

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

[2021] NZLCRO 128

Ref: LCRO 106/2021

**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**

**TH**

Applicant

**AND**

**QA**

Respondent

**DECISION**

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

**Introduction**

[1] Mr TH has applied to review a decision by the [Area] Standards Committee [X] (the Committee) dated 30 June 2021, in which the Committee decided to take no further action on his complaint concerning the conduct of Mr QA.

[2] The Committee based its decision on ss 138(1)(f) and 138(2) of the Lawyers and Conveyancers Act 2006 (the Act).

[3] Section 138(1)(f) of the Act allows a Committee to take no further action on a complaint if a complainant has an alternative and adequate remedy that it would be reasonable for them to exercise. Section 138(2) of the Act allows a Committee to dismiss a complaint if it considers that further action on it is neither necessary nor appropriate.

## Background

[4] In [Month] 2017, Mr TH entered into an agreement to sell his home. Settlement was to be six months later on [Date] 2018.

[5] Mr QA provided some advice to the purchasers after they had entered into the agreement with Mr TH. He had not been the purchasers' original conveyancing solicitor.

[6] Thirteen minutes before the 5pm settlement deadline on [Date] 2018, the purchasers cancelled the agreement.

[7] Mr TH retained the deposit that the purchasers had paid. Litigation ensued in the High Court, with the purchasers as plaintiffs.

[8] Amongst the issues in the proceedings were questions of the property's weather tightness.

[9] Mr QA acted for the purchasers in the proceedings.

[10] Mr TH was unsuccessful.<sup>1</sup>

[11] Mr TH had significant concerns about Mr QA's conduct both before and during the proceedings.

## Complaint

[12] Mr TH lodged his complaint against Mr QA with the New Zealand Law Society Complaints Service (the Complaints Service) on 11 April 2021.

[13] Mr TH has described Mr QA's conduct before and during the proceedings, as amounting to the more serious category of misconduct under the Act.

[14] Mr TH's complaint included the following:

- (a) Mr QA was in possession of personal information about Mr TH, obtained by either unethical or unlawful means, about which he cross-examined Mr TH during the proceedings. This raised issues of a conflict of interest by Mr QA.
- (b) A simple case about retention or return of a deposit on a cancelled purchase, was made unnecessarily complicated and costly by Mr QA.

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<sup>1</sup> *ZN v TH* [XXXX] NZHC XXXX ([date]) (the [date] judgment).

- (c) Mr QA vexatiously and vindictively raised issues about Mr TH's legal aid eligibility.
- (d) Costs claimed as a result of the proceedings were excessive and unreasonable.
- (e) Mr QA unethically and unprofessionally attempted to influence a witness to give evidence supporting his clients.

[15] A key aspect of Mr TH's complaint concerns Mr QA's access and use of, before and during the proceedings, confidential, personal and privileged information belonging to and about Mr TH (the personal information). Mr TH asserts that Mr QA came by the personal information dishonestly and has never satisfactorily explained how that occurred.

[16] Mr TH complained that obtaining and using the personal information was an infringement of his privacy. He said that because of the way in which Mr QA had obtained the personal information, he "became seriously conflicted" because his "personal (or self-serving) interests and professional duties or responsibilities" conflicted with his obligation "to follow fair processes."

[17] As well, Mr TH complained that Mr QA used the proceedings for an improper purpose, specifically "for the purpose of causing considerable additional and unnecessary levels of distress, embarrassment, inconvenience and causing a great many other impacts on [Mr TH]."

[18] Mr TH complained that the purpose of the proceedings included a wider agenda to tarnish his reputation in a way that negatively impacted on other litigation in which he was involved.

[19] As to the proceedings themselves, Mr TH said that Mr QA hijacked them from being a case about the deposit, to an unmeritorious claim about weather tightness. He said that this had the effect of misleading the court.

[20] As well, Mr TH said that Mr QA complained to the Ministry of Justice that he (Mr TH) was not eligible for legal aid. This was a strategy designed to distract Mr TH from concentrating on the proceedings. As it turned out, Mr QA's complaint about Mr TH's eligibility for legal aid was quickly dismissed by the Ministry of Justice.

[21] Mr TH also complained about aspects of Mr QA's cross-examination of him during the proceedings, describing some of the questions as "completely unfounded, [making] unacceptable insinuations [and] implying some kind of fraud."

[22] Finally, Mr TH noted that costs are “now into hundreds of thousands of dollars” as a result of the way in which Mr QA conducted the proceedings.

### **Standards Committee process**

[23] Mr TH’s complaint was initially assessed as being suitable for the Complaints Service’s Early Resolution Process (ERP).

[24] That procedure involves a Standards Committee conducting an initial assessment of a complaint and forming a preliminary view as to outcome.

[25] If the Committee’s preliminary view is that the complaint appears to lack substance, a Legal Standards Officer (LSO) will contact the respondent lawyer and inform them of the Committee’s preliminary view, inviting a response from the lawyer.

[26] Any response is included in a file note prepared by the LSO and provided to the Committee, which then completes its inquiry into the complaint.

[27] On 28 June 2021, the LSO spoke to Mr QA by telephone and advised him about the complaint. The LSO informed Mr QA that a copy of the complaint would be sent to him, and that he could respond if you wish to, although the Committee did not require “any further info or a response from him.”

[28] The LSO emailed a copy of the complaint to Mr QA, also on 28 June 2021, and in the email noted that the “Committee is of the preliminary view that no further action need to be taken on this complaint.” Mr QA was offered an opportunity to provide a response.

[29] In an email to the Complaints Service dated 30 June 2021, Mr QA said that “we do not consider the complaint raises any issues requiring a response.”

[30] The matter was then referred to the Committee for further consideration.

### **Standards Committee decision**

[31] The Committee identified the issues as being whether:<sup>2</sup>

- (a) Mr QA has breached any of his professional obligations; and
- (b) it has jurisdiction to review a matter before the High Court.

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<sup>2</sup> Standards Committee decision dated 30 June 2021 at [10].

[32] In deciding to take no further action on Mr TH's complaint, the Committee held:<sup>3</sup>

- (a) Mr QA was not Mr TH's lawyer.
- (b) The Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) have minimal application to the relationship between a lawyer and a third party, such as here.
- (c) Mr TH's allegations about Mr QA's are serious and concern a matter that has been brought before the High Court. "Cogent evidence" to support those allegations is necessary.
- (d) Insufficient evidence has been provided to support the allegations. It was limited to what Mr TH said.
- (e) Allegations that a lawyer has breached their duty to uphold the rule of law and the administration of justice, administer their practice in a way that ensures the duties to the court and their clients are adhered to and protect court processes are best dealt with in the forum of the court dealing with the matter.
- (f) The appropriate place for Mr TH to have raised these matters, was the High Court.
- (g) In the event that the court made "adverse comments about the conduct of Mr QA", then that would provide grounds for a fresh complaint.

### **Application for review**

[33] Mr TH filed his application for review on 23 July 2021. He said:

- (a) The Committee "failed to address the specifically identified breaches of the Rules by Mr QA."
- (b) The Committee failed to deal with the matter neutrally.
- (c) The complaint was dealt with hastily and inadequately, and it was wrong for the Committee to conclude "that the matters raised could be dealt with as part of the High Court proceedings."

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<sup>3</sup> At [11]–[19].

- (d) Some or all of the Committee's members were biased and influenced by "inaccurate media reporting."
- (e) One member of the Committee "may have had a conflict that should have been disclosed."
- (f) The convener of the Committee "has a history of failing to deal with legitimate complaints and is in the role for ulterior political and aspirational reasons."
- (g) The High Court is not the correct venue to resolve the complaints.

### **Mr QA's response**

[34] In an email to this Office also dated 23 July 2021, Mr QA indicated that nothing in Mr TH's review application required any response from him.

### **Discussion**

[35] There are two parts to Mr TH's complaint about Mr QA.

[36] First, Mr QA's conduct before the proceedings were heard – specifically in relation to his involvement in obtaining Mr TH's personal information.

[37] As well, in relation to the pre-proceedings conduct there is complaint that Mr QA improperly forced himself into the proceedings as counsel for the purchasers when they had previously been represented by another law firm, and that the proceedings were issued for an improper purpose.

[38] Secondly, Mr TH complains about Mr QA's conduct during the proceedings. This concerned his cross-examination of Mr TH, and more generally, the fact that the proceedings were unnecessarily made complicated for a collateral purpose, one of the consequences of which was that the court was misled by Mr QA.

[39] Mr TH's complaint against Mr QA, identified the following alleged breaches of the Rules:

- (a) Rule 2.2.
- (b) Rule 2.3.
- (c) Rule 8.8.

- (d) Rule 10.
- (e) Rule 10.1.
- (f) Rule 11.1.
- (g) Rule 13.2.1.
- (h) Rule 13.2.3.
- (i) Rule 13.2.4.
- (j) Rule 13.10.11.

[40] Mr TH's review application contains a submission that the Committee failed to consider the rules he identified as having been breached by Mr QA.

[41] There is no doubt that Mr TH's complaint very comprehensively set out his allegations of ethical, professional and Rule breaches by Mr QA. His complaint is articulate and uncompromising, and argues that Mr QA's conduct was no less than the more serious misconduct.

[42] However, it is sometimes said that fine words butter no parsnips.

[43] Setting out a detailed and very specific list of alleged Rule breaches, and surrounding that list with forceful language does not clothe a complaint with substance.

[44] As the Committee observed, and as is compellingly correct, there must be cogent evidence, beyond mere allegation, to support any complaint.

[45] For reasons which now follow, it is my view that Mr TH has failed to provide any evidence of any credible or cogent nature, to support the serious allegations he has made about Mr QA's conduct.

### ***Pre-proceedings conduct:***

#### *Personal information*

[46] A significant feature of Mr TH's complaint about Mr QA's conduct, is his access to and use of the personal information. Mr TH firmly believes that the personal information was dishonestly obtained, and that Mr QA was behind that.

[47] Beyond that basic allegation, there is nothing to support what Mr TH has said.

[48] The proper place for airing a complaint, about what amounts to theft of personal information, is in a complaint to the Police. As well, the Privacy Commissioner has jurisdiction in connection with the collection, use and disclosure of personal information about an individual.

[49] It is patently not the function of the lawyers' regulatory process to investigate matters which are more properly within the jurisdiction of some other agency or the courts.

[50] That being said, the regulatory regime would be quick to respond to a finding by another agency or a court or tribunal, that a lawyer's conduct may raise disciplinary issues warranting investigation.

[51] I deal with that further below, when considering Mr TH's complaint that Mr QA had improperly used the personal information during the trial of the proceedings.

#### *Acting for the purchasers*

[52] Mr TH suggests that it was improper for Mr QA to have inserted himself into the proceedings as the purchasers' lawyer. He said that Mr QA was not the purchasers' usual solicitor and had not acted when the purchase agreement was originally entered into in [month] 2017.

[53] There is nothing in this issue of complaint, whatsoever. The purchasers clearly instructed Mr QA to act in the proceedings and he did so without apparent objection by Mr TH at the time.<sup>4</sup>

#### ***Conduct during the proceedings:***

##### *Cross-examination*

[54] Cross-examination is, by its very nature, an uncomfortable process for a witness and understandably witnesses will often take offence at propositions being put to them.

[55] However, that is quite a different matter from whether, objectively viewed, a lawyer's questions have overstepped professional or other legal boundaries.

[56] Allegations that a lawyer's cross-examination during the course of a hearing was improper are, in the first instance, within the jurisdiction of the presiding judicial

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<sup>4</sup> I say "apparent objection" because Mr TH has not produced any material to show that he applied to have Mr QA removed as counsel for the plaintiffs, or that this issue was even obliquely raised before or during the proceedings. The [date] judgment makes no reference at all to the issue.



officer to evaluate, regulate and, if necessary, refer to the Complaints Service. Judges and other judicial officers frequently refer lawyers in this way.

[57] There is no suggestion, from any of the material provided by Mr TH – or from the [date] judgment itself – that concern was raised by the judge about Mr QA’s cross-examination.

*Personal information*

[58] Mr TH’s complaint about the use of his personal information during the proceedings is that the information had been dishonestly obtained and was thus improperly used by Mr QA.

[59] Again, a trial judge in those circumstances retains an overall discretion to exclude evidence which might be said to be tainted in some way, such as having been dishonestly obtained. It is not for the complaints regime to second-guess how that might play out in a conventional trial.

[60] The only reference in the [date] judgment to material that might be in the category of the allegedly dishonestly obtained personal information belonging to Mr TH, is the following:

[XX] REDACTED

[XX] REDACTED

[61] The references to “anonymous information” and “additional information” are not qualified by the judge with any criticism as to either the source or use of the information during the proceedings. Nor has Mr TH provided any minutes, directions or rulings made by the judge during the trial as to the admissibility of that information, based upon its provenance.

[62] As indicated, the complaints process cannot be used as a proxy for arguments that should have taken place in the court at the time.

*Dragging the proceedings out*

[63] Again, there is nothing in this issue of complaint. The [date] judgment contains no hint of criticism by the judge that these proceedings were inappropriate, improper, dragged out or otherwise brought for some collateral purpose. The fact that the purchasers were largely successful is all that needs to be said about that issue.

### *Committee processes*

[64] Finally, I deal with Mr TH's review grounds raising allegations of bias against "some or all of the Standards Committee members", a conflict on the part of at least one member of the Standards Committee and specifically identifying the convenor of that Committee as, in essence, routinely acting in bad faith and for personal gain.

[65] Beyond those bald assertions, Mr TH has not provided a shred of evidence to back them up. I give those allegations no credence whatsoever.

### ***General comments***

[66] Mr TH was unsuccessful in the proceedings brought against him in the High Court. Judgment was entered against him in the sum of [redacted], with the judge describing this as "interim" and "which may be increased" subject to clarification about some of the damages claimed by the plaintiffs.<sup>5</sup>

[67] The judge reserved the question of costs in the proceedings. As I note further below, Mr TH was ordered to pay costs.

[68] Mr TH lodged an appeal against the High Court's [date] judgment, but as recently as on 14 July 2021, it was clear that the status of the appeal was, at best, uncertain.

[69] The plaintiffs in the proceedings took steps to enforce their judgment, including to adjudicate Mr TH bankrupt (the bankruptcy proceedings). This resulted in a decision by Associate Judge [Redacted] in which he said the following (relevant to the issue of costs in the [date] judgment and the status of any appeal):<sup>6</sup>

[X] REDACTED

...

[X] REDACTED

[XX] REDACTED

[XX] REDACTED

[70] Thus, the High Court's [date] judgment appears to remain the last word on the proceedings, including as to whether Mr QA's conduct during those proceeding warrants disciplinary inquiry.

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<sup>5</sup> *ZN v TH* [XXXX] NZHC XXXX (date) at [125].

<sup>6</sup> *ZN v TH* [XXXX] NZHC XXXX (date).

[71] Mr TH is not entirely correct to say, as he has in his review application, that the High Court “is not the correct venue to resolve [his] complaints”.

[72] Naturally, the lawyers’ regulatory regime is the appropriate place to inquire into and make decisions about a lawyer’s conduct.<sup>7</sup> However, when the issues concern a lawyer’s conduct during the course of proceedings presided over by a decision-maker, then it is the decision-maker’s role to identify relevant shortcomings and take such steps as they consider appropriate. This can include referring the issues to the Complaints Service.

[73] If an opposing lawyer’s conduct is felt by the other party to have wrongly caused the original hearing to miscarry in some way, then the proper approach is to appeal or otherwise review the original outcome to an appellate court or tribunal. It is only in that setting that proper assessment can be made of conduct in question and its bearing upon outcome.

[74] Again, if the appellate or review body considers that the lawyer’s conduct warrants disciplinary inquiry, then an appropriate referral to the Complaints Service can be expected.

[75] I do not overlook that Mr TH’s complaint was comprehensive and extremely detailed. However, at its heart was a complaint that Mr QA improperly inserted himself into the proceedings for a wider collateral purpose designed to tie Mr TH up in litigation; that he was a party to dishonestly obtaining Mr TH’s personal information and improperly using that in the proceedings; and that the proceedings themselves were brought and prosecuted for an improper purpose.

[76] Mr TH’s complaint provides examples of what he maintains is the evidence to shore up those claims.

[77] I have considered all of that evidence, but the inescapable conclusion is that a properly fought trial was conducted; judgment was entered against Mr TH; and that the legal and procedural process is now, seemingly, at an end.

[78] I can really do no better than repeat again what [REDACTED] said in the bankruptcy proceedings: “[REDACTED]”.

[79] Nothing in Mr TH’s complaint remotely undermines that.

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<sup>7</sup> That being said, the High Court retains its inherent jurisdiction over enrolled lawyers (see ss 266–270 of the Act).

[80] [REDACTED] also observed in the bankruptcy proceedings:

[XX] [REDACTED]

[81] I view Mr TH's complaint about Mr QA's conduct as being a further example of that.

### **Section 205 of the Lawyers and Conveyancers Act 2006**

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

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

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

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

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

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

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

#### *Abuse of process*

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

[88] In *Moevao v Department of Labour*, the Court of Appeal held that the underlying objective of the abuse of process doctrine is the maintenance of public confidence in the administration of justice.<sup>8</sup>

[89] In the United Kingdom, Lord Bingham said the following:<sup>9</sup>

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

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

[91] Mr TH cannot use the complaints process to raise matters which ought to have been put before the High Court, the Court of Appeal and/or some other agency.

[92] The complaints and review processes are not alternatives to inquiry by other jurisdictions. Where another jurisdiction has considered an issue, the complaints and review processes merely supplement that jurisdiction if lawyer conduct issues have been identified.

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<sup>8</sup> *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA) at 481.

<sup>9</sup> *Johnson v Gore Wood & Co* [2000] UKHL 65; [2002] 2 AC 1 at 31.

[93] Having carefully considered all of the material that was before the Committee, as well as Mr TH's submissions in support of his application for review, I am satisfied that the Committee's decision to take no further action on this complaint was appropriate.

[94] I am satisfied that Mr TH's application for review is an abuse of process.

### **Decision**

[95] Pursuant to the provisions of s 205(1)(d) of the Act, Mr TH's application for review is struck out on the grounds that I am satisfied that it is an abuse of process, as that term is explained at [88] above.

### **Anonymised publication**

[96] Pursuant to s 206(4) of the Act, this decision is to be made available to the public with the names and identifying details of the parties removed.

**DATED** this 17<sup>TH</sup> day of AUGUST 2021

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**R Hesketh**  
**Legal Complaints Review Officer**

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr TH as the Applicant  
Mr QA as the Respondent  
Mr VX, as a Related Person  
[Area] Standards Committee [X]  
New Zealand Law Society