This may have been slack behaviour on his part that is unacceptable in terms of professional standards** but is not deliberate fraud or wilful blindness (at [244]).

#### *Unsatisfactory conduct*

[42] “Unsatisfactory conduct” is defined in s 12(a) of the Act<sup>22</sup> as being:

conduct of the lawyer ... that occurs at a time when he or she ... is providing regulated services and is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; ...

[43] The only restriction on the application of s 12(a) is that the lawyer must be providing regulated services. The Act does not restrict this to regulated services to the lawyer's own client. The fact that Mr ET was not Mr CG's client, does not relieve Mr CG from ensuring that he adhered to the required professional standards.

[44] Mr CG gave advice to Ms YO in the course of providing regulated services and a member of the public is entitled to expect that advice to reach the standard of competence that might be expected of a reasonably competent lawyer.

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<sup>22</sup> Lawyers and Conveyancers Act 2006 (the Act).

### *Summary*

[45] (a) The duties of a lawyer to a non-client in negligence are not synonymous with a lawyer's professional duties to a non-client; and

(b) the definition of "unsatisfactory conduct" in s 12(a) requires that the conduct take place whilst the lawyer is providing regulated services, but any person may complain about that conduct.<sup>23</sup>

### **Conclusion**

[46] Mr CG was involved in discussions to arrange a procedure whereby Ms YO could uplift her belongings. Mr CG's advice to Ms YO that she could enter the property in Mr ET' absence was in direct contravention of the condition set by Mr ET that Ms YO could only enter the property under supervision.

[47] The wording of the Act and the Order was clear. It is expected that a reasonably competent lawyer would be able to comprehend the restrictions imposed on Ms YO entering on to the property without Mr ET' consent. The fact that no Occupation Order had been made does not affect the conditions for access imposed by the Act. Mr ET was occupying the property. That is all that was required.

[48] Mr CG's conduct was less than what could be expected by a member of the public of a reasonably competent lawyer. Mr ET is a member of the public, and did not expect that Mr CG would advise Ms YO to act contrary to the terms of the Protection Order and enable Ms YO to access the property unsupervised (by him or his support person).

### **Decision**

[49] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee is reversed.

[50] Mr CG's conduct constitutes unsatisfactory conduct as defined in s 12(a) of the Act.

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<sup>23</sup> Section 132(1) of the Act.

## Orders

[51] In considering what orders should follow this finding, I have had regard to the comments made by the authors of the text referred to in [38] supra:<sup>24</sup>

To mark out conduct as unsatisfactory is hardly damning condemnation. To state the obvious, lawyers' conduct can either be satisfactory or not. It is suggested that the choice of the only faintly damning description of "unsatisfactory" indicates that a finding of unsatisfactory conduct is not intended to be an indicator of any kind of egregious conduct, but is rather an indication that the practitioner in question "must try harder".

[52] Mr ET says he has been unable to recover the property taken by Ms YO, some of which was needed for the operation of the farm. He says he has been placed under considerable financial stress.

[53] There is no specific evidence on which orders for compensation can be based.

[54] It cannot be assumed that Ms YO's actions were a direct consequence of Mr CG's advice. Ms YO may have entered the property regardless of the advice she received. She removed more than her own personal belongings from the property, as well as damaging the property.

[55] Mr CG has apologised (although the apology is directed to Ms YO for exposing her to potential criminal actions).<sup>25</sup>

[56] The events took place some 18 months ago. That stems from delays in this Office but it is accepted that Mr CG is embarrassed by the fact that his client breached the Protection Order on the basis of his advice.

[57] Taking all of these factors into account the only appropriate order is an order for payment of costs.

[58] Pursuant to s 210(3) of the Lawyers and Conveyancers Act 2006 Mr CG is ordered to pay the sum of \$900 to the New Zealand Law Society within one month from the date of this decision.

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<sup>24</sup> Webb, Dalziel and Cook, above n 19, at p119.

<sup>25</sup> [Law Firm B], letter to Lawyers Complaints Service (15 October 2018).

*Anonymised publication*

[59] Pursuant to s 206(4) of the Act, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and bereft of anything as might lead to their identification.

**Enforcement of costs orders**

[60] Pursuant to s 215 of the Act, I confirm that the costs order made by me may be enforced in the civil jurisdiction of the District Court.

**DATED** this 29<sup>TH</sup> day of JANUARY 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 ET as the Applicant  
Mr CG as the Respondent  
Mr KN as the Representative for the Respondent  
Mr CF as a Related Person  
[AREA] Standards Committee [X]  
New Zealand Law Society