

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

[2022] NZLCRO 008

Ref: LCRO 189/2021

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

KP
Applicant

AND

MM
Respondent

DECISION

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

Introduction

[1] Mr KP has applied to review a decision by the [Area] Standards Committee [X] (the Committee) dated 1 November 2021, in which the Committee decided to take no further action on his complaint about Mr MM.

[2] The Committee based its decision upon s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act). This allows a Standards Committee to dismiss a complaint at an early stage if, based on the information it has, the Committee considers that further action is unnecessary or inappropriate.

[3] The issue on review is narrow: should a finding of unsatisfactory conduct be made against Mr MM for what the Committee described as a “technical breach” by him of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

Background

[4] Through a company called [Company A Limited], in which he is the sole director and shareholder, Mr KP carries on business in car sales.¹ He sold a vehicle to a Mr P.

[5] Mr P had complaints about the vehicle, and asked Mr KP to refund the purchase price. Mr KP declined to do so.

[6] There followed litigation between the two, beginning in the Motor Vehicle Disputes Tribunal (the Tribunal).

[7] The Tribunal ordered Mr KP to refund the purchase price to Mr P, together with associated costs.²

[8] Mr KP unsuccessfully appealed that decision to both the District and the High Courts.

[9] Mrs F, then an associate in the law firm [lawfirm], represented Mr P in the appeals. Mr MM was the partner in that law firm responsible for supervising Mrs F’s work.

[10] For one of the related proceedings (judicial review), Mr KP was represented by counsel. Otherwise, he represented himself.

[11] Mr MM commenced enforcement action against Mr KP in relation to the purchase price refund and various costs orders that had been made in the litigation.

[12] On 14 May 2021, Mr MM wrote to Mr KP directly about the proceedings in which Mr KP represented himself. In that letter, Mr MM also discussed the judicial review proceedings in which Mr KP had been represented by counsel.

¹ For ease of reference in this decision I will simply refer to Mr KP rather than his company.

² *EJ v Company A Limited* [XXXX] NZMVDT XXX.

Complaint

[13] In a complaint emailed to the New Zealand Law Society Complaints Service (Complaints Service) on 24 May 2021, Mr MM complained about Mr MM as follows (relevant to the issue to be decided on review):

- (a) Rule 10.2 of the Rules provided that a lawyer must not communicate directly with a client represented by another lawyer.³
- (b) Mr KP was represented by counsel in the judicial review proceedings.
- (c) All correspondence from Mr MM about those proceedings should have been sent to Mr KP's counsel.
- (d) Mr MM wrote to Mr KP directly on 14 May 2021. The letter included discussion about the judicial review proceedings. At that time, Mr KP was still represented by counsel in those proceedings.
- (e) Mr MM was well aware that Mr KP was legally represented in relation to the judicial review proceedings.

[14] Mr KP attached a copy of Mr MM's 14 May 2021 letter, addressed directly to Mr KP.

[15] Mr KP also attached a number of other documents to his complaint, providing background to the various court proceedings in which he and Mr P were then still involved.

[16] By way of outcome, Mr KP asked the Committee to discipline Mr MM, and to order him to provide an apology.

Standards Committee processes

[17] Mr KP's complaint was initially assessed as being suitable for the Complaints Service's Early Resolution Process (ERP).

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

³ Rule 10.2 of the Rules was replaced by r 10.4 of the Rules, from 1 July 2021.

[19] 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.

[20] 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.⁴

[21] On 20 October 2021, the LSO spoke to Mr MM and informed him of Mr KP's complaint, and the Committee's preliminary view about that complaint.

[22] The file note records the following:

20 October – I called Mr MM and told him about the complaint and the SC's preliminary view of a no further action decision.

- I offered him the opportunity to respond and said I will email the complaint to him. I sent him the password by text.
- He said he does not have anything to add.
- I said I will send an email explaining the process.
- I then sent an email to him with the complaint.

[23] Later that day, the LSO emailed Mr MM and attached a copy of Mr KP's complaint.

[24] Mr MM emailed the LSO on 21 October 2021, and said:

[I] acknowledge the opportunity to provide a formal reply but [am] of the view that a response ... is unlikely to assist the Committee, although [I] remain willing to provide any assistance or information [that] the Committee wishes.

[I am] accordingly content to abide the Committee's decision in due course.

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

Standards Committee decision

[26] The Committee identified the issue to be determined as being "whether Mr MM has breached his professional obligations."⁵

[27] Relevant to this review application, the Committee identified r 10.2 of the Rules as having application. It noted that the rule "provided that a lawyer must not

⁴ The file note is generally described as "Early Resolution Process – Call Log."

⁵ Standards Committee decision (1 November 2021) at [13].

communicate directly with a person who the lawyer knows is represented by another lawyer”.⁶

[28] Of Mr MM's 14 May 2021 letter, the Committee said that “it seems likely that [the] letter refers to matters where Mr KP was represented by a lawyer and to matters in which there was no representation by a lawyer.” Further, “to the extent that the letter referred to the judicial review proceedings, it might amount to a technical breach of r 10.2 of the Rules [but] not ... so serious as to warrant any disciplinary action being taken against Mr MM”.⁷

Review Application

[29] Mr KP filed his application for review on 22 November 2021. He submitted:

- (a) Mr MM's 14 May 2021 letter was “more than [a technical breach of r 10.2 of the Rules]”.
- (b) The appropriate outcome was for the Committee to have imposed a fine on Mr MM and ordered him to apologise.
- (c) Mr MM was “consciously aware” that Mr KP was represented by counsel in the judicial review proceedings. He referred to this in his 14 May 2021 letter.
- (d) On that account, it amounted to “a wilful, deliberate disregard for r 10.2 [of the Rules].”
- (e) Mr MM must be assumed to be aware of his ethical and professional obligations.
- (f) Previous Review Officer decisions dealing with breaches of r 10.2 of the Rules have held that where there was an intent to breach the rule, it must be seen as being deliberate and more than technical.

[30] By way of outcome, Mr KP asked that a fine be imposed on Mr MM, and that he be directed to apologise to Mr KP for his breach of r 10.2 of the Rules.

⁶ At [15].

⁷ At [17].

Response

[31] In an email to the Case Manager dated 30 November 2021, Mr MM said the following:

[I] ... acknowledges the opportunity to comment on the application for review but [am] of the view that a response ... is unlikely to further assist the Committee [sic] beyond what is already on file, although [I] remain willing to provide any assistance or information the Committee [sic] wishes...

Procedural steps

[32] Mr KP's review application was allocated to me for case management, relevant directions and eventual disposition.

[33] In considering the Committee's decision, I noted that it described Mr MM as having committed a "technical breach" of r 10.2 of the Rules, but which did not justify a disciplinary response.

[34] Mr KP has taken issue with that outcome and considers that the breach should have attracted a finding of unsatisfactory conduct, a fine and a direction for Mr MM to apologise.⁸

[35] Having identified that as the issue to be decided by me, I issued a Minute to the parties on 24 January 2022, and invited Mr MM to make submissions targeted to the issue of whether the Committee's finding that he had committed a technical breach of r 10.2 of the Rules, should be met with a finding of unsatisfactory conduct and penalty.

[36] In submissions dated 26 January 2022 responding to my Minute, Mr MM has relevantly said:

- (a) He accepts the Committee's finding that he committed a technical breach of r 10.2 of the Rules in writing directly to Mr KP about the judicial review proceedings, for which Mr KP had been legally represented.⁹
- (b) Relevant to whether this should be met with a disciplinary response, is the fact that "there were several proceedings on foot arising out of the same circumstances." These proceedings "covered the period from 2018 until

⁸ Mr KP does not specifically refer to a finding of unsatisfactory conduct, but such a finding must be made before any penalty can be imposed (see s 156 of the Act).

⁹ Throughout his submissions, Mr MM refers to r 10.4 of the Rules, which as indicated above did not come into force until 1 July 2021; these events having occurred on 14 May 2021. Nevertheless, the new r 10.4 in the old r 10.2 are, to all intents and purposes, identical.

their conclusion in late 2021.” Mr KP was in regular contact with Mr MM’s office whilst all of the various proceedings were being dealt with by the courts.

- (c) The 14 May 2021 letter “was clearly a summary of the overall position of all of the proceedings” and not simply about the judicial review proceedings.
- (d) In all of the proceedings, with the exception of the judicial review proceedings, Mr KP represented his company. He was unable to do so in the judicial review proceedings because of the rule requiring a company to be represented by counsel.
- (e) Mr MM had not received any communication from Mr KP’s counsel in connection with a costs issue affecting the judicial review proceedings. Indeed, Mr KP had personally filed some submissions in those proceedings.
- (f) It is not credible for Mr KP to assert that he was disadvantaged by Mr MM’s technical breach of r 10.2 of the Rules.

[37] Mr KP was given an opportunity to respond to Mr MM’s submissions, by 4 pm on Tuesday, 8 February 2022.¹⁰

[38] As at the date of this decision, nothing has been received from Mr KP.

Review on the papers

[39] This review has been undertaken on the papers and in the absence of the parties, pursuant to s 206(2) of the Lawyers and Conveyancers Act 2006 (the Act). This provision allows a Legal Complaints 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.

[40] In anticipation of that process being followed, in directions by me dated 24 January 2022, the parties were given an opportunity to make submissions as to

¹⁰ In an email to the Case Manager dated 24 January 2022, Mr KP requested until 7 February 2022 to make any submissions. That date was a public holiday (Waitangi Day observance) hence my indication that his submissions could be received the following day, 8 February 2022.

whether they wished the review application to proceed by way of a hearing in person, or a hearing on the papers.

[41] The parties were advised that in the absence of any response, it would be assumed that there is no objection to the matter being determined on the papers.

[42] In an email to the Case Manager dated 24 January 2022, Mr KP said:

I would like to go to hearing if allowed. I feel so aggrieved that these lawyers sat on crucial evidence that has cost my business tens of thousands ... that aside could I have till the 7 of Feb to respond.

[43] It was Mr KP's above email which prompted me to allow him until 4 pm on 8 February 2022, to make further submissions as to the format of the hearing.

[44] As indicated above, nothing further has been heard from Mr KP.

[45] In Mr MM's email to the Case Manager dated 26 January 2022, to which his written submissions were attached, he said that his view was "that the matter ought to be dealt with on the papers. It is not complex, nor does it raise any novel considerations."

[46] Further, Mr MM submitted that Mr KP's review application indicated an intention by him to rehearse the arguments raised in the various court proceedings between 2018 and 2021. Mr MM described this as being potentially "unhelpful, unproductive and [an unnecessary] burden [on] the LCRO's resources."

[47] Beyond indicating a wish for his review application to "go to hearing", Mr KP has not identified any particular aspects – relevant to the issue to be considered – which make it necessary for this matter to be dealt with at a hearing in person.

[48] The issue to be considered is narrow, and both parties have staked out their positions very clearly.

[49] On the basis of the information available, which I have carefully considered, I have concluded that the review may be adequately determined on the papers and in the absence of the parties.

[50] I record that I have carefully read the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review. There are no additional issues or questions in my mind that necessitate any further submission from either party.

Nature and scope of review

[51] The nature and scope of a review was discussed by the High Court in 2012, which said of the process of review under the Act:¹¹

... 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.

[52] In a later decision, the High Court described a review by a Review Officer in the following way:¹²

[2] ... A review by [a Review Officer] is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the [Review Officer’s] own opinion rather than on deference to the view of the Committee.

...

[19] ... A “review” of a determination by a Committee dominated by law practitioners, by the [Review Officer] who must not be a practising lawyer, is potentially broader and more robust than either an appeal or a judicial review. The statutory powers and duties of the [Review Officer] to conduct a review suggest it would be relatively informal and inquisitorial while complying with the principles of natural justice. The [Review Officer] decides on the extent of the investigations necessary to conduct a review in the context of the circumstances of that review. The [Review Officer] must form his or her own view of the evidence. Naturally [a Review Officer] will be cautious but, consistent with the scheme and purpose of the Act ... those seeking a review of a Committee determination are entitled to a review based on the [Review Officer’s] own opinion rather than on deference to the view of the Committee. That applies equally to review of a [decision] under s 138(1)(c) and (2) [of the Act].

[20] ... While the office of the [Review Officer] does not have the formal powers and functions of an Ombudsman, it can be expected to be similarly concerned with the underlying fairness of the substance and process of the Committee determinations in conducting a review.

¹¹ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

¹² *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475.

[21] A review by the [Review Officer] is informal, inquisitorial and robust. It involves the [Review Officer] coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[53] Given those directions, my approach on this review has been to:

- (a) independently and objectively consider all the available evidence afresh;
- (b) consider the fairness of the substance and process of the Committee's determination; and
- (c) form my own opinion about all of those matters.

Discussion

[54] The Committee noted that Mr MM was entitled to write directly to Mr KP in connection with matters in which Mr KP was representing himself. It noted that in his 14 May 2021 letter to Mr KP, Mr MM dealt with those matters but also raised an issue in connection with the judicial review proceedings for which Mr KP was being represented.

[55] This latter reference in Mr MM's letter, amounted to the "technical breach".

[56] The Committee's rationale for not imposing a disciplinary finding against Mr MM for that breach, appears to be that it was not a serious breach, and occurred in the context of Mr MM quite properly writing to Mr KP directly about other matters.

[57] Mr MM has accepted that he breached r 10.2 of the Rules by raising the judicial review proceedings directly with Mr KP, in circumstances where he knew that Mr KP was legally represented. Quite properly, on the basis of the facts he has not sought to rely on any of the exceptions to that rule.

[58] Rule 10.2 provides:

A lawyer acting in a matter must not communicate directly with a person whom the lawyer knows is represented by another lawyer in that matter except as authorised in this rule.

[59] The rule is unequivocal to laypersons and lawyers alike and there can be no uncertainty about its meaning.

[60] The principle behind the rule is equally clear:¹³

¹³ Duncan MM, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [15.4].

The rule seeks to prevent a lawyer from circumventing the protection afforded by the other party's lawyer and obtaining an unfair advantage. A lawyer may be retained to ensure no concessions or admissions are made and no information is disclosed, except on good grounds. If a client is contacted directly, the judgement of the lawyer in assisting with those decisions is dispensed with and a significant reason for retaining the lawyer rendered useless.

[61] By the time that Mr MM wrote his letter to Mr KP on 14 May 2021, the judicial review proceedings had reached the point whereby they had been dismissed, and the court was awaiting submissions on the question of costs. Mr KP's lawyer had sought an extension from the court for filing his submissions.

[62] The relevant part of Mr MM's letter, says:

1. Your Judicial Review application has properly been dismissed by Justice [A]. The Counsel you instructed to appear at the hearing ... has obtained an extension in relation to filing the Memorandum regarding costs, and this is now due on 14 June 2021.

[63] The rest of Mr MM's letter – approximately one full A4 page – deals with the various other court cases in which Mr KP was representing himself and about which Mr MM was perfectly at liberty to communicate with him directly.

[64] As discussed above, the principle behind r 10.2 of the Rules is to ensure that a lawyer does not obtain some unfair advantage for their client by communicating directly with a party who is also represented by a lawyer.

[65] A lawyer representing a client is both sword and shield. This is the foundation on which professional advocacy is built and practised.

[66] The offending paragraph in Mr MM's letter does not endeavour to either extract any concession from Mr KP or otherwise take advantage of him. It does not seek (or even require) any response, and it does not advocate for any position on Mr MM's client's behalf.

[67] The offending paragraph contains three undisputed facts: the dismissal of the judicial review proceedings; Mr KP's counsel's request for an extension of time to file cost submissions and the date by which those submissions were due.

[68] It is difficult to see how Mr MM's single paragraph has undermined the principle behind r 10.2 of the Rules, which is to ensure that a represented party's interests are protected by their lawyer.

[69] That being said, I do not overlook the effect on a represented party of receiving correspondence directly from a lawyer on the other side of a matter, irrespective of the contents of that correspondence. It is not difficult to imagine that a represented party in those circumstances might be unsettled by a direct approach, if not intimidated by the mere fact of that approach.

[70] However, in the present case that natural anxiety must be balanced against the fact that Mr KP was representing himself in the bulk of the proceedings arising out of the vehicle sale. Indeed, Mr KP endeavoured to continue that representation in the judicial review proceedings, but for conventional rules-based reasons was unable to do so.

[71] Whilst I do not doubt that Mr KP was unhappy to receive correspondence from Mr MM in which there was reference to the judicial review proceedings, overall I do not regard that as compounding Mr MM's breach of r 10.2 of the Rules.

[72] Whether to impose a finding and a penalty for a conduct breach is an inexact science, and even amongst decision-makers there will be divergent views about the appropriate outcome. There is room for genuine debate and disagreement about those outcomes.

[73] A breach of the Act or the Rules, if established, does not automatically attract a disciplinary sanction. In *Burgess v Tait* the High Court observed:¹⁴

The ability to take no further action on a complaint can be exercised legitimately in a wide range of circumstances, including those which would justify taking no action under s 138(1) and (2). It is not confined to circumstances where there is no basis for the complaint at all.

[74] That position was affirmed in *Chapman v Legal Complaints Review Officer* where the High Court noted that:¹⁵

... it appears to me that the LCRO may have assumed that her finding of unsatisfactory conduct inevitably led to the setting aside of the Committee's decision to take no further action under s 138. No point has been taken on this but any such assumption would be incorrect. The discretion which s 138 confers subsists throughout.

¹⁴ *Burgess v Tait* [2014] NZHC 2408 at [82].

¹⁵ *Chapman v Legal Complaints Review Officer* [2015] NZHC 1500 at [47].

[75] In conducting a review, a Review Officer may exercise any of the powers that could have been exercised by the Standards Committee in the proceedings in which the decision was made or the powers were exercised or could have been exercised.¹⁶

[76] Included in those powers, is the ability to exercise a discretion to take no action, or no further action on the complaint.¹⁷ That discretion may be exercised in circumstances where the Review Officer, having regard to all the circumstances of the case, determines that any further action is unnecessary or inappropriate.¹⁸

[77] In *Wilson v Legal Complaints Review Officer*, Hinton J observed:¹⁹

[43] This court has said on several occasions that the Rules are to be applied as specifically as possible. In my view, they are also to be applied as sensibly and fairly as possible. These are practice rules, not a legislative code.

[78] I accept that Mr MM included the offending paragraph in his 14 May 2021 letter to Mr KP with the knowledge that Mr KP was legally represented in that litigation. It would have been a simple matter for Mr MM to have carved-out the offending paragraph and include it in an email or letter sent directly to Mr KP's counsel.

[79] Indeed, in accepting that he breached r 10.2 of the Rules Mr MM must be taken to acknowledge that.

[80] However, and as indicated above by me, I have come to the view that Mr MM's offending paragraph did not attempt to seek any concession from Mr KP in the judicial review proceedings, or otherwise undermine his position. The offending paragraph was entirely factual and devoid of any advocacy.

[81] Moreover, the paragraph was included in a much longer letter in which Mr MM was legitimately discussing other cases directly with Mr KP.

[82] I do not consider that Mr KP was in any way prejudiced or compromised by Mr MM's breach of r 10.2, although I do not underestimate his disquiet at being approached directly about the judicial review proceedings.

¹⁶ Section 211(1)(b) of the Act.

¹⁷ Section 138.

¹⁸ Section 138(2).

¹⁹ [2016] NZHC 2288 (citation omitted).

[83] Accordingly, I agree with the Committee's conclusion that Mr MM's breach of r 10.2 of the Rules does not require any disciplinary response or sanction.

[84] That being said, I have no doubt that the processes of complaint and review have served to remind Mr MM of the importance of ensuring that ethical and professional rules are scrupulously maintained.

Decision

[85] Pursuant to s 211(1)(a) of the Act, the decision of the Committee is confirmed.

Anonymised publication

[86] 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 10TH day of FEBRUARY 2022

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 KP as the Applicant
Mr MM as the Respondent
Mr HY as a Related Party
[Area] Standards Committee [X]
New Zealand Law Society
Secretary for Justice