

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

[2020] NZLCRO 139

Ref: LCRO 077/2020

CONCERNING

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

AND

CONCERNING

a determination of the [Area] Standards Committee X

BETWEEN

MP

Applicant

AND

RJ

Respondent

DECISION

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

Introduction

[1] Mr MP has applied for a review of a decision by the [Area] Standards Committee X to take no further action in respect of his complaint concerning the conduct of the respondent, Mr RJ.

Background

[2] Mr MP has proceedings before the District Court, those proceedings taken under the Retirement Villages Act 2003.

[3] Mr RJ acted for the defendant in those proceedings, [Retirement Village A]. Mr RJ ceased acting for [Retirement Village A] in September 2019.

[4] Mr MP made a complaint to the New Zealand Law Society's Lawyers Complaints Service about Mr RJ's conduct in the course of representing [Retirement Village A].

[5] The [Area] Standards Committee X was tasked with the responsibility of conducting an investigation into Mr MP's complaint. The Committee, in a decision issued on 4 October 2019, determined to take no further action in respect to Mr MP's complaint.

The complaint and the Standards Committee decision

[6] Mr MP lodged a second complaint with the Lawyers Complaints Service on 27 November 2019.

[7] Mr MP submitted that this was a fresh complaint.

[8] He explained in correspondence supporting his complaint that "this is a new complaint based on the original complaint due to change in circumstances where by Mr RJ is no longer acting for [Retirement Village A] as per the attached advice from [Law Firm A]".¹

[9] Mr MP's complaint, supported by 16 attachments, was comprehensive.

[10] The complaint provided a detailed account of the concerns Mr MP had regarding what he perceived to be Mr RJ's failure to meet discovery obligations in the District Court.

[11] The Standards Committee identified the elements of Mr MP's complaint as being:

- (a) complaint that Mr RJ had failed to respond to requests to provide information; and
- (b) complaint that Mr RJ had indulged in misleading and deceptive conduct by failing to comply with his client company's disclosure obligations; and
- (c) complaint that Mr RJ had threatened him with defamation proceedings, contempt of court and;
- (d) threatened to evict him from his retirement village.

[12] The Standards Committee delivered its decision on 20 March 2020.

¹ Mr MP, correspondence to the Lawyers Complaints Service (27 November 2019).

[13] The Committee determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) that no further action on the complaint was necessary or appropriate.

[14] In reaching that decision the Committee concluded that:

- (a) The issues raised by Mr MP were matters that were properly addressed by the presiding judge, not by the Lawyers Complaints Service; and
- (b) Should the presiding judge issue a ruling that made adverse comment about Mr RJ, Mr MP would be able to lodge a new complaint at that time.

Application for review

[15] Mr MP filed an application for review on 3 May 2020. The outcome sought is that:

- (a) his complaint be reconsidered; and
- (b) if the Legal Complaints Review Officer was to find his complaint legitimate, that the Standards Committee's decision of 20 March 2020 be set aside, and that complaint be rescheduled to be heard following the completion of the court proceedings.

[16] Mr MP submits that:

- (a) The Standards Committee had abrogated its responsibilities in respect to his complaint being that the complaint is about a lawyer who has resigned from the legal proceedings; and
- (b) the Committee was incorrect to record that it was the responsibility of the presiding judge to regulate procedure, being that the litigation had not progressed to the point where a judge had been appointed to oversee the proceedings; and
- (c) the Committee was "putting the onus and expense onto the complainant to add further complications to the complainant's current court proceedings that are unrelated to the original matters before the court"; and
- (d) the Law Society was obliged to respond to complaints; and

- (e) suggestion that complaints be taken up with the court, in circumstances where counsel complained of is no longer engaged in the proceedings, is contrary to natural justice.

[17] Mr RJ was invited to comment on Mr MP's review application.

[18] He submits that:

- (a) whilst in agreement with the Committee's decision, the Committee ought, as part of its reasoning, have recorded in its reasons for deciding to take the complaint no further, that Mr MP's second complaint was seeking to relitigate his first complaint; and
- (b) his client was under no obligation to provide the information sought by Mr MP until the commencement of formal discovery; and
- (c) there was nothing improper in the correspondence forwarded to Mr MP on 3 September 2019, and in any event, that correspondence was subject to absolute privilege.

[19] Mr MP provided a response to the submission filed by Mr RJ. In that response, Mr MP argued that:

- (a) Mr RJ had twice provided him with copies of documents purporting to be a warranty, which were, on both occasions, expired warranties; and
- (b) a new complaint had been filed, because Mr RJ was no longer acting in the proceedings; and
- (c) the new complaint filed included, a "new cause of action" being allegation that Mr RJ had forwarded threatening correspondence to Mr MP; and
- (d) Mr RJ had failed to respond to correspondence for many months; and
- (e) Mr RJ had been providing documentation prior to discovery commencing; and
- (f) it was not contended that Mr RJ correspondence had been defamatory; and
- (g) he considered it "incredible" that the legal profession tolerates lawyers making misleading statements in the course of a judicial settlement conference.

Review on the papers

[20] This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review 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.

[21] The parties have agreed to the review being dealt with on the papers.

[22] I record that having carefully read the complaint, the response to the complaint, the Committee's first and second decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party. On the basis of the information available, I have concluded that the review can be adequately determined in the absence of the parties.

Nature and scope of review

[23] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:²

... 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.

[24] More recently, the High Court has described a review by this Office in the following way:³

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

² *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

³ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[25] 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

[26] The issues to be considered on review are:

- (a) Is Mr MP's second complaint a repetition of his first and, if the answer is yes, is it appropriate for the Review Office to investigate complaints that have been the subject of a previous Committee investigation?
- (b) Does Mr RJ's correspondence of 3 September 2019 raise any conduct issues that would require a disciplinary response?
- (c) Should the Committee's decision of 20 March 2020 be set aside, for further consideration once the court proceedings have been concluded?

Is Mr MP's second complaint a repetition of his first?

[27] In large part, yes.

[28] I have carefully read the Committee's decision issued on 4 October 2019.

[29] The Committee identified Mr MP's first complaint to the Lawyers Complaints Service as being complaint that:

- (a) Mr RJ had been misleading and deceptive in relation to his client company's disclosure obligations; and
- (b) Mr RJ had failed to provide documents requested, and
- (c) Mr RJ had made statements that were misleading in a judicial conference.

[30] When filing his second complaint, it is readily apparent that Mr MP was aware that he was at risk of his second complaint being dismissed on grounds that Mr MP was attempting to relitigate a complaint that had already been addressed by a Standards Committee.

[31] In articulating his second complaint, he argues that “this is a new complaint based on the original complaint due to change in circumstances whereby Mr RJ is no longer acting for [Retirement Village A] as per the attached advice from [Law Firm A]”. It is argument that his complaints should have been looked at afresh by the Standards Committee because of a significant change in circumstances, being that Mr RJ was no longer representing [Retirement Village A] in the ongoing litigation.

[32] It is not a new complaint.

[33] Mr MP’s second complaint in large part, traverses the issues raised in his first.

[34] As Mr RJ is no longer acting in the proceedings, Mr MP clearly considered that any opportunity for the court to censure Mr RJ for any inappropriate conduct (if established) was lost, therefore it was appropriate for him to return to the Complaints Service to seek remedy.

[35] There is a fundamental flaw in this argument.

[36] Firstly, it is not the role of a Standards Committee or a Legal Complaints Review Officer, to determine civil disputes. And that essentially, is what Mr MP is asking to happen.

[37] Questions as to whether copies of warranties provided by Mr RJ were valid, expired, or relevant to a particular building consent issued, are not matters that fall to be determined through the vehicle of a conduct complaint.

[38] These are matters of contested evidence which, if relevant to the proceedings on foot before the District Court, would fall to be decided in that jurisdiction.

[39] It is not established that Mr RJ twice provided incorrect information to Mr MP on two occasions, simply because Mr MP says that was the case. It is not the case that mere allegation (untested at this juncture) can be elevated to the status of conclusive fact, such as would merit the serious consequence of imposing a disciplinary sanction on a lawyer.

[40] Nor is it the case that if it was established that Mr RJ had provided Mr MP with inaccurate information, that this would inevitably provide grounds for a conduct complaint. There could be a multitude of explanations for Mr RJ providing the information he did (and Mr RJ provides his account of events in his response to the first complaint) but if argument is to be made that Mr RJ deliberately set out to mislead, that is argument that, as the Committee correctly noted, is properly addressed in the court proceedings.

[41] If Mr MP is convinced that Mr RJ set out to deliberately mislead and conceal, his opportunity to have those concerns addressed by the court is not lost simply because Mr RJ is no longer acting in the proceedings.

[42] In the course of providing his evidence to the Court, Mr MP will have opportunity to advance his evidence on the warranties issue, and the absence of Mr RJ from the proceedings will not inhibit or restrain the judge from identifying and commenting on instances of egregious conduct on the part of a lawyer that has had involvement in those proceedings, if evidence of such conduct is established.

[43] In raising complaint that Mr RJ allowed misleading information to be presented in the course of a judicial settlement conference, Mr MP returns by a direct route, to an issue he had raised in his first complaint.

[44] I agree with the Committee that statements made at a settlement conference are privileged.

[45] Mr MP makes forceful plea that it is “incredible that the legal profession and the law tolerate opponents writing lies in “will say” statements and telling lies in front of a judge in a judicial settlement conference situation. This appears to me to be fundamentally wrong and against the principles of justice”.

[46] The point has been noted that accusation is not elevated to established fact, simply on the strength of Mr MP’s allegations. He will have opportunity to have the veracity of the defendants “will say” statements tested in court. Accusation that a lawyer has played fast and loose with the truth in the course of a conference before a judge, are matters that should properly have been immediately addressed to the judge or, if concerns arise subsequent to the conference, addressed by identifying any discrepancies in the evidence in the course of the substantive hearing.

[47] I am satisfied that Mr MP’s second complaint in large part traverses matters raised in his first.

[48] In *LO v RT LCRO 202/2017* (4 February 2019), the Review Officer made observation that in rare cases a person may relitigate an earlier complaint. Those uncommon cases are generally confined to those circumstances where a party uncovers further and relevant evidence that was not available at the time that the first complaint was made.

[49] In those cases, it would fall initially to the Committee charged with making inquiry into the second complaint, to consider whether the fresh information that had come to light, was relevant, and information that the Committee considered should have

been produced, or was not able to have been produced, when the first complaint was under consideration.

[50] But it is critical to emphasise, that the complaints process is not a process which provides opportunity for parties to bring complaints against lawyers on an evolving basis. The need for finality, and the requirement for complaints to be dealt with expeditiously, would be seriously compromised, if parties were able to respond to findings adverse to them, by simply filing further complaints.

[51] Nor is it acceptable for complainants to attempt to avoid allegation of filing repetitive complaints, by “tweaking” their complaints in an attempt to convince that new matters have been raised.

Does Mr RJ’s correspondence of 3 September 2019 raise any conduct issues that would require a disciplinary response?

[52] No.

[53] On 3 September 2019, Mr RJ wrote to Mr and Mrs MP concerning an email that it was alleged Mr and Mrs MP had forwarded to the secretary of the [Retirement Village A] Residents Association Committee on 20 July 2019.

[54] It was contended that the contents of this email be ultimately disseminated to all the village residents.

[55] Mr RJ’s correspondence of 3 September 2019 was comprehensive and traversed a number of issues, but relevant to this review, was concern expressed that:

- (a) The MPs’ correspondence made reference to matters that were before the Court, and thus subject to the sub judice rule.
- (b) The correspondence referenced documents that had been disclosed in the course of discovery.
- (c) The correspondence gave rise to an arguable case of defamation or injurious falsehood.

[56] After filing his second complaint (which essentially sought to relitigate the matter raised in his first on the basis of Mr RJ’s withdrawal as counsel for [Retirement Village A]), Mr MP advised the Complaints Service that he wished to add to his complaint filed, by raising objection to the correspondence that Mr RJ had forwarded on 3 September 2019.

[57] Mr MP's concerns regarding that correspondence were comprehensively explained but may be summarised as concern that:

- (a) Mr RJ had obtained a private email.
- (b) Mr RJ was aware that the email was not intended for widespread dissemination, and had denied knowledge as to how the email had been accessed.
- (c) The email was privileged.
- (d) There was no justification for Mr RJ to allege that the email potentially gave rise to an arguable case of defamation or injurious falsehood.
- (e) Mr RJ had made threats on the basis of a document that his client had illegally obtained.
- (f) Mr RJ's correspondence of 3 September 2019 breached his obligation to deal with the MPs in a courteous and respectful manner.

[58] The Committee distilled this element of Mr MP's complaint, to argument Mr RJ had threatened the MPs with defamation and contempt proceedings, and possibility of them being evicted from their home.

[59] On review, Mr MP emphasises that he had not accused Mr RJ or [Retirement Village A] of having defamed him in his complaint.

[60] To the extent that he seeks to have the LCRO review this aspect of his complaint, he says that he will "leave it to the LCRO to determine if Mr RJ's letter was threatening and based on irresponsible or untrue observations".⁴

[61] In responding to this element of Mr MP's complaints, Mr RJ submits that complaints raised about his 3 September 2019 correspondence, were "the only fresh and available matter of complaint that was properly for consideration in the second complaint".⁵

[62] Mr RJ submits that "... It is my view that the letter and the enclosed material supplied with the complaint speaks for itself. I fail to see how there is anything arguably improper in my conduct in the content of that letter".⁶

⁴ Mr MP, correspondence to the LCRO (1 July 2020) at [2.5].

⁵ Mr RJ, correspondence to the LCRO (26 May 2020) at [7].

⁶ Mr RJ, correspondence to the LCRO (26 May 2020) at [7].

[63] In making request of the LCRO to determine whether Mr RJ's correspondence was based on "irresponsible and untrue observation", Mr MP is issuing further invitation to the LCRO to become the arbiter of the issues in dispute between himself and [Retirement Village A].

[64] Mr RJ is required to follow his client's instruction. He is obliged to act in his client's best interests. In advocating for their client, a lawyer is frequently required to robustly advance their client's position.

[65] To the extent that Mr RJ owed duties to Mr MP, those duties are limited, and confined to a duty to maintain proper standards of professionalism in his dealings.⁷

[66] Robust presentation of a client's position does not amount to a lack of professionalism.

[67] There is no indication in Mr RJ's correspondence of him crossing the line from vigorous advancement of his client's position to the personally discourteous or disrespectful.

[68] But the singular feature of Mr MP's criticism of Mr RJ's correspondence, is that his criticisms inevitably return to an examination of the issues in dispute between Mr MP and [Retirement Village A].

[69] In doing so, Mr MP's arguments frequently demand acquiescence to an acceptance that his positions are established, correct, and unchallengeable.

[70] One example will suffice.

[71] In advancing complaint that Mr RJ had committed professional conduct breaches in writing to him in the manner he did on 3 September 2019, Mr MP states that "worst of all he has based his threats on a private document that his client has illegally obtained then he has used that document against us".

[72] It is not established that Mr RJ's client obtained the document illegally.

[73] Mr MP may believe that to be the case, but it is not conclusively established that Mr RJ obtained a document improperly, simply because Mr MP says that was the case.

[74] It is not the task of a Review Officer to determine whether Mr RJ's client breached Mr MP's privacy.

⁷ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 10.

[75] A complaint of that nature must be directed initially to the [Retirement Village A] management, or advanced through avenues such as complaint to the office of the Privacy Commissioner.

Should the Committee's decision of 20 March 2020 be set aside, for further consideration once the court proceedings have been concluded?

[76] No.

[77] In addition to making request that his complaint be reconsidered (described by Mr MP as a "second request"), Mr MP makes request that if the LCRO was to conclude that his second complaint was "legitimate", that the Committee decision issued on 20 March 2020 be set aside, and rescheduled to be heard at the conclusion of the Court proceedings.

[78] Having concluded that Mr MP's second complaint is not upheld, there is no basis for direction to be made that the complaint be further considered at a later date.

Conclusion

[79] Having carefully read the submissions by Mr MP both those in support of his initial complaint, and the submissions filed on review, it is compellingly clear that Mr MP retains a firm belief that the management of the retirement complex have been less than forthcoming in disclosing building defects in the complex, particularly problems with weathertight issues.

[80] The manner in which Mr MP presents his submissions gives vivid indication that he has a considerable ability to marshal information and competently manage the advancing of arguments that, as perhaps inevitably in disputes such as these, have a degree of complexity which demand a level of understanding of technical issues.

[81] The issue engaged in the dispute with [Retirement Village A] are of critical importance to Mr MP and his wife. Concerns that a home that has been purchased may have weathertight issues, inevitably creates enormous stress for the homeowners.

[82] However, and I certainly do not intend my comment to be construed by Mr MP as a criticism of him, having carefully considered the issues raised by Mr MP in two complaints, my sense is that his complaints against Mr RJ in significant part, present as an attempt by him to litigate his dispute with through the vehicle of advancing a conduct complaint against [Retirement Village A]'s lawyer.

[83] The Court is the appropriate forum to determine the issues that Mr MP advances under the umbrella of a conduct complaint.

[84] I am also persuaded, that Mr MP's second complaint is largely a repetition of his first.

[85] The grounds advanced by Mr MP in support of his request to have his first complaint reconsidered are not persuasive.

[86] I see no grounds which could persuade me to depart from the Committee's decision.

Anonymised publication

[87] 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.

Decision

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

DATED this 30TH day of JULY 2020

R Maidment
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 MP as the Applicant
Mr RJ as the Respondent
Messrs DT and SA as Related Persons
[Area] Standards Committee X
New Zealand Law Society