

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

[2023] NZLCRO 154

Ref: LCRO 121/2023

**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**

**AI**

Applicant

**AND**

**HR**

Respondent

**DECISION**

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

**Introduction**

[1] The applicant has applied for a review of a decision by the [Area] Standards Committee [X] (the Committee) dated 2 August 2023 in which it resolved to take no further action in respect of his complaint about the respondent.

**Background**

[2] In 2017 – 2018, the applicant was engaged in relationship property negotiations with his former wife. The respondent was the wife’s lawyer.

[3] The couple had significant assets and liabilities. The assets included three properties owned by various family trusts, shares also owned by a family trust in a

company in which both the applicant and his former wife worked, vehicles, a launch, chattels and cash.

[4] The liabilities, through the trusts, included money owing to a bank and money owing to the wife's parents' family trust. The company also had liabilities.

[5] The wife was the sole trustee of the three family trusts. The applicant was a discretionary beneficiary of one of the family trusts but not of the other two.

[6] The negotiations were successful to the extent that, in March 2018, the couple signed a separation and relationship property agreement pursuant to s 21A of the Property (Relationships) Act 1976 (the PRA) recording their separation and dividing the property owned by either or both of them or the trusts.

[7] In the agreement,<sup>1</sup> there was no issue between the parties as to the relationship property status of assets owned by trusts, despite the applicant not being a beneficiary of two of those trusts.

[8] One of the three properties (Property A) had been sold eight months before the agreement was signed. The agreement recorded that the proceeds of sale were \$548,000.

[9] The agreement required numerous things to be done to achieve separation of the parties' property interests, including the sale of assets, the transfer of ownership of assets and the satisfaction of liabilities.

[10] In relation to some of the assets that needed to be sold, the agreement recorded what the parties considered to be their realisable value and required financial adjustments to be made depending on the outcome of asset sales.

[11] The agreement contained a "disclosure" clause which read as follows:

[The wife and the applicant] both confirm that they have made full disclosure of all assets and liabilities in the possession or ownership, or from which they derive any beneficial interest as at the date of this Agreement and it is agreed that in the event of either party having failed to disclose to the other any item or items of relationship property having significant value, the party to whom such disclosure has not been made shall be entitled to treat this Agreement as voidable at that party's option.

[12] The agreement also contained reasonably standard clauses by which the parties acknowledged that they did not require their lawyers to obtain valuations of, or to advise them about the values of, the relationship property.

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<sup>1</sup> Separation and Relationship Property Agreement (6 March 2018) (the agreement).

[13] The agreement contained a further lawyer protection clause which read as follows:

The parties hereby acknowledge and agree that in executing this Agreement they have not relied on the other parties (sic) legal advisers and they hereby cross indemnify the other party's legal advisers in regard to any claim relating to this Agreement, including any claim for professional negligence in respect of advice given. The parties have reached their own agreement on the extent and value of the separate and relationship property and agree that this Agreement is a compromise by both parties intending to achieve a division they consider to be fair and reasonable.

[14] It also contained a standard acknowledgement that the parties had received independent legal advice about the agreement, a "full and final settlement" clause and a provision that the agreement could be pleaded as a bar to any subsequent proceedings.

[15] The parties' respective lawyers signed the necessary certificates pursuant to section 21F of the PRA. The respondent was the certifying lawyer for the wife.

[16] Despite all the provisions mentioned above, both parties to the agreement failed in many material respects to perform it. The reasons for this appeared to include that some assets did not realise their expected values, there were variances between the sales processes contemplated by the agreement and the sales processes actually pursued and there were adverse outcomes in litigation referred to in the agreement.

[17] In addition, the parties negotiated and recorded, solely by email, their own material variation to the terms of the agreement in respect of the sale of one of the significant assets and the consequent financial adjustment required between them.

[18] Another reason that is more pertinent to this review is that the applicant came into possession of information that led him to believe that the wife had not made the full disclosure of assets and liabilities required by the clause quoted at paragraph [11] above.

[19] The information included two email exchanges between the wife and the respondent, in May – June 2017 and August 2017 respectively, relating to the drafting of lawyer-to-lawyer correspondence being prepared in the course of the negotiations over the draft agreement.

[20] There has been vigorous disagreement between the parties to the agreement, and now between the applicant and the respondent, as to how the applicant came into possession of the email correspondence and as to the propriety of reference being made to its content, for relevant legal purposes.

[21] Legal proceedings subsequently ensued between the parties to the relationship property agreement in both the Family Court and the High Court. In the High Court, both

parties to the agreement sought a range of orders either setting aside the agreement and/or seeking specific performance of aspects of the agreement and/or claiming damages for breach of the agreement and/or, in effect, materially varying its terms and validating their own agreed variation of the agreement.

[22] Those proceedings resulted in a range of orders being made in a High Court judgment issued in June 2023, with leave being reserved for further applications to be made as the parties worked through the ongoing process of resolving their relationship property affairs.

[23] One of the legal issues raised in those proceedings, as it has been in this professional disciplinary process, was the privileged nature of the correspondence between the wife and the respondent, the possible waiver of that privilege and an application by the applicant that privilege should be disallowed pursuant to section 67(1) of the Evidence Act 2006. I will return to this issue.

[24] The applicant stated that, as at February 2023, he was facing bankruptcy and he believed that if all relationship property had been disclosed at the time of settlement and distributed equally, he might have been in a position to avoid that outcome.

### **The complaint**

[25] The applicant's complaint derives partly from his interpretation of the provisions of the relationship property agreement relating to the property that had been sold before the agreement was signed (Property A). The applicant relevantly stated that:

In the agreement it states that the proceeds from the sale of [Property A] were \$114,106.00.... The actual net proceeds... received from the... property... were \$241,111.15 not \$114,106 as claimed in the agreement (see... [trust account] statement attached...)

[26] On the basis of that interpretation, the applicant has also referred to a meeting that occurred in January 2018 involving the two parties and the two lawyers to finalise the agreement. He stated that he questioned the amount of the money to be divided from the Property A sale and "felt that there was money missing and unaccounted for".

[27] He stated that "[the respondent] aggressively stated that both she and [the wife] had signed a disclosure statement in the agreement confirming that they have made full disclosure of all assets and property and how dare I question their integrity".

[28] The applicant asserted that there was a difference of \$127,005.15 between the Property A sale proceeds recorded in the agreement and the actual property sale

proceeds and that “[the respondent] failed to disclose the \$127,005.15 in the agreement and denied the funds existence when questioned”.

[29] A separate aspect of the factual background to the complaint was that the wife had a small Kiwisaver balance and at no stage did the agreement, either in draft or final form, refer to the Kiwisaver balance as an item of relationship property.

[30] The applicant’s complaint against the respondent is encapsulated in the following paragraph:

It is apparent that [the respondent] has been a party to what I consider to be theft of \$127,000 and intentionally withholding further matrimonial property. [The respondent] has knowingly signed the agreement, including the disclosure clause with the full knowledge that it is a misrepresentation of the actual property held. Not only the considerable amount of funds, but also intentionally removing any reference or mention of [the wife’s] Kiwi Saver. Even when questioned personally by me during our meeting of the 17 January 2018 [the respondent] was adamant that all property had been disclosed.

[31] The applicant did not seek any specific outcome of the complaint.

[32] In her response to the complaint, the respondent relevantly stated that “... the information relied on by [the applicant] in his complaint is information that has been obtained unlawfully... [and is] ... protected by solicitor and own client privilege which has not been waived.”

[33] She requested that “... NZLS first make a determination as to whether I should be required to respond to a complaint based entirely on confidential and privileged emails which were allegedly illegally accessed by [the applicant] without our client’s consent.”

### **The Standards Committee decision**

[34] In its decision, the Committee focused solely on whether it had jurisdiction to consider the complaint, given its view that the complaint “relied on information that may be legally privileged to [the wife].”

[35] It broke this question down into three issues, namely:

- (a) whether the information relied on by the applicant was privileged to the wife;
- (b) if so, whether the wife had implicitly waived privilege; and
- (c) if the wife did not implicitly waive privilege, whether the Committee should disallow privilege.

[36] On the first issue, the Committee concluded that “the information [the applicant] had discovered was in fact privileged to [the wife]”.

[37] On the second issue, it referred to s 65(4) of the Evidence Act 2006 and concluded that “... regardless of how [the applicant] discovered it, the information is legally privileged to [the wife] and she has not waived privilege, expressly or implicitly.”

[38] The Committee then determined that, by reason of s 151(4) of the Lawyers and Conveyancers Act 2006 (the Act), the Committee had the same power as a Judge to disallow privilege pursuant to s 67(1) of the Evidence Act 2006.

[39] Section 151(4) of the Act provides that, subject to subsections (1) to (3) of that section (which are not applicable to the circumstances), the Evidence Act 2006 applies to a standards committee in the same manner as if it were a court within the meaning of the Evidence Act.

[40] Section 67(1) of the Evidence Act 2006 requires a judge to disallow a claim of privilege in respect of a communication or information “if satisfied there is a prima facie case that the communication was made or received, or the information was compiled or prepared, for a dishonest purpose or to enable or aid anyone to commit or plan to commit what the person claiming the privileged new, or reasonably should have known, to be an offence.”

[41] Having determined that it had the power to disallow privilege, the Committee declined to form a view as to whether any grounds had been made out for doing so and accordingly whether it should exercise that power. It decided simply that:<sup>2</sup>

... [the applicant] has also initiated High Court proceedings for relief in relation to the relevant relationship property settlement. It considered that this issue would be more appropriately dealt with by the High Court.

[42] On that basis, the Committee decided not to take “the matter” any further and recorded that if the applicant was successful in his High Court applications, he might consider re-filing his complaint in light of the High Court’s decision.

[43] The Committee formally decided to take no further action on the complaint pursuant to section 138(2) of the Act on the grounds that, having regard to all circumstances, any further action would be unnecessary or inappropriate.

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<sup>2</sup> Standards Committee determination (2 August 2023) at [26].

## Application for review

[44] The applicant filed an application for review in August 2023. The application initially restated his original complaint and slightly recast it. In his own words, relevantly:

... [The respondent] was compliant in ... the nondisclosure of joint property.... Even though I had doubts and questioned both [the wife] and [the respondent], at our roundtable meeting 17 January 2018, whether or not all property had been disclosed, I placed trust in the fact that [the respondent] had signed the disclosure statement. A trust I believed to be justified with a correct respondent being a lawyer. It would appear [the respondent] had knowingly lied on behalf of her client verbally, by stating (rather aggressively) all property had been disclosed, and signing the disclosure statement in our property agreement.

I was under the belief that if the lawyer signed the document then the lawyer believes unequivocally that the contents of the document to be true and correct. Based on [the Committee's] decision, this is clearly not the case. Disclosure is fundamental to property resolution of the relationship property issues, and is commonly (as in this case) a specific provision in relation to property agreements.

[45] The applicant sought the following remedies, paraphrased:

- (a) an apology from the respondent;
- (b) compensation for legal fees he had incurred “in an attempt to resolve these issues”;
- (c) compensation “for withholding the existence of \$120,000 of relationship property. Depriving me of access to an equal share of the funds, therefore not allowing me the discretion of how my share of the funds was to be used.”

[46] The applicant also sought to advance new evidence in support of his application for review. The new evidence comprised:

- (a) a minute of a duty judge of the High Court in the High Court proceedings relating to the applicant's application to disallow the wife's privilege;
- (b) a one-page extract from a brief of evidence of the wife in those proceedings;
- (c) a one-page printout of text exchanges between the applicant and the wife between 14 March and 20 March 2020.

[47] On this occasion, the respondent responded by letter to the substance of the original complaint as well as to the review application. She also sought to advance new evidence, comprising:

- (a) a memorandum filed by counsel for the wife in the High Court proceedings regarding the issue of privileged information (noting that the respondent herself was not involved in the High Court proceedings);
- (b) the June 2023 judgment of the High Court.

[48] This prompted further submissions from the applicant and another item of fresh evidence, namely a brief minute of the High Court Judge in June 2023 in which her Honour was sharply critical of some of the content of a brief of evidence filed by the wife in the proceedings and of both the tone and content of submissions filed by her counsel.

### **Review on the papers**

[49] Section 206(2) of the Act allows a Legal Complaints Review Officer (Review Officer) to conduct the review on the basis of all information available if the Review Officer considers that the review can be adequately determined in the absence of the parties. This is commonly referred to as a hearing “on the papers”.

[50] After undertaking a preliminary appraisal of the file, I formed the provisional view that the review could properly be conducted on the papers. The parties were given the opportunity to comment on that proposal. Neither party objected to that course of action.

[51] Having carefully read the complaint, the Committee’s decision, the submissions filed in support of the application for review and the respondent’s response, and the fresh evidence filed by both parties (to which I will make further reference), I decided that it was unnecessary to hold a hearing in person.

### **Nature and scope of review**

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

... 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

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



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.

[53] More recently, the High Court has described a review by this Office in the following way:<sup>4</sup>

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.

[54] 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 consider all of the available material afresh, including the Committee's decision and provide an independent opinion based on those materials.

## Issues

[55] The issues to be considered in this review are as follows:

- (a) Should I have regard to the fresh evidence filed on review?
- (b) What is the substance of the complaint?
- (c) What is the information on which the applicant relies in support of his complaint and is that information subject to solicitor-client privilege?
- (d) Was there a reasonable basis for the Committee to decide to take no action on the complaint pursuant to s 138(2) of the Act on the grounds that it did?
- (e) Do I have the power to disallow solicitor-client privilege?
- (f) If I do have that power, is it exercisable in the circumstances?
- (g) Is the exercise or non-exercise of that power material to the outcome of this review?
- (h) What are the respondent's professional obligations to the applicant?

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

- (i) Was there either non-disclosure or materially inaccurate disclosure of the asset representing the proceeds of sale of Property A?
- (j) If so, did the respondent have any responsibility to the applicant for such non-disclosure or materially inaccurate disclosure?
- (k) Was there non-disclosure of the asset representing the wife's Kiwisaver balance;
- (l) If so, did the respondent have any responsibility to the applicant for such non-disclosure?
- (m) Has the respondent breached any professional obligations owed to the applicant?
- (n) What is the appropriate outcome of the review application?

## Discussion

### *(a) Should I have regard to the fresh evidence filed on review?*

[56] It is unusual for a Review Officer to accept any fresh evidence on review. The complainant is expected to marshal all available information he or she considers relevant to the complaint and present it to the standards committee for its consideration. In the context of the statement made at paragraph [54(a)] above, the task of the Review Officer is to consider afresh all the material that was made available to the Committee.

[57] If this practice is not followed, the risk that arises is that the Review Officer can end up making a decision on what can turn out to be a materially different complaint. This can mean that the Review Officer is, in effect, making a decision at first instance. This is inappropriate. It is the task of the standards committee to make a decision at first instance and for the Review Officer to review it in the manner described in paragraph [52] above.

[58] In this instance, I have decided to have regard to the fresh evidence filed by both parties. I do so for the following reasons:

- (a) the complaint has been more fully articulated by the applicant on review but is not in any material particular different from the original complaint;
- (b) the complaint was made in a context where there were parallel High Court proceedings in which one element of the complaint, namely the reference

to privileged material, was in both the applicant's and the respondent's view material to both processes;

- (c) the discussion of the factual issues contained in the June 2023 High Court judgment is useful in determining the relevance and materiality of some of the allegations made by the applicant in the complaint;
- (d) that information could not have been made available by either party to the complaint at the time the complaint was filed or at the time the respondent responded (or not) to it i.e. it is genuinely fresh evidence;
- (e) by reason of its focus on the issue of privilege and the possible disallowance of privilege, the Committee did not address the significance of the material before it that was not subject to privilege;
- (f) as I will later explain, the complaint (and consequently the review application) can properly be determined without reference to the privileged material;
- (g) if I accept fresh evidence from one party, I must accept fresh evidence from the other if the latter fresh evidence is advanced in response to the former fresh evidence. To do otherwise would be procedurally unfair.

*(b) What is the substance of the complaint?*

[59] I consider the substance of the complaint to be that the respondent breached obligations she owed to applicant by:

- (a) being a knowing party to the misrepresentation by the wife of the value of relationship property recorded in the relationship property agreement; and
- (b) being a knowing party to the non-disclosure by the wife of relationship property that should have been recorded in the relationship property agreement; and/or
- (c) misleading the applicant during the meeting of 18 January 2018; and/or
- (d) in some way falsely certifying the completeness or accuracy of the relationship property agreement.

[60] I acknowledge that this is not the way any of those matters has been expressed and that they could be expressed in different ways but, neither the applicant nor the

Committee having done so, it is necessary to give some form of written expression to the complaint.

(c) *What is the information on which the applicant relies in support of his complaint and is that information subject to solicitor-client privilege?*

[61] It is necessary to address this question because the Committee did not seek to distinguish in its analysis between information subject to privilege and information not subject to privilege. Rather, it took the approach that because some of the written material on which the applicant sought to rely comprised privileged solicitor-client communications, it was not able to determine the substance of the complaint.

[62] The first document the applicant produced was the trust account statement issued by the lawyer acting on the sale of the relevant property. As matter of law, there is no privilege in a trust account statement.<sup>5</sup>

[63] The second document is an email exchange comprising an email from the respondent to the wife on 9 August 2017 and a reply from the wife on 15 August 2017. The exchange is plainly subject to solicitor-client privilege.

[64] The third document is an email from the respondent to the wife on 16 August 2017 comprising a third instalment in the above email exchange. It is again subject to solicitor-client privilege.

[65] The fourth document is an extract from a bank statement relating to a bank account of the trust that owned the property. There is no privilege in a bank account statement.

[66] The fifth and sixth documents (in the order produced by the applicant) comprise an earlier email exchange between the respondent and the wife between 26 May and 1 June 2017. This exchange is also privileged.

[67] The seventh document is the signed relationship property agreement. No privilege resides in that material.

[68] There are then the three additional documents listed in paragraph [46] above, none of which are privileged.

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<sup>5</sup> *Re Merit Finance & Investment Group* [1993] 1 NZLR 152; s 393(4) Companies Act 1993; *BQ v CR* LCRO 281/2012 at [14].

[69] The non-privileged documents are available and relevant. They record matters of fact. For the purposes of this review, I am not concerned about how the applicant came to be in possession of them.

(d) *Was there a reasonable basis for the Committee to decide to take no action on the complaint pursuant to s 138(2) of the Act on the grounds that it did?*

[70] I understand the Committee's rationale for deciding not to make a decision on the applicant's application for disallowing the claim of privilege on the privileged material. I am not so sure that it was the optimum decision to make.

[71] The applicant's corresponding application in the High Court proceedings related to the issues at large in those proceedings, which were issues between the applicant and the wife regarding the effect and enforcement of the relationship property agreement and subsequent variation. His application in the complaint process related to the complaint, which was against the respondent about her professional conduct. The jurisdiction, processes, parties and issues were different.

[72] As matters transpired, the applicant's application in the High Court proceedings for disallowance of privilege in the solicitor-client communications was not even mentioned in the High Court judgment. It can be assumed that those communications, which occurred in the context of negotiation of the agreement, were not relevant to the interpretation and application of the agreement itself.

[73] There appeared to be ample evidence before the Court regarding the relevant details of the Property A sale and the application of the sale proceeds. The Kiwisaver issue was dealt with in one paragraph as follows:

Thirdly, [the applicant] contended that [the wife] had omitted to make full disclosure of her assets. However, the assets in question are trivial, being a modest Kiwisaver balance and cash at bank. I also accept [the wife's] evidence that she overlooked these matters when disclosing assets for the purposes of the settlement agreement. I propose to put them to one side.

[74] The Court's reference to the wife's evidence ties back to the extract from her brief of evidence produced by the applicant. Relevantly, the wife's evidence was that the Kiwisaver was worth only about \$2,000 when the agreement was being negotiated, she thought at the time it was worth less than \$800 because that is what she had put in, she had not contributed to it in years and did not realise that government contributions had swelled the balance to \$2,000, and she thought it "seemed insignificant in the scheme of things" in the context of a settlement involving millions of dollars of property.

[75] The primary difficulty with the Committee's decision to take no action on the grounds that it did is that it is debatable whether the Committee could make an assessment under s 67(1) of the Evidence Act (i.e. whether or not to disallow privilege) for the purposes of the complaint. The privilege belonged to the wife. The wife was not a party to the complaint.

[76] It would seem strange if a Committee could decide not to determine a complaint on the grounds that it had not made a decision on a legal issue arising in the complaint where it is arguable that it had no power to make a decision on that legal issue anyway, at least without in some way procedurally involving the person whose legal rights would thereby be affected.

[77] I acknowledge that the previous paragraph sounds confusing. This is because the issue it addresses is inherently confusing. The issue is not central to this review, however.

[78] The one thing that can be said with certainty is that it was not open to the respondent to make any reference to the content of the communications that were subject to her client's privilege where that privilege had been neither waived nor disallowed.

[79] Be that as it may, there was nothing to prevent the respondent responding to the complaint by reference to the actual substance of the complaint and to the material that was not subject to solicitor-client privilege. Similarly, it was open to the Committee to address the substance of the complaint without reference to the privileged material, in my view.

*(e) Do I have the power to disallow solicitor-client privilege?*

[80] I agree with the Committee's analysis of the legal position. On the face of it, a standards committee has the same power as a judge to disallow a claim of privilege pursuant to s 67(1) of the Evidence Act 2006, or rather an obligation to do so if the criteria in that section are satisfied. Under section 211(1)(b) of the Lawyers and Conveyancers Act 2006 (the Act), a Review Officer has all the powers of a standards committee under the Act. I therefore have the power and obligation to disallow a claim of privilege on those grounds.

*(f) If I do have that power, is it exercisable in the circumstances?*

[81] The same difficulty arises for a Review Officer as arises for a standards committee, however. In a court proceeding, a claim of solicitor-client privilege is made

by a party to the proceeding to prevent the other party in the proceeding from referring in evidence to relevant communications between the first party and that party's lawyer.

[82] In a professional disciplinary complaint process, the party with the claim of privilege is a party to the process only if that party is the complainant. In the current circumstances where the client is not the complainant, I consider it unnecessary to express a view as to whether the power to disallow a claim of privilege under s 67(1) is exercisable.

*(g) Is the exercise or non-exercise of that power material to the outcome of this review?*

[83] The reason I consider it unnecessary to express a view on that issue is that, for the reasons explained below, it is unnecessary to refer to the privileged communications in determining the outcome of the application for review. The issue of privilege seems to me to have been something of a rabbit hole down which the Committee has been drawn. The complaint does not depend "entirely on confidential and privileged emails", as asserted by the respondent.

*(h) What professional obligations did the respondent owe to the applicant?*

[84] The respondent owed numerous professional obligations to her client, the wife. They included in this context, in particular:

- (a) the duty to protect and promote the interests of the client to the exclusion of the interests of third parties, within the bounds of the law and the Rules;<sup>6</sup>
- (b) the duty to protect and hold in strict confidence all information concerning a client, the retainer, and the client's business and affairs acquired in the course of the professional relationship, subject to various exceptions specified in the Rules;<sup>7</sup>
- (c) the duty to act competently consistent with the terms of the retainer and the duty to take reasonable care;<sup>8</sup>
- (d) the duty to complete the retainer.<sup>9</sup>

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<sup>6</sup> Rule 6 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

<sup>7</sup> Rule 8 of the Rules.

<sup>8</sup> Rule 3 of the Rules.

<sup>9</sup> Rule 4.2 of the Rules.

[85] All duties owed to the client are subject to overriding duties including duties to the courts and the justice system, particularly the fundamental obligation to uphold the rule of law and to facilitate the administration of justice.

[86] In contrast, the respondent's obligations to the applicant were limited. The applicant was a person negotiating a relationship property agreement with the respondent's client. He was the opposing party. In such circumstances, the respondent's regulatory duties were principally:

- (a) a general duty to promote and maintain professional standards;<sup>10</sup>
- (b) the duty to treat the applicant with respect and courtesy.<sup>11</sup>

[87] It is for the applicant to establish the factual basis of his complaint on the balance of probabilities. If I find that he has succeeded in doing so, the factual particulars must then in some way result in a finding of failure by the respondent either to promote and maintain professional standards, or to treat the applicant with respect and courtesy, or to uphold the rule of law.

(i) *Was there either non-disclosure or materially inaccurate disclosure of the asset representing the proceeds of sale of the relevant property?*

[88] This is where the applicant's complaint comes materially unstuck on a factual basis. As recorded at paragraph [21], the applicant's allegations were that the agreement stated that the proceeds from the sale of the property were \$114,106.00 and that the actual net proceeds were \$241,111.15. The first statement is incorrect.

[89] The agreement records, at paragraph K(e) of the Background, that the proceeds of sale were \$548,000. The trust account statement produced by the applicant then records that the sum received by the vendor's lawyer on settlement was \$492,920.29.

[90] I have no information from which to reconcile the two figures but note that the trust account statement makes no reference to the real estate agent's commission or to the interim \$10,000 distribution to the applicant recorded in the agreement, as discussed below. In any event, the agreement does not record that the proceeds of sale, either gross or net, were \$114,106.00.

[91] Clause 9 of the agreement sets out what was agreed to happen with the proceeds of sale. It states:

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<sup>10</sup> Rule 10 of the Rules.

<sup>11</sup> Rule 10.1 of the Rules.



- 9.1 On 10 July 2017 the ...property [A] was sold. From the proceeds of sale the following payments were made:
- (a) The sum of \$114,106.00 was paid to [lender] family trust being the balance owed by [owner] trust to the [lender] trust for the 2<sup>nd</sup> [lender trust] advance<sup>12</sup>;
  - (b) [the applicant] received \$10,000 by way of interim distribution.
- 9.2 On the date of this Agreement the following interim distributions will be made:
- (a) \$20,000 to [the applicant];
  - (b) \$30,000 to [the wife] to equalise the distributions to [the applicant] in clause 9.1(b) and 9.2(a).
- 9.3 On the settlement date of the sale of [Property B], the [Property A] proceeds shall be distributed as follows:
- (a) the wife shall receive the sum of \$20,000 to repay a joint debt of the parties;
  - (b) The remaining proceeds shall be divided equally between [the applicant] and [the wife];
  - (c) In the event that there are insufficient funds to meet the payment to [the wife] of \$20,000 as per clause 9.3(c)<sup>13</sup>, [the applicant] shall be required to meet the value of the shortfall from his share of the sale proceeds of [Property B].”

[92] From the net proceeds of \$492,920.29 received by the lawyer acting on the sale of Property A, two payments were made on 10 July 2017, of:

- (a) \$250,295.89 to repay a mortgage to Bank A, this payment being made through the vendor trust’s “025” bank account; and
- (b) \$1,513.25 to pay the lawyer’s costs on the sale, this payment being directly from the lawyer’s trust account,

leaving a net sum of \$241,111.15 for distribution.

[93] Of the net sum of \$241,111.15 available for distribution:

- (a) \$114,106.00 was paid to the [lender trust], as recorded in clause 9.1(a) of the agreement entered into 8 months later;
- (b) \$120,000 was transferred to the vendor trust’s “Saver” account,

leaving a credit balance of about \$7,000 in the vendor’s trust’s “025” account.

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<sup>12</sup> The original principal sum of this loan was \$150,000.

<sup>13</sup> The reference should obviously have been to clause 9.3(a).

[94] It is unclear from the High Court judgment whether the parties received the payments specified in clauses 9.1(a), 9.2(a) and 9.2(b), a total of \$60,000. The Court found only that the “remaining proceeds” of sale referred to in clause 9.3(b) had all been applied by the wife in payment of joint expenses and that she had therefore not received the payment required by clause 9.3(a).

[95] For present purposes, the principal point is that there is no evidence that the wife misrepresented to the applicant the amount of the proceeds of sale of Property A. The only arguable representations made in the agreement relevant to the issue are those in paragraph K(e), clause 9.1(a) and clause 9.1(b).

[96] Each of those statements is a statement of fact made by the parties to the agreement, the applicant and the wife, to each other. If the statement in paragraph K(e) was factually incorrect by overstating the gross proceeds of sale, that is an error made by both the applicant and the wife. In any event, it does not alter the effect of clause 9.3, which simply requires the “remaining proceeds” to be divided equally without stating the amount of the “remaining proceeds”.

[97] Accordingly, this element of the complaint is not made out.

*(j) If so, did the respondent have any responsibility to the applicant for such non-disclosure or materially inaccurate disclosure?*

[98] For the reason stated above, it is not necessary to consider this issue. I nevertheless do so because it is clear that the applicant is labouring under a fundamental misunderstanding of the role of a lawyer in a relationship property settlement.

[99] The respondent had no professional responsibility to the applicant for any factual statements made in the agreement. Any such statements that were premised on information available to the wife and not the applicant were made by the wife, not by the respondent.

[100] This would be so even if it were not for the clauses referred to in paragraphs [12] and [13] above. As a matter of contract, the respondent had no responsibility even to her own client for verifying any information provided by either her client or the applicant about the value of relationship property. Such property included the remaining proceeds of sale of Property A. (The respondent was not the lawyer who acted on the sale of Property A). Further, the applicant expressly acknowledged that he did not rely on the respondent in any respect.

[101] The applicant places great reliance on the “disclosure” clause quoted at paragraph [11] above and on the respondent’s certificate under s 21F of the PRA.

[102] The disclosure clause is a representation made by the applicant and the wife to each other. It is not in any sense a representation made by either certifying lawyer. The certifying lawyers are not parties to any relationship property agreement. Nor are they verifiers of statements, representations or disclosures made by either party to the agreement or guarantors of the obligations undertaken by the parties to each other.

[103] The certificate given by each lawyer under s 21F of the PRA is solely a certificate that the lawyer has given independent legal advice to the lawyer's own client and explained the effect and implications of the agreement. It is not a warranty that the client has been informative, accurate or truthful or has complied with the law in entering into the agreement.

*(k) Was there non-disclosure of the asset representing the wife's Kiwisaver balance?*

[104] It is clear from the materials that there was a Kiwisaver balance of about \$2,000 and that the wife did not disclose it. It was the wife's obligation to disclose it. The confirmation she gave in the "disclosure" clause was therefore either inaccurate or false in that respect.

*(l) If so, did the respondent have any responsibility to the applicant for such non-disclosure?*

[105] It was not the respondent's obligation to disclose the matter or to insist that it be disclosed. Her obligations were as summarised in paragraph [85] above and, in giving her certificate when the agreement was signed, to do the things she certified she had done. These included explaining the implications of the agreement.

[106] One of those implications was the applicant's right to avoid the agreement in the event of non-disclosure of an asset "having significant value". That was a legal issue arising between the applicant and the wife and has been dealt with by the Court in the proceedings.<sup>14</sup> It was not and is not a professional conduct issue arising between the applicant and the respondent.

[107] These principles apply regardless of whether the conduct complained about relates to correspondence in mid-2017, the meeting in January 2018 or the entry into the agreement in March 2018.

[108] I observe at this point that the respondent had not signed any certificate at the time of the January 2018 meeting, as asserted by the applicant. Regardless of the applicant's factual error regarding the interaction at that time, the respondent's primary professional obligations to her client, the wife, remained the same on both occasions.

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<sup>14</sup> See [72] above.

[109] Amongst them was her obligation to hold all information concerning the client's affairs in strict confidence. Disclosing to the applicant any information about the wife's assets without instructions to do so would have constituted unethical conduct on the respondent's part. I make that observation in relation to all aspects of the negotiation of the agreement and to the execution of the agreement.

[110] The respondent did not act for the wife on the Court proceedings, so no issue arises as to any overriding duties to the Court.

*(m) Was the respondent discourteous or disrespectful towards the applicant?*

[111] I raise this as a potential issue because of the assertion made by the applicant recorded at paragraph [27] above. In response, the respondent denied that she "... provided assurance that full disclosure had been made during a round table meeting to negotiate settlement." She did not comment on the manner in which she expressed herself.

[112] In a hearing on the papers, I cannot make any finding of credibility as to what was said or how it was said. For present purposes, the issue is only whether the manner in which the respondent expressed herself, as asserted by the applicant, could reasonably be regarded as discourteous to the applicant.

[113] Any lawyer is entitled to express herself robustly in advocating for her client's interests. On the assumption that the respondent's manner of expression was as reported by the applicant, I am not satisfied that it was intemperate enough to constitute discourtesy towards the applicant.

*(n) Has the respondent breached any professional obligations owed to the applicant?*

[114] For the above reasons, I am satisfied that, on the basis of all the information before me, the respondent has not breached any of the professional obligations owed to the applicant that I have interpreted as being potentially applicable to the factual particulars of the complaint.

*(o) What is the appropriate outcome of the review application?*

[115] In most instances where a standards committee has not properly addressed the core issues by reason of being led astray by a peripheral issue, as is the case here, the appropriate course of action is normally for the Review Officer to direct the Committee to reconsider the complaint.

[116] In this instance, however, I have had the benefit of both material fresh evidence that was not available to the Committee and a proper response from the respondent.

[117] It is also clear that the complaint was factually misconceived and premised on a misunderstanding of a lawyer's role and relevant duties in the context of a relationship property settlement.

[118] In all the circumstances, I consider that no useful purpose would be served by requiring the Committee to reconsider the complaint and that further action on the complaint would be inappropriate in terms of s 138(2) of the Act.

[119] Consequently, there is no basis for ordering the requested apology or for awarding the applicant any compensation.

### **Decision**

[120] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 and for the reasons stated in this decision (and not the reasons stated in the Committee's decision), the decision of the Committee to take no further action on the complaint is confirmed.

### **Publication**

[121] Section 206(1) of the Act requires that every review must be conducted in private. Section 213(1) of the Act requires a Review Officer to report the outcome of the review, with reasons for any orders made, to each of the persons listed at the foot of this decision.

[122] Pursuant to s 206(4) of the Act, a Review Officer may direct such publication of his or her decision as the Review Officer considers necessary or desirable in the public interest. "Public interest" engages issues such as consumer protection, public confidence in legal services and the interests and privacy of individuals.

[123] Having had regard to the issues raised by this review, I have concluded that it is desirable in the public interest that this decision be published in a form that does not identify the parties or others involved in the matter and otherwise in accordance with the LCRO Publication Guidelines.

**DATED** this 12<sup>TH</sup> day of DECEMBER 2023

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**FR Goldsmith**  
**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:

AI as the Applicant  
HR as the Respondent  
ZW as a Related Party  
[Area] Standards Committee [X]  
New Zealand Law Society