

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

[2020] NZLCRO 127

Ref: LCRO 91/2020

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

LS

Applicant

AND

DV

Respondent

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

DECISION

Introduction

[1] LS has applied for a review of a decision by the [Area] Standards Committee X to take no further action in respect of her complaint concerning conduct on the part of DV.

Background

[2] The KMN Trust (the Trust) was established some time in the distant past.

[3] By 2018 LS and TK had been appointed as replacement trustees. It is in her capacity as a replacement trustee of the trust that LS advances her complaint.

[4] Before LS became a trustee, the Trust lent money (the debt). The debt was secured by a mortgage that was registered against certificate of title [1] (the title). That mortgage is described on the title as mortgage [1] (the mortgage). The mortgage was registered on [date] as a second mortgage to the then trustees, GH and BT. The title shows that the mortgage was varied on [date] then again on [date], latterly moving the mortgage from second registered security to third. Variations to securities also occurred in [date]. On [date], the mortgage was “extinguished by virtue of Power of Sale being exercised under prior Mortgage”.

[5] The trust thereby lost its registered security, but a debt of \$184,500, remained in the trust’s accounts. No other documentation from 2012 has been provided to explain what if anything happened to the debt.

[6] It appears from LS’s complaint and application for review that the present trustees cannot ascertain from the trust records how the debt was treated in a way that enables LS to understand what occurred. Having requested an explanation in 2018 from the law firm that acted for the trustees of the trust at the time, LS was advised that the trustees had “written off” the debt. She questions how this can have happened.

[7] DV’s name appears on the Land Register as one of the lawyers who was involved in the transactions that occurred in September 2012, when the mortgage was extinguished. The trustees of the trust were not DV’s clients. Nonetheless, LS made a complaint to the New Zealand Law Society (NZLS) regarding DV’s involvement in the transactions that resulted in the trust losing its registered security.

Complaint

[8] Briefly, LS’s complaint is a request for an explanation and information from DV to enable the trustees to understand what happened in 2012. LS attached various documents in support.

Practitioner’s Reply

[9] DV’s response to LS’s complaint, dated 24 May 2019, is brief. He says:

...The complaint consists of a narrative of facts as understood by the complainants, but there are no particulars of what I, as the lawyer complained against, have done that is believed to be contrary to the Rules of Conduct and Client Care.

I did not act for the complainants nor did I act for the party they have said they represent. I represented a company that purchased a mortgage from [Solicitor’s

Nominee Company]. At no stage during the transactions did I have any contact with the complainants, and I did not owe any professional duties to the complainants. I am unable to obtain any authority from my client to depart from rule 8.1.

[10] Rule 8.1 says:

A lawyer's duty of confidence commences from the time a person makes a disclosure to the lawyer in relation to a proposed retainer (whether or not a retainer eventuates). The duty of confidence continues indefinitely after the person concerned has ceased to be the lawyer's client.

The Standards Committee decision

[11] The Committee considered the complaint and related materials. For the reasons set out at [5] to [7] of its decision, the Committee found no basis on which it could say that DV had breached a duty or obligation he owed to LS, her husband (whose name also appears in the complaint materials) or the trustees of the trust, none of whom were his client.

[12] 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.

Application for review

[13] LS applied for a review of the Committee's determination. LS's focus remains firmly on the transactions that occurred on 7 September 2012 in the course of which the mortgage was extinguished. LS says:

It doesn't make sense. Up until coming across this situation we has [sic] always thought, given the underlying property was of sufficient value, that a 2nd mortgage over a property was a secure investment? We cannot believe what transpired on 7/9/2012, where a 1st mortgagee can surreptitiously eliminate a 2nd mortgage, is within the law...

[14] LS contends DV enabled his client to avoid "having to repay the second mortgage".

[15] Through the process of review, LS wishes to recover the money "rightfully owed under the mortgage", \$184,500 plus interest, and for DV to be dealt with appropriately.

Strike Out – s 205(1)

[16] LS's application for review has been determined pursuant to s 205(1)(c) of the Act which says:

- (1) The Legal Complaints Review Officer may strike out, in whole or in part, an application for review if satisfied that it—
 - (c) is... vexatious;...

[17] “Vexatious” is defined in the Shorter Oxford English Dictionary (5th ed, 2003) as:

- 1. Causing or tending to cause vexation, annoyance or distress; annoying, troublesome. 2. (Law) Of an action: instituted without sufficient grounds for winning purely to cause trouble or annoyance to the defendant.

[18] It is important to note that the intention of the review applicant is not relevant to the question of whether an application for review is vexatious under the Act.¹

[19] Section 205 of the Act came into effect in November 2018. It appears among sections of the Act under the heading “Powers of the Legal Complaints Review Officer”.

[20] The next sections address review procedures. Those sections anticipate that reviews will generally be conducted with a level of consultation with the parties around procedure. However, there is no apparent requirement to consult the parties on the exercise of the discretion to strike out if the LCRO is satisfied that one or more of the grounds set out in s 205(1) are met. Thus, if an application for review satisfies one or more of the grounds for strike out, a LCRO has the discretion to adopt that course without seeking prior comment from the parties.

[21] The word “vexatious” also appears in s 138(1)(c) of the Act which allows a standards committee to take no action on a complaint if the Committee forms the opinion that the complaint is “frivolous or vexatious or is not made in good faith”. Section 138(1)(c) has been in effect since the Act came into force on 1 August 2006. It has been the subject of comment in a number of decisions by this Office. Those commentaries help to inform the meaning of the word “vexatious” in the context of the Act, and assist in the application of s 205(1)(c).

[22] In an early case addressing s 138(1)(c), *P v H*, the LCRO explained that:

- [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

¹ *P v H* LCRO 02/09 (20 March 2009).

NZCYPS v B [1996] NZFLR 385 Judge OS 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’”...

[9] ... 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 intentions 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.

...

[11] ... Where proceedings are brought for a collateral purpose this will weigh in favour of them being found to be vexatious...

[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...

[23] The amendments made to the Act in 2018 include the insertion of s 192A, which specifies that a LCRO will perform his or her functions on review in an orderly and efficient manner, and in a way that achieves the purposes of the Act.

[24] It would not be efficient to protract the process of review if it were apparent on the face of a review application that the application is wholly without foundation, lacks sufficient grounds and has no proper basis under the Act. Protracting a review process where the application suffers from such shortcomings has a tendency to undermine what should be an orderly process of reviewing materials that have already been considered

by a standards committee constituted under the Act. The review process under the Act should not be treated as an open opportunity to start afresh with new complaints. It is a very particular statutory process that most often follows from the making of a complaint under the Act.

[25] The Act opens wide the gateway to the complaint process. While complaints are a fact of professional life for a lawyer, any professional standards complaint, even one that lacks a proper basis, is a serious matter for the practitioner concerned. The lawyer concerned will almost invariably be notified that a complaint has been made. Few if any lawyers would not be distracted by a complaint; even unfounded complaints may exercise the mind.

[26] Complaints made under the Act leave a blemish on a lawyer's professional record, even those that are summarily disposed of by a Committee without further action being taken. The exercise of the discretion to strike out a review application by this Office effectively contains the complaint to the standards committee process, if the LCRO is independently satisfied one or more of the grounds in s 205(1)(a) to (d) are met. Striking out a review application leaves the decision of the standards committee unaffected, but does not remove the blemish of a complaint from a lawyer's professional record.

[27] As to vexatious complaints, it is helpful to consider the LCRO's comments in *LCRO 112/2013* (30 August 2013). The LCRO relevantly considered whether the complaint was "instituted without sufficient ground", and whether it had "no real prospect of success and serves only to cause annoyance".

[28] In *Attorney-General v O'Neill*,² the High Court endorsed a long standing approach, saying:

a proceeding may be vexatious, notwithstanding that it may disclose the germ of a legitimate grievance, a cause of action, or a ground for institution.

[29] The primary question when considering a review application under the Act is whether the materials that were before the Committee evidence conduct on the part of the practitioner concerned that could be said to fall within the definitions of unsatisfactory conduct or misconduct. If no such evidence has been provided to a Committee, it may be that the review application has no real prospect of success. Without wishing to over-generalise, it would not be difficult to accept that a review application advanced with no

² *Attorney-General v O'Neill* [2007] NZHC 1526, [2008] NZAR 93 at [43].

real prospect of success would be an inconvenience to the practitioner concerned, and may well cause some level of annoyance.

[30] In any jurisdiction, the discretion to strike out is to be exercised sparingly, with due caution, and only after proper consideration has been given to the available materials. Striking out an application brings the process invoked by an applicant to an abrupt end.

Nature and scope of review

[31] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:³

... 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.

[32] More recently, the High Court has described a review by this Office in the following way:⁴

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.

Discussion

[33] DV did not act for LS, her husband or the trust.

³ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

⁴ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[34] DV's response to LS's complaint dated 24 May 2019 provides a complete answer to LS's complaint.

[35] As the Committee noted, DV owed obligations primarily as an officer of the court, and to his client. Beyond those, he owed very limited duties and obligations to non-clients.

[36] The theme of LS's complaint and application for review is that she does not understand what occurred in 2012, and finds it difficult to accept what she was told in 2018 had happened, namely that the trustees of the trust wrote off the debt. If there is a record of the trustee's decisions and reasons, those should form part of the trust's records.

[37] It was not part of DV's role as a lawyer in 2012 to maintain the trust's records, or in 2018 to assist LS to piece together past events. DV says in his letter to the trust's lawyer dated 11 February 2019 that:

The transaction proceeded properly and the actions of our clients were perfectly legal.

[38] Beyond questions and doubts, LS has produced no evidence to counter the position DV articulates.

[39] DV's evidence is uncontested and accepted as correct.

[40] The outcome LS seeks on review is to recover the debt of \$184,500 plus interest.

[41] If the current trustees wish to advance a claim, they should advance that in the proper jurisdiction. This Office is not a forum for debt recovery.

[42] There is nothing in the materials that were available to the Committee that establishes sufficient grounds for LS's complaint. Her application for review suffers from the same shortcoming.

[43] The main purpose of LS's complaint appears to be the furtherance of an inquiry into the trust's financial position. That appears to be part of an exercise that is somehow related to a resthome subsidy. That inquiry would be a collateral purpose which has everything to do with the way the trustees dealt with the debt, and nothing to do with DV's professional conduct.

[44] This Office is not the proper forum in which to hold trustees to account.

[45] In the circumstances LS describes, DV owed professional obligations to his client, over and above any obligations he owed to the trustees of the trust. There is nothing in the materials that suggests DV's conduct towards the trustees of the trust fell below a proper professional standard.

[46] I have carefully considered the materials that are available on review, and am satisfied that LS's complaint lacked sufficient grounds. Given the Committee's comments, the application for review probably has the effect of simply causing inconvenience to DV. It protracts a process where the facts do not disclose the germ of a legitimate grievance, a cause of action, or a ground for institution under the Act. The complaint seems to be a collateral complaint.

[47] Whatever LS's intentions, her application for review is baseless, and in my view vexatious within the meaning of s 205(1)(c). In the circumstances the application for review is struck out.

[48] The Committee's decision is unaffected.

Anonymised publication

[49] 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 205(1)(c) of the Lawyers and Conveyancers Act 2006 LS's application for review is struck out in whole on the basis that it is vexatious.

DATED this 29th day of July 2020

D Thresher
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:

LS as the Applicant
DV as the Respondent
CW as the Related Person
[Area] Standards Committee X
New Zealand Law Society