

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

[2021] NZLCRO 078

Ref: LCRO 63/2021

CONCERNING

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

AND

CONCERNING

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

BETWEEN

FB

Applicant

AND

LK

Respondent

DECISION

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

Introduction

[1] Mr FB has applied to review a decision by the [Area] Standards Committee [X] (the Committee) dated 31 March 2021, in which the Committee decided to take no further action on his complaint concerning the conduct of his former lawyer, Mr LK.

[2] The Committee based its decision on s 138(1)(f) of the Lawyers and Conveyancers Act 2006 (the Act). This section allows a Committee to take no further action on a complaint if it considers that a complainant has an adequate remedy that it would be reasonable for them to take.

Background

[3] In late 2013, Mr and Mrs FB separated. They were unable to reach agreement between themselves as to the division of their relationship property.

[4] Mr FB instructed Mr LK to act for him. Mrs FB instructed Mr WR.

[5] In early 2014, Mr FB suffered health issues which required a period of treatment and care.

[6] The two lawyers endeavoured to negotiate some of the relationship property issues on behalf of their clients. Sticking points concerned the treatment of debts owing to a family trust, and the division of proceeds following the sale of a property.

[7] However, some agreement was reached as to interim distributions of funds to the parties.

[8] In late 2014, Mr and Mrs FB and their lawyers met to discuss settlement. Agreement was reached at that meeting, and the parties executed a written relationship property agreement, appropriately certified by their lawyers (the agreement).¹

[9] Mr FB subsequently became unhappy about the agreement. He considered that Mr LK had failed to protect his interests in the negotiations leading up to the agreement being signed, and that the agreement unjustly favoured Mrs FB.

Complaint

[10] Against that background, on 18 February 2020, Mr FB lodged his complaint with the New Zealand Law Society Complaints Service (Complaints Service). That complaint against Mr LK may be summarised as follows:

- (a) Mr LK was negligent and/or incompetent in connection with the sale of a property.
- (b) Mr LK was negligent and/or incompetent, and failed to follow instructions, in connection with an interim payment to Mrs FB.
- (c) Mr LK's advice about relationship property and the agreement, was negligent and/or incompetent.

¹ The agreement was one made under s 21A of the Property (Relationships) Act 1976 (PRA); certification of such an agreement is required under s 21F of the PRA.

- (d) Mr LK failed to protect and promote Mr FB's interests, particularly as he was a vulnerable client (a reference to Mr FB's 2014 health issues).
- (e) Mr LK failed to act independently and/or had conflicting interests.
- (f) Mr LK was unresponsive including as to his law firm's complaints process.

[11] Mr FB's complaint was supplemented by him by some 240 pages of documents and related correspondence.

Standard Committee processes

[12] Whilst Mr FB's complaint was being progressed, he informed the Complaints Service that he had filed proceedings in the High Court against Mr LK's law firm. Mr FB indicated that the proceedings concerned Mr LK's representation in connection with the relationship property dispute, including the agreement.

[13] As well, Mr FB informed the Complaints Service that he had lodged an application in the Family Court.

[14] The Complaints Service was unable to ascertain the status of the two sets of proceedings, but concluded that although Mr FB may well have filed proceedings in the High Court, there were issues about service on Mr LK.

[15] The Committee made several requests to both Mr FB and Mr LK for clarification, but matters were not able to be advanced.

[16] Nevertheless, Mr LK provided a brief response to Mr FB's complaint.

Response by Mr LK

[17] In his letter to the Complaints Service dated 31 August 2020, Mr LK said the following:

- (a) He repeated earlier objections to Mr FB using the complaints process as an alternative to proceedings in the High Court.
- (b) Mr FB had repeatedly said that proceedings had been filed, but would not inform Mr LK when service of those proceedings might be expected.
- (c) At the time of writing his letter to the Complaints Service, Mr LK had still not been served with any proceedings.

- (d) Proper response to Mr FB's complaint included Mr LK's ability to comment on the proceedings that Mr FB said he had filed.

[18] Mr LK said that "for the record, [he denied that he or his law firm were] negligent in any manner whatsoever and [Mr FB's] complaints about being vulnerable and the settlement being prejudicial to him financially were both factually and financially incorrect."

[19] Mr LK provided a brief summary of answers to specific matters raised by Mr FB in his complaint.²

Comment by Mr FB

[20] Although offered an opportunity to provide comment on Mr LK's response to his complaint, Mr FB informed the Complaints Service that he had not read that response.³

[21] Mr FB did however raise concerns with the Complaints Service about the way in which his complaint had been managed, indicating that he was "yet to be convinced that the Law Society [was] taking the matter seriously." He indicated that he "[had] excellent grounds for an application for a judicial review should the Committee fail to take any action against [Mr LK] and his misconduct."

Standards Committee decision

[22] The Committee identified the issue for it to consider as being "whether [it] was the appropriate forum to address the issues raised by Mr FB."⁴

[23] The Committee observed that Mr FB's complaint was primarily concerned with the agreement, and his long-standing unhappiness with it.

[24] Mr FB's position was that Mrs FB had received more than her legal entitlement, and that the agreement was inconsistent with relationship property law.

[25] Further, because of what he described as his "vulnerability" at the time the agreement was negotiated and executed, in particular that he was under some duress, Mr FB considered that it was void.

² Mr LK provided the Complaints Service with a further brief letter (28 October 2020) in which he noted that proceedings had still not been served on him. I deal further below with other comments made by Mr LK in that letter.

³ Email from Mr FB to the Complaints Service (14 October 2020).

⁴ Standards Committee decision at [29].

[26] The Committee held:⁵

[T]he usual course of action, if a party to a relationship property agreement is dissatisfied with any aspect of it, is for that person to seek legal advice about whether there would be grounds to apply to the Family Court to have the agreement set aside.

[27] The Committee also noted that Mr FB had referred to negligence proceedings against Mr LK, but concluded that although possibly filed by Mr FB, they had not been served. Further, there was uncertainty as to whether or not Mr FB had filed an application in the Family Court seeking an order setting aside the agreement.

[28] The Committee referred to Mr FB's submissions about the cost of such proceedings, and delays with legal aid, and held:⁶

Mr FB's description of the financial obstacles preventing him from bringing proceedings left [the Committee] with the impression that the present complaint might be intended as either: (a) a substitute for the appropriate court proceedings; or (b) a means of securing some financial compensation from Mr LK, for alleged professional failings, with a view to using that compensation to finance the court proceedings.

[29] In coming to that conclusion, the Committee referred to the outcome sought by Mr FB in his complaint which included "orders which will see [him] have access to justice, restitution, and allow [him] to enjoy a correct financial position."

[30] Having regard to that, the Committee "reached the view that Mr FB had misunderstood its role". It held:⁷

it is not for a professional standards body to determine whether a relationship property agreement should be set aside. Such matters fall within the exclusive jurisdiction of the Family Court. Challenges to a relationship property agreement are complex proceedings. They involve the Family Court hearing competing legal arguments and testing the evidence through cross-examination. A party cannot avoid the need for such proceedings by making a complaint that a lawyer assisted in the negotiation of a relationship property agreement which a complainant now, a number of years after the fact, believes to be unfair.

[31] Further:⁸

In the same way, [the Committee] is not a substitute for negligence proceedings. If Mr FB genuinely believes Mr LK was negligent, then it is open to him to seek legal advice. A lawyer with the requisite experience would be able to advise Mr FB whether, in the circumstances, he has grounds to bring negligence proceedings in the High Court. Mr LK would have an opportunity to oppose such proceedings. A decision would be made by the High Court after testing evidence and applying the relevant law.

⁵ At [32].

⁶ At [34].

⁷ At [35].

⁸ At [36].

[32] It was the Committee's conclusion that the issues arising out of Mr FB's complaint "ought properly to be dealt with by way of proceedings in the Family Court and the High Court."⁹

[33] Finally, the Committee said that if "as a result of any subsequent proceedings in the Family Court or High Court, judicial comment is made which calls into question any aspect of Mr LK's professional conduct, then it would be open to Mr FB to make a further complaint at that stage."¹⁰

Application for review

[34] Mr FB filed his application for review on 7 May 2021. He said:

- (a) The Committee erred in its decision.
- (b) The Committee did not "correctly apply the actual events and actions of the parties" in considering the complaint.
- (c) The Committee "made significant errors which overlook most obvious examples of negligence, incompetence, and unlawful activities that caused [Mr FB to suffer] financial loss."
- (d) The Committee "incorrectly [applied] the law which relates to practice standards and consumer protection".
- (e) The Committee was wrong to shift the burden of establishing professional shortcoming, to Mr FB through "complex and expensive" litigation.

[35] Mr FB was also critical of the time taken to consider his complaint and issue a decision.

[36] By way of outcome, Mr FB sought a "finding that Mr LK committed considerable errors and ordering fines, compensation, suspension, and a lengthy period of re-education." Mr FB also asked for an order directing publication of both his complaint and this decision.

Response

[37] Mr LK responded to Mr FB's review application in a letter to the Case Manager dated 25 May 2021. He said:

⁹ At [37].

¹⁰ At [38].

- (a) Mr FB's allegations were "ill-founded ... incorrect and illogical."
- (b) Mr FB has a "bee in his bonnet and has subsequently emotionally and irrationally assessed [the agreement]."
- (c) Despite Mr FB saying that he had filed proceedings against either or both of Mr LK and his law firm, proceedings had never been served.
- (d) Mr FB initially "[acknowledged] his appreciation for what [Mr LK] did for him]" to now "taking aim" at Mr LK. Mr FB's expectations as to what should have been achieved were "never obtainable".
- (e) There has been no negligence and "throwing around words does not cover up a lack of facts and evidence."

[38] Mr LK attached to that letter, correspondence that he had sent the Complaints Service on 28 October 2020. In that letter, Mr LK noted that:

- (a) Proceedings had not yet been served on him.
- (b) Any claimed "loss" by Mr FB was no more than \$19,000, and involved a concession that a debt owed by Mrs FB was, as she had strongly argued, a relationship debt.
- (c) At the time that the parties executed the agreement in 2014, Mr FB also signed a separate document addressed to Mr LK in which he "[confirmed] that [he] fully [understood] the terms of the agreement on the basis of the values accepted and the division thereof." The document also authorised Mr LK to provide the required certification of the agreement.

Discussion

[39] The Committee's decision was based on its view that the allegations made by Mr FB about Mr LK's conduct, were in the nature of a tortious claim of negligence (to which I would add a breach of a fiduciary duty), and that allegations of that nature must first be tested in the conventional and appropriate forum of the civil courts, before any professional disciplinary issues can be considered.

[40] I completely agree with the Committee's views about that.

[41] Conventional civil litigation involves a process which is tailor made for resolving contested tortious allegations, such as negligence or the breach of a fiduciary duty.

[42] The features of the litigation process which make it the appropriate forum include the need for clear pleadings of fact, full and supervised discovery (i.e. exchanges of relevant documents) as well as other procedural tools, a hearing at which evidence (including expert evidence) is given on oath and subject to the scrutiny of cross-examination, ring-fenced by procedural rules, the law of evidence as well as a substantial body of case law.

[43] The jurisdictions of the complaints and review processes are inquisitorial and contain none of the above procedural or evidential rules and practices. Formal evidence is not given at a Committee hearing (the default process for which is a hearing on the papers). Similarly, evidence is not given (in the conventional sense) at an in-person review hearing in this jurisdiction.

[44] As well, Committees and Review Officers do not have the jurisdiction to make a finding that a lawyer has committed a tortious act.

[45] Where a client's core complaint is that their lawyer was negligent and that this caused a loss, and this is disputed by the lawyer concerned, that issue requires determination by a civil court.

[46] I acknowledge that Committees and Review Officers are empowered to consider and make findings about a lawyer's competence, and that competence and negligence can often be two sides of the same coin. However, when the basic complaint is framed as one which engages the ingredients of negligence, and that allegation is disputed by the lawyer, there is little scope for the complaints and review processes to make a firm determination about that conduct.

[47] As the Committee pointed out, this is not to say that the disciplinary machinery can never be ignited in a case where negligence is at the heart of a complaint.

[48] If a court, in considering a claim of negligence (or breach of a fiduciary duty) against a lawyer, makes critical comment about the lawyer's conduct, then that provides grounds upon which a Committee may launch a disciplinary inquiry and, if appropriate, make a disciplinary finding against the lawyer.

[49] The same principle can be applied to Mr FB's complaint that the agreement was unfair to him and did not reflect the principles underpinning the PRA.

[50] There is a substantial body of jurisprudence in the Family Court in connection with agreements made under s 21A of the PRA, and later attempts by one of the parties to set those agreements aside.

[51] A challenge for a party seeking to do so is to overcome the fact that they received independent legal advice before signing the agreement. As noted earlier in this decision, the lawyer giving independent advice must certify in writing that they have done so.

[52] Therefore, applications to the Family Court challenging the fairness of an agreement will include a focus on the independent legal advice given at the time. If that is found to have been wanting in some material respect, it may lead to the agreement being set aside.

[53] If a Family Court judge makes critical comment about a lawyer's advice in the course of considering an application to set aside an agreement, then as with critical comment made in the course of negligence (or similar) proceedings, this may provide grounds for a Committee to launch a disciplinary inquiry into that lawyer's conduct.

[54] Mr FB has alluded to both negligence proceedings against Mr LK and an application to the Family Court to set aside the agreement. It is not entirely clear to me whether either proceeding was ever filed. Mr LK has said that he has never been served with any proceedings in which his representation of Mr FB has been a focus.

[55] Mr FB has referred to the cost of the litigation and with difficulties with legal aid. He has also alluded to the possibility that litigation may be time-barred by now, given that the agreement was executed in late 2014.

[56] It is not for the complaints or review processes to enter into discussion about the costs of Mr FB's proposed litigation, issues about legal aid or limitation issues.

[57] I would however observe that, in relation to limitation issues, Mr FB appears to have raised his concerns about the issue of whether agreement ought to be set aside, in or about the middle of 2016; and Mr LK's representation of him, during 2019.¹¹ I would be surprised if there were limitation issues at those times.

[58] As the Committee observed, Mr FB cannot advance those matters as a justification for preferring instead to pursue his allegations about Mr LK's shortcomings through the machinery of the disciplinary process. There is no choice of procedure.

[59] It is not enough for Mr FB to repeatedly and expansively allege tortious wrongdoing by Mr LK. A belief that there has been wrongdoing is not a substitute for objective evidence of that wrongdoing. The necessary objective evidence is, as I have

¹¹ See for example a letter from Mr FB's then lawyers to Mr WR (29 July 2016) and Mr FB's emails to Mr LK (17 & 24 September 2019).

indicated above, findings to that effect by the appropriate jurisdictions of the conventional courts.

[60] Those findings may well provide evidence of ethical and/or professional lapses, such as those claimed by Mr FB (for example, that Mr LK failed to promote and protect Mr FB's interests). But those findings are a necessary pre-requisite to disciplinary inquiry.

[61] The complaints process cannot be used as an alternative vehicle for tortious allegations. When that happens, the complaints process is being misused.

Section 205 of the Lawyers and Conveyancers Act 2006

[62] Section 205(1) of the Act provides:

The Legal Complaints Review Officer may strike out, in whole or in part, an application for review if satisfied that it—

- (a) discloses no reasonable cause of action; or
- (b) is likely to cause prejudice or delay; or
- (c) is otherwise frivolous or vexatious; or
- (d) is otherwise an abuse of process.

[63] Section 205 of the Act is expressed in terms substantially identical to the provisions of r 15.1 of the High Court Rules 2016. The principal difference is that r 15.1 is directed to pleadings (which is how claims and defences are expressed in the High Court), whereas s 205 of the Act relates to applications for review.

[64] A strike out application in the High Court under r 15.1 will be made at the early stage of a case: normally very soon after a claim (or defence) has been filed.

[65] On the other hand, s 205 of the Act empowers only this Office to strike out an application for review, not Standards Committees where complaints are initially, and usually finally, adjudicated.

[66] In my view, s 205 of the Act is intended to arm this Office with the summary ability to bar applications for review that lack merit, in order to focus what are limited resources to cases where there is an arguable case for the review application proceeding further.

Abuse of process

[67] The meaning and application of “abuse of process” has been widely considered by the Courts. Some useful themes emerge.

[68] In *Moevao v Department of Labour* the Court of Appeal held that the underlying objective of the abuse of process doctrine is the maintenance of public confidence in the administration of justice.¹²

[69] In the United Kingdom, Lord Bingham said the following:¹³

The underlying public interest is ... that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not ... Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.

[70] In the context of this Office’s review jurisdiction, whether an application for review is an abuse of process translates neatly to an assessment of whether the review application raises issues which could be considered and finally determined in another jurisdiction, such that for a Review Officer to embark upon separate inquiry would undermine public confidence in the administration of justice.

[71] I am satisfied that Mr FB’s application for review is an abuse of process. Put another way, he is attempting to litigate matters which ought more properly to be aired before the Courts.

¹² [1980] 1 NZLR 464 (CA) at 481.

¹³ *Johnson v Gore Wood & Co* [2000] UKHL 65; [2002] 2 AC 1.

[72] I have come to that conclusion for the following reasons:

- (a) The issue of whether the agreement ought to be set aside, is contestable.
- (b) Similarly, the question of whether Mr LK was negligent or breached any fiduciary duties he owed to Mr FB, is contestable.
- (c) Both issue involve facts about which both parties clearly disagree.
- (d) Determining which facts are to be preferred, will involve a decision-maker making findings about not only reliability, but credibility.
- (e) Disputed evidence, particularly where the disputes are significant and go to the heart of how a court must resolve a legal issue, must be properly tested in a forum equipped to conduct that type of analysis with appropriate rigour and within proper procedural and evidential boundaries.
- (f) The jurisdictions of the complaints and review processes do not easily lend themselves to that degree of analysis.
- (g) Tortious allegations, such as those made by Mr FB about Mr LK, must first be tested in conventional courts.
- (h) As well, the Family Court has the appropriate expertise to answer the question of whether a relationship property agreement, made under s 21A of the PRA, complies with the requirements of that legislation. It involves, for example, analysing whether a lawyer gave their client advice matching the principles of that legislation.
- (i) The complaints and review processes are not, and should never be used as, an alternative to conventional civil litigation. Those processes complement conventional litigation by attaching a disciplinary consequence to any torturous or other statutory breach found to have been committed by a lawyer.
- (j) The fact that Mr FB may be out of time to bring his civil claim or to set aside the agreement, does not mean that the disciplinary machinery becomes a convenient substitute.

[73] Having carefully considered Mr FB's submissions in support of his application for review, I am satisfied that the Committee's decision to take no further action on this complaint was appropriate.

Decision

[74] Pursuant to the provisions of s 205(1)(d) of the Act, Mr FB's application for review is struck out on the grounds that I am satisfied that it is an abuse of process, as that term is explained at [70] above.

Anonymised publication

[75] 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 31ST 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 FB as the Applicant
Mr LK as the Respondent
Mr MH as a Related Person
[Area] Standards Committee [X]
New Zealand Law Society