

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

[2022] NZLCRO 034

Ref: LCRO 40/2021

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

BETWEEN

PT

Applicant

AND

**UT and RL
t/a [LAW FIRM A]**

Respondent

DECISION

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

Introduction

[1] Mr PT has applied for a review of a decision by the [Area] Standards Committee.

Background

[2] Mr PT represented Ms AI (Ms AI), a daughter of the late Mr HT.

[3] Mr HT set up a trust, the CTG Trust (“the trust”). At the time the trust was established (2005), Mr HT was a client of a [City A] based law firm, [Law Firm B].

[4] In 2014, [Law Firm B] merged with the firm [Law Firm C], to form the firm [Law Firm A] ([LAW FIRM A]).

[5] In December 2011, Mr HT had executed his last will and testament. Mr HT's will appointed Mrs YW (his wife) as a discretionary beneficiary of his trust.

[6] [LAW FIRM A] acted for Mr SZ and Mrs QT, the executors named in Mr HT's will. Mr SZ, a practising accountant, was a trustee of Mr HT's trust, as was Mrs QT (Mr HT's sister). Mr KB, a solicitor in the employ of [LAW FIRM A], was involved in providing advice to the trustees.

[7] Following Mr HT's death, Ms AI had concerns as to how the affairs of her late father were being managed. She instructed Mr PT. It was Mr PT's view that Mr HT's will did not provide a proper legal basis for Mrs YW to be appointed a beneficiary, and that attempts by [LAW FIRM A] to formalise the appointment of Mrs YW as a beneficiary were of no effect.

[8] When issues relating to the trust arose, [LAW FIRM A] recognised that they could be conflicted in continuing to act for Mr SZ and Mrs QT, and in recognition of that potential for conflict, referred both to another [City A] law firm ([Law Firm D]).

[9] Mr PT prepared a draft statement of claim for filing in the High Court. Those anticipated proceedings named his client AI as plaintiff, Ms LM (Mr HT's widow of his second marriage) as first defendant, and Mr SZ and Mrs QT as second and third defendants in their capacity as executors, and trustees of the CTG Trust. [Law Firm D] were provided with a copy of the draft statement of claim.

The complaint and the Standards Committee decision

[10] Mr RL and Mr UT, partners in the firm of [Law Firm A] lodged a complaint against Mr PT with the New Zealand Law Society Complaints Service (NZLS) on 10 September 2019. The substance of their complaint was that:

- (a) Mr PT had maligned the reputation of [LAW FIRM A] lawyers in the draft statement of claim he had prepared, in that the draft made accusation that [LAW FIRM A] lawyers had acted incompetently, dishonestly, and with improper regard to their own interests; and
- (b) Mr PT had made improper allegation that Mr SZ and/or Mrs QT had acted in bad faith in exercising their duties as trustees; and

- (c) Mr PT had made improper allegation that [LAW FIRM A], Mr SZ and Mrs QT had deliberately or recklessly misled Ms AI; and
- (d) Mr PT had alleged that a lawyer in the employ of [LAW FIRM A] (Mr KB) had failed to act professionally by taking a personal position on decisions concerning the administration of the trust; and
- (e) Mr PT had contacted Mr SZ directly when he would have been aware that [LAW FIRM A] was (at the point the contact was made), acting for Mr SZ.

[11] In summary, Mr RL and Mr UT considered that matters traversed in Mr PT's draft statement of claim constituted an "egregious and unjustifiable attack meriting the intervention of the Law Society".

[12] Mr PT responded to the complaint on 15 November 2019.

[13] Mr PT submitted that:

- (a) in preparing his draft statement of claim, he was required to be "resolute" in protecting the interests of his client; and
- (b) the complaint failed to identify any specific conduct rule that had been breached; and
- (c) the draft proceedings had not been filed; and
- (d) opportunity had been provided to the trustee's new lawyers to answer the matters raised in the draft statement of claim; and
- (e) statements made in the statement of claim were necessary and essential factual planks to establish the claim; and
- (f) when evaluating a lawyer's conduct, the standard objective test is that of an "honest and reasonably competent lawyer" and pleadings drafted in this form do not constitute allegation that a lawyer has acted dishonestly.

[14] In correspondence to the Complaints Service of 11 December 2019, Mr RL and Mr UT provided response to Mr PT. They submitted that:

- (a) Mr PT had breached r 10.2 of the Rules,¹ by contacting parties directly in circumstances where he was aware that those parties were represented by lawyers; and
- (b) in contravention of r 10.1, Mr PT had effectively defamed [LAW FIRM A] in the draft statement of claim; and
- (c) Mr PT's attacks on Mr KB both in the draft statement of claim and in correspondence of 15 November were defamatory; and
- (d) Mr PT's defence of his attack on the lawyers by reference to argument that he was acting on his client's instructions, failed to recognise that the lawyers who were the subject of his criticisms, were acting on their clients' instructions; and
- (e) Mr PT adopts the stance that the legal positions he had taken on various issues had been vindicated by the fact that the parties had agreed on a settlement, but the contested legal views on issues identified in Mr PT's statement of claim were not definitively resolved (in his favour) by virtue of the fact that a settlement had been reached; and
- (f) there was no evidential foundation for what Mr RL and Mr UT considered to be Mr PT's "scandalous" allegation that Mr KB had been acting in the role of a "shadow trustee"; and
- (g) Mr PT's assertion of a standard objective test ("honest and reasonably competent lawyer") is not articulated in the Rules or the Lawyers and Conveyancers Act 2006 (the Act), nor is there a foundation for the test advanced in the common law; and
- (h) as a consequence, Mr PT could not realistically submit that his pleadings as framed, did not contain allegation that both lawyers and trustees had acted dishonestly.

[15] Whilst Mr RL and Mr UT had refrained when first filing their complaint from making suggestion to the Committee as to the nature of the penalty that they considered the Committee should impose if their complaint was upheld, on considering Mr PT's response to the complaint and having then formed the view that Mr PT's response was lacking in contrition, Mr RL and Mr UT considered that it would be appropriate for the

¹ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

Committee to direct that Mr PT provide [LAW FIRM A], Mr SZ, Mrs QT and Ms AI, with a letter of apology.

[16] Mr JK (for Mr PT) provided a further response to the complaints on 20 December 2019. It was submitted for Mr PT that:

- (a) there had been no breach of r 10.2; and
- (b) [LAW FIRM A] acknowledged that the allegations contained in the statement of claim were not allegations made in the course of the proceedings; and
- (c) distilled to its essence, the substance of [LAW FIRM A]'s concerns appeared to be with the tone adopted by Mr PT; and
- (d) approached from that perspective, a more accurate summation of the [LAW FIRM A] complaint would be that it was complaint that Mr PT had failed to treat [LAW FIRM A] with courtesy and respect; and
- (e) opportunity was provided to challenge the issues identified in the statement of claim; and
- (f) there was a solid basis for criticising the conduct of the trustees "and their firm"; and
- (g) the complaints were advanced in the context of [LAW FIRM A] surrendering the file and having its trustee firm removed from office in circumstances which have "coloured the complaint strongly"; and
- (h) the "administration argument" advanced by [LAW FIRM A] was manifestly wrong; and
- (i) if [LAW FIRM A] had considered that matters contained in the draft statement of claim were raising allegation that a lawyer had acted dishonestly, it could reasonably have been expected that immediate objection would have been raised, but that did not occur; and
- (j) the failure to raise objection (if affront was taken) presented as particularly surprising considering the number of authors that had worked on the file; and
- (k) Mr PT had applied the correct test in contending that allegation that a lawyer has failed to attain the standard of an honest and competent

practitioner is not the equivalent of making allegation that the lawyer is incompetent or dishonest;

- (l) there were no grounds which could reasonably require or necessitate Mr PT being required to provide apology to any party.

[17] Mr RL and Mr UT provided a response to Mr JK's correspondence of 17 January 2020. It was submitted that:

- (a) it would have been clear from the documents in Mr PT's possession (being that the issues engaged matters of trust administration) that [LAW FIRM A] were acting for the trustees; and
- (b) Mr PT's purpose in writing directly to Mr SZ was likely an attempt by him to secure a psychological advantage; and
- (c) [LAW FIRM A] had sound reasons for not raising objection to allegations contained in the statement of claim, notwithstanding that members of the [LAW FIRM A] staff who had read the statement of claim were offended by it; and
- (d) [LAW FIRM A]'s decision to surrender its file and permit its trustee company to be removed from the trust reflected an appropriate recognition of its professional obligations and should not be construed as indication that [LAW FIRM A] accepted allegation that it had mismanaged matters; and
- (e) Mr PT and Mr JK's responses, provide indication of their refusal to acknowledge [LAW FIRM A]'s "essential complaint", being argument that the draft statement of claim was defamatory of both [LAW FIRM A] and the trustees; and
- (f) even in the event that [LAW FIRM A] were wrong in advising their clients in the manner they had (which was denied), this would still not justify assertions made by Mr PT that Mr SZ, Mrs QT, Mr KB or [LAW FIRM A] were dishonest and/or incompetent; and
- (g) the defamatory remarks made in the statement of claim were the most egregious feature of a "wildly defective document"; and
- (h) argument advanced by Mr PT to support contention that his legal analysis was correct was misconceived; and

- (i) it remained undetermined in New Zealand Law as to whether a will can constitute a deed; and
- (j) an apology was sought from Mr PT.

[18] Armed with a comprehensive raft of submissions from the parties, the Standards Committee concluded that it would be appropriate to traverse the possibility of the parties being referred to mediation. The complainants did not wish to consider that option. The matter was set down for a hearing, and the parties invited to provide further submissions.

[19] The notice of hearing identified the issues raised by the alleged conduct as being whether Mr PT:

- (a) Made direct contact with a represented client in breach of r 10.2 of the Rules.
- (b) Drafted or allowed the drafting of a statement of claim which included a possible breach of proper purpose (r 2.3).
- (c) Failed to adequately communicate in the drafting of the statement of claim in breach of r 3.

[20] Mr PT provided a brief response to the Committee's notice of hearing on 10 August 2020. He submitted that:

- (a) the complaint appeared to have been reframed to a degree by the Committee, and that in addition to r 10.2, the Committee specifically references rr 2.3 and 3; and
- (b) he had nothing further to add in respect to the complaint of a breach of r 10.2; and
- (c) the question to be addressed in considering r 2.3, is whether he had had "purposefully" set out to cause unnecessary embarrassment, distress or inconvenience to the trustees and/or [LAW FIRM A]; and
- (d) Rule 3 was fundamentally directed towards a lawyer's conduct engaging their own client.

[21] Mr RL and Mr UT filed their final submission on 24 August 2020.

[22] Their submission commenced with acknowledgement that whilst what they described as Mr PT's offending conduct would not be considered "major", it nevertheless was conduct that was deserving of a disciplinary response.

[23] In significant part, the final submission amplified and provided further context to the concerns that had been addressed in the earlier submissions filed.

[24] The Standards Committee identified the focus of its investigation as being a consideration of the issues identified in its notice of hearing.

[25] The Standards Committee delivered its decision on 15 February 2021.

[26] The Committee determined that Mr PT's actions in writing directly to the trustees constituted a breach of r 10.2. Further, the Committee concluded that Mr PT had breached r 2.3 by advancing allegations against [LAW FIRM A] of incompetence, dishonesty, deception and a lack of professionalism.

[27] Consequential on its findings that Mr PT had breached conduct rules, the Committee made findings that Mr PT's conduct had been unsatisfactory.

[28] In reaching that decision the Committee considered that:

- (a) Mr PT should have been aware, considering the documents in his possession that indicated that [LAW FIRM A] acted for the trustees, that it would have been appropriate for him to have contacted [LAW FIRM A] rather than writing directly to the trustees.
- (b) Mr PT could have advanced a strong argument without necessity for speculation that [LAW FIRM A] were motivated by incompetence, dishonesty, deception and/or improperly vested interests.

[29] In providing its assessment as to the seriousness of the two conduct breaches established, the Committee concluded that both matters constituted unsatisfactory conduct at the more serious end of the scale.

Application for review

[30] Mr PT filed an application for review on 30 March 2021.

[31] He submits that:

- (a) he had not breached r 10.2;

- (b) nor had he used or threaten to use a process for an improper purpose (r 2.3).

[32] It was Mr PT's contention, that r 10.2 requires actual knowledge of representation in a matter, rather than the constructive knowledge relied on by the Committee. He did not consider that the rule could sensibly be applied in circumstances where he had opened a fresh file and forwarded correspondence to a trustee.

[33] Turning to the question as to whether a legal process had been used for an improper purpose, Mr PT submitted that no legal process was involved (in the sense as he described such process) in preparing the draft statement of claim. Further, he contended that whilst the Standards Committee had referenced numerous paragraphs in the draft statement of claim that the Committee had concluded were objectionable, it had failed to identify the specific passages in the statement of claim which merited such finding.

[34] Mr PT disagreed with the Committee's conclusion that there was no basis for the allegations made against [LAW FIRM A].

[35] Mr PT rehearsed argument advanced in earlier submissions that he had prefaced his criticisms of [LAW FIRM A]'s conduct by reference to the standards required of an honest and competent lawyer, in effect raising his concerns under the spectre of a potential negligence claim. Reference to the standards expected of an "honest and reasonably competent lawyer" did not amount to a legal process being used for an improper purpose.

[36] Mr UT and Mr RL were invited to comment on Mr PT's review application.

[37] That response, understandably in circumstances where both parties had availed themselves of ample opportunity to ventilate the issues, essentially reinforced the arguments that had been earlier traversed.

[38] In summary, it was argued by Mr UT and Mr RL that:

- (a) acquiescence to Mr PT's argument that a breach of r 10.2 could only be established in circumstances where a lawyer had actual knowledge that a party was legally represented, would provide opportunity for lawyers to circumvent the rules; and
- (b) it defied credibility for Mr PT to contend that he did not know at commencement that [LAW FIRM A] were acting for the trustees; and

- (c) Mr PT's actions in writing directly to the trustees, had caused distress to both; and
- (d) the only inference that could be drawn from Mr PT's decision to communicate directly with the trustees, was that in doing so he was endeavouring to obtain an advantage; and
- (e) Mr PT had not provided [LAW FIRM A] with a copy of the statement of claim and it was misleading for Mr PT to suggest that he had provided opportunity to [LAW FIRM A] to comment on the statement of claim; and
- (f) Mr PT continued to ignore the significant issue that he was not a party to the instructions received by [LAW FIRM A]; and
- (g) underpinning Mr PT's argument is the enduring and adamant conviction that he is "correct" on all issues of legal interpretation, this to justify the aggressive and inappropriate manner in which he had framed the draft statement of claim; and
- (h) argument that the statement of claim had not been filed, and was not a public document, was ignoring of the fact that the document had been disseminated to a range of parties.

[39] In conclusion, Mr RL and Mr UT indicated their agreement with the Standards Committee assessment of both breaches being at the more serious end of the scale. To mark what they perceived to be Mr PT's lack of contrition or humility in the course of progressing his response to the complaint, they sought direction that the fine imposed by the Committee be doubled.

Hearing

[40] A hearing proceeded on Thursday, 10 March 2022.

[41] Mr NT appeared for Mr RL and Mr UT. Mr PT was represented by Ms CZ.

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

... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

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

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.

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

A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO’s own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee’s determination.

[44] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee’s determination, has been to:

- (a) Consider all of the available material afresh, including the Committee’s decision; and
- (b) Provide an independent opinion based on those materials.

Discussion

[45] The issues to be addressed on review are:

- (a) Did Mr PT breach r 10.2 by communicating directly with Mr SZ in circumstances where it should have been apparent to Mr PT that Mr SZ was legally represented?
- (b) Did Mr PT breach r 2.3 by failing to use a legal process for proper purpose?

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

Did Mr PT breach r 10.2 by communicating directly with Mr SZ in circumstances where it would have been apparent to Mr PT that Mr SZ was legally represented?

[46] Rule 10.2 provides that:

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.

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

[48] The principle behind the rule is equally clear: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.

[49] The exceptions to the rule that allow a lawyer to communicate directly with a person who is represented, have no application in this case.

[50] It has been noted that "sound reasons of principle are behind this rule. The rule seeks to prevent a lawyer from circumventing the protection afforded by the other party's lawyer and obtaining an unfair advantage."⁵

[51] It was submitted for Mr PT, that in concluding that Mr PT should not have directly written to Mr SZ, the Committee overlooked a critical element of r 10.2 in that it had failed to recognise that when Mr PT wrote to Mr SZ, he was doing so from the context of acting on fresh instructions in a new matter in which he had been recently instructed.

[52] The Committee had, it was argued for Mr PT, misunderstood that Mr PT was acting on a new retainer.

[53] Nor did Mr PT consider that there were issues of public protection that were compromised by him writing directly to Mr SZ. Mr SZ was an experienced auditor and accountant who was fully aware that Mr PT's client had concerns regarding the administration of her late father's trust.

[54] Concern was raised by Mr PT, that lawyers could potentially put themselves at risk of breaching privacy principles if they wrote to a lawyer raising concerns identified

⁴ Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [15.4].

⁵ At [15.4].

by a client, in circumstances where it had not been identified that the lawyer written to was acting for a particular party.

[55] Mr PT emphasised that he knew Mr SZ. He understood Mr SZ to be a personable individual who would be receptive to commencing a conversation around the issues that were of concern to Mr PT's client.

[56] Mr PT says that his correspondence to Mr SZ was written not with purpose to identify a particular dispute and to advocate his client's position in respect of that dispute, but rather to open a conversation on various issues. It was his hope and expectation that opening a dialogue would pave the way for the parties to negotiate an outcome beneficial to both.

[57] Having carefully considered the submissions advanced for Mr PT, I am not persuaded that Mr PT was acting on a new matter such as would absolve him of obligation to have understood and appreciated that Mr SZ would have been legally represented.

[58] I do not consider that Mr PT's characterisation of his correspondence to Mr SZ as an attempt to initiate a conversation, accurately reflects the extent to which those concerns had become previously ventilated.

[59] Prior to instructing Mr PT, Ms AI had sought advice from another lawyer.

[60] Her concerns regarding the management of her late father's trust could be succinctly identified. She objected to her father's second wife being appointed as a beneficiary of her late father's trust. Whilst identifying the steps that could be taken to ameliorate those concerns may not have presented as straightforward, Ms AI's position was clearly understood.

[61] The commencing paragraph of Mr PT's correspondence to Mr SZ of 11 December speaks volumes to Mr PT's understanding that he was, when writing to Mr SZ, not initiating a fresh conversation about a new issue, but rather communicating with Mr SZ about a matter that Mr SZ was well aware had been concerning to Ms AI. Mr PT commences his correspondence with indication to Mr SZ that "[it] will come as no surprise to you that Ms AI is unhappy with the way the CTG Trust (the Trust) is being administered".

[62] However, whilst I agree with the Committee that Mr PT should have been aware that Mr SZ was represented by [LAW FIRM A], I am not persuaded that the breach required a disciplinary response.

[63] It has been frequently emphasised that conduct rules must be considered in their context and applied as “sensibly and fairly as possible”.⁶

[64] Whilst I agree with the Committee that Mr PT should have been aware from the documentation in his possession that [LAW FIRM A] had long acted for the trustees (and he would have been aware of that from the instructions he received from his client) it appears to be the case that whilst Ms AI had been expressing reservations about the trust, those concerns had not got to the point where a direct challenge had been taken to the trust.

[65] After hearing evidence from Mr PT, I was persuaded that he was genuine in his view that he saw no difficulty in writing directly to Mr SZ. He considered that he was, after first taking instructions from Ms AI, initiating new steps and did not see the necessity to forward the correspondence to [LAW FIRM A] as he could not be certain that [LAW FIRM A] would be acting.

[66] Mr PT said that he had personal knowledge of Mr SZ. He had a view of Mr SZ as being a personable and pragmatic individual. Mr PT considered that Mr SZ would be receptive to receiving what Mr PT considered was a courteous request for information.

[67] [LAW FIRM A] submitted that what likely prompted Mr PT to write directly to Mr SZ, was a desire to “obtain a psychological advantage in respect of their client’s adversarial claim”. Further, it was contended by [LAW FIRM A], that Mr SZ had expressed “surprise and concern at the aggressive tone struck by Mr PT”.⁷

[68] I have no direct evidence before me from Mr SZ and accept the evidence of [LAW FIRM A] that Mr SZ was disquieted when he received correspondence from Mr PT.

[69] But I do not consider that Mr PT’s correspondence was discourteous or overtly abrasive. [LAW FIRM A] may have considered that the information requested by Mr PT had been previously provided to his client, but there is nothing objectively problematic with either the tone or content of Mr PT’s correspondence.

[70] Nor with every respect to [LAW FIRM A], do I consider that Mr PT’s correspondence can reasonably be interpreted as an attempt by him to secure a “psychological advantage”. That considerably overstates the impact of what was essentially a request made of Mr SZ to provide information, and an account of concerns Mr PT had concerning the manner in which the trust had been administered.

⁶ *Wilson v Legal Complaints Review Officer* [2016] NZHC 2288 at [43].

⁷ [Law Firm A] correspondence to Standards Committee 17 January 2020, at p [5].

[71] It is on occasions understandable that as the investigation of a conduct complaint evolves through the inquiry process, both the complainant and the party complained of become more firmly entrenched in their respective positions.

[72] In correspondence to the Complaints Service of 17 January 2020, [LAW FIRM A] advised that it would not have taken steps to file complaint that Mr PT had breached his professional obligations by writing directly to Mr SZ if that had been the only issue of concern. However, on receipt of Mr PT's draft pleadings, [LAW FIRM A] concluded that it had no option but to proceed with a conduct complaint.

[73] In its final submission to the Standards Committee of 13 October 2020, [LAW FIRM A] noted that whilst it acknowledged that Mr PT's offending conduct "may not be major in the scale of lawyer misconduct, it is submitted that formal censure is appropriate".

[74] When the matter arrived at review, [LAW FIRM A] observed that it found itself in agreement with the Standards Committee that both issues identified in the Committee's investigation constituted unsatisfactory conduct "at the more serious end of the scale".⁸

[75] I do not minimise [LAW FIRM A]'s concern at Mr PT's decision to write directly to Mr SZ, but I think it probable that the practitioners' early indication that they would not have proceeded a conduct complaint if the complaint related solely to concerns over Mr PT's actions in writing to Mr SZ, presents as a realistic reflection of their assessment as to the seriousness of that particular conduct issue.

[76] [LAW FIRM A]'s attitude to the conduct hardened as a consequence of what they perceived to be a continuing indifference on Mr PT's part to the impact of his conduct.

[77] Whilst I do not overlook the effect on a represented party of receiving correspondence directly from a lawyer and I accept that Mr SZ may have been upset at having been written to directly, as an experienced auditor and accountant, I think it highly unlikely that Mr SZ would have been unduly disconcerted on receiving Mr PT's correspondence. As an experienced professional, he would have immediately recognised that he should consult his lawyer. I think it probable that Mr PT would have had that expectation that Mr SZ would likely have sought legal advice on receipt of his correspondence.

⁸ [Law Firm A] submissions to LCRO (16 April 2021) at [45].

[78] I do not consider that Mr SZ was in any way prejudiced or compromised by Mr PT's breach of r 10.2.

[79] 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:⁹

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.

[80] That position was affirmed in *Chapman v Legal Complaints Review Officer* where the High Court noted that:¹⁰

... 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.

[81] 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.¹¹

[82] Included in those powers, is the ability to exercise a discretion to take no action, or no further action on the complaint.¹² 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.¹³

[83] I propose to reverse the Committee's finding that Mr PT's conduct in writing directly to Mr SZ, constituted unsatisfactory conduct.

Did Mr PT breach r 2.3 by failing to use a legal process for proper purpose?

[84] Both counsel for Mr PT and counsel for [LAW FIRM A] agreed that this issue was, by some distance, the more serious of the conduct issues.

[85] The Standards Committee on examining the draft statement of claim, concluded that Mr PT had made allegations in the statement of claim that [LAW FIRM A], and specifically Mr KB, had acted incompetently and dishonestly, and exhibited a lack of professionalism by acting in their own interests.

⁹ *Burgess v Tait* [2014] NZHC 2408 at [82].

¹⁰ *Chapman v Legal Complaints Review Officer* [2015] NZHC 1500 at [47].

¹¹ Section 211(1)(b) of the Act.

¹² Section 138.

¹³ Section 138(2).

[86] The Committee considered that Mr PT had no grounds to support the allegations made, and that in advancing such serious accusations, Mr PT had breached r 2.3.

[87] Rule 2.3 provides that:

a lawyer must use legal processes only for proper purposes. A lawyer must not use, or knowingly assist in using, the law or legal processes for the purposes of causing unnecessary embarrassment, distress, or inconvenience to another person's reputation, interest, or occupation.

[88] At the hearing, it was submitted for Mr PT that:

- (a) in preparing a draft statement of claim, Mr PT was not using a legal process, and therefore r 2.3 could not be engaged; and
- (b) the purpose of Mr PT's draft statement of claim was to outline the issues of concern to him, to provide a context for those concerns, and to open a dialogue which would allow opportunity for those concerns to be addressed; and
- (c) the statement of claim should be viewed for what it was, a draft, and be assessed in that context; and
- (d) if Mr PT had proceeded to file the statement of claim, the document filed would likely have been significantly amended and modified from the draft prepared; and
- (e) in referencing the practitioners' conduct in the statement of claim to the standard of an honest and competent lawyer, Mr PT was simply referencing a standard commonly applied in pleadings and in doing so, was not making or intending to make, negative comments which impugned the honesty of [LAW FIRM A] or Mr KB.

[89] The first matter to consider, is the question as to whether Mr PT's decision to provide the lawyers acting for the trustees with a draft statement of claim constituted a legal process.

[90] There is no indication in the Standards Committee decision of the Committee having directly addressed the question as to whether Mr PT's preparation of the draft statement of claim constituted a legal process.

[91] It was submitted by Ms CZ, that the statement of claim (and the accompanying correspondence) was prepared by Mr PT and provided to the trustees' lawyers with

purpose to provide an overview of the concerns his client had regarding decisions that had been made in the management of the trust.

[92] This argued Ms CZ, was no more than Mr PT setting out his analysis of the factual and legal issues, and articulating that analysis in the form of a statement of claim.

[93] Mr PT described the purpose of the draft statement of claim as a genuine attempt to open a conversation with intention that it provide a springboard for ongoing discussions. Mr PT records his objective in drafting the statement of claim as being to partly assess the case, but also to “conveniently summarise the facts as they have emerged from the correspondence and documents we have to date”.¹⁴

[94] This could not, it was argued for Mr PT, constitute a legal process such as was envisaged or intended to be captured by r 2.3.

[95] It was submitted, that the footnote to r 2.3 which provides examples of legal processes that could potentially constitute a breach of r 2.3, identified three examples, all of which engaged actions taken when a particular and specific legal process is instigated (issuing of a statutory demand/registering a caveat/serving documents). Steps taken by Mr PT were not, it was argued, analogous with processes of that nature.

[96] I agree with Ms CZ that the examples provided reference steps that suggest that for rule 2.3 to be engaged, it would require evidence of some formal procedural or statutory steps to have been taken. It could not reasonably be contemplated for example, that the rule would embrace for instance the conventional and common practice of lawyers exchanging correspondence and communications concerning their respective client’s affairs.

[97] It was submitted for Mr PT, that an examination of the correspondence that accompanied Mr PT’s draft statement of claim, reinforces argument that Mr PT was using the vehicle of the statement of claim, as a means to articulate his client’s position, and to provide a comprehensive overview of the factual and legal issues engaged.

[98] Mr PT’s correspondence gives no indication of an intention to file the statement of claim if the objectives he seeks in his correspondence are not met.

[99] I agree with the submission made for Mr PT that the preparation of a draft statement of claim does not present as entirely analogous with direct steps taken to initiate a specific legal process such as lodging a caveat or serving a statutory demand,

¹⁴ Mr PT’s correspondence to [Law Firm D] (11 July 2019) at [4].

[100] But I am not persuaded that Mr PT's statement of claim, considered as it must necessarily be in context, does not fall within the description of a legal process as contemplated and envisaged by r 2.3.

[101] I do not consider that attempts to characterise the statement of claim as being no more than a first attempt to articulate the issues, a "conversation opener", provide full account of what Mr PT was endeavouring to achieve by electing to advance his client's position in this fashion.

[102] To state the obvious, if Mr PT simply wished to outline his client's position, he could have adopted a conventional approach of simply writing to opposing counsel setting out his client's position.

[103] But he did not do that. He elected to prepare a comprehensive statement of claim to accompany his initial correspondence.

[104] The draft statement of claim was, as noted, comprehensive. It identifies three defendants. The claim pleads three causes of action. Specific remedies of significant consequence are sought, together with orders for costs.

[105] I do not consider that any reasonable construction can be placed on the steps taken by Mr PT, other than that he had expectation that advancing his client's case to the point where an "oven ready," comprehensive statement of claim was provided to the trustee's lawyers, was a step taken with purpose to assert leverage over the trustees.

[106] Mr PT was not simply opening a conversation or articulating his client's position, he was advancing that position from the stance of advancing argument that both the trustees and the lawyers representing those trustees had breached obligations owed to his client to the extent that those breaches provided foundation for actionable claims to be advanced in the High Court.

[107] Framing his client's concerns in the form of a properly formatted and comprehensive statement of claim, rather than in a more conventional correspondence format, is a singular message to the recipients that this is what they can expect to be confronted with in the High Court if matters aren't resolved.

[108] In electing to advance his client's position in this fashion, Mr PT was using a legal process.

[109] Rule r 2.3 provides that a lawyer must not use, or knowingly assist in using, the *law* (emphasis added) or legal process for the purpose of causing unnecessary distress or inconvenience to another person's reputation, interests or occupation.

[110] Reference to “the law” in conjunction with legal process, gives indication that the parameters of conduct captured by rule are to be interpreted reasonably broadly. But that interpretation must be overlaid by a consideration of context.

[111] In my view, Mr PT was, in providing the trustees with a comprehensive fifty-two-page statement of claim, using the law and a legal process.

[112] It is not disputed, that if Mr PT had proceeded to file his statement of claim, there could be no disagreement that he was implementing a legal process.

[113] Had the statement of claim been filed, complaint that Mr PT had maligned reputations without having a proper foundation to do so, is conduct that would fall to be considered under rr 13.8, 13.8.1 and 13.8.2.

[114] Those rules collectively:

- (a) impose obligation on a lawyer engaged in litigation to refrain from attacking without good cause a person’s reputation in court or in documents filed in court proceedings; and
- (b) direct that a lawyer must not be a party to the filing of any document in court alleging fraud, dishonesty, undue influence, duress or other reprehensible conduct, unless the lawyer has taken appropriate steps to ensure that there were reasonable grounds for making the allegation; and
- (c) provide that a lawyer should not make allegations against persons not involved in the proceedings, unless those allegations are necessary to the conduct of the litigation and reasonable steps have been taken to ensure the accuracy of the allegations and, where appropriate, the protection of the privacy of those persons.

[115] Whilst the rules which require a lawyer to exercise necessary caution when filing documents or making submissions to the court which have potential to attack or impugn a person’s reputation have no direct application here as Mr PT had not filed the statement of claim, it could reasonably have been expected of Mr PT that he would be cognisant of the need to ensure when preparing his draft, that there was proper foundation for any allegation that had potential to impugn any individual’s reputation.

[116] Whilst Mr PT argues that it was likely that there would have been amendments and modifications to the statement of claim in the event that he proceeded to file the document, if the comprehensive criticisms made concerning the conduct of both the trustees and [LAW FIRM A] and Mr KB, particularly to the extent that those criticisms

embraced allegations of lack of competency, failure to disclose information, possibility of deceptive conduct, and misrepresentation, were matters that Mr PT would contemplate removing from the statement of claim, question could fairly be asked as to why those matters were included in the draft.

[117] If by subsequent amendment of the draft pleading Mr PT means that he would have removed paragraphs which might have infringed rr 13.8, 13.8.1 & 13.8.2 then this in my view underscores my conclusion that the draft was intended to cause embarrassment, distress or inconvenience. Why include the paragraphs otherwise?

[118] I have noted that conduct rules are to be interpreted sensibly and fairly. It cannot be the case (and nor is it argued by Mr PT) that a lawyer can prepare a draft statement of claim and provide that document to opposing counsel with a cavalier indifference to the need for the statement of claim to have been drafted with attention to the requirements of r 13.

[119] Mr PT vigorously rejected suggestion that his statement of claim was improper, or that it could be construed as having contained allegations that [LAW FIRM A] or Mr KB had acted dishonestly.

[120] In advancing this argument, Mr PT contended that the approach he had adopted in drafting his statement of claim, particularly in respect to those elements of the claim in which he had pleaded that Mr KB or [LAW FIRM A] had failed to meet the standard of an honest and competent lawyer, reflected an entirely conventional and commonplace approach to pleading a claim.

[121] In essence, Mr PT was arguing that those elements of his statement of claim which the Committee had concluded were speculative, improper, unacceptable and aggressive, were entirely mischaracterised by the Committee. It was his view, that the manner in which the statement of claim was pleaded, particularly to the extent that the claim referenced the standard of an honest and competent lawyer, was consistent with a standard commonly adopted. Mr PT argued that pleading a claim by reference to the standard required of an honest and competent lawyer, did not convey accusation of a party having acted dishonestly. Mr PT argued that no disciplinary consequence could reasonably flow from him adopting what he considered was a common approach to pleading arguments in a trust claim.

[122] Considerable opportunity was provided to Mr PT at the hearing to explain the standard on which he placed such reliance, and to clarify how application of the standard he relied on, removed any hint from the pleadings of him having made allegation that parties had acted dishonestly.

[123] It was Mr NT's position that he had never, in his considerable experience as a litigator, encountered the standard that Mr PT was placing reliance on.

[124] In explaining his position, Mr PT said the following:

Lawyers can have arguments about whether that is the relevant standard and so forth but that is the standard I consider relevant to a lawyer advising executors and trustees.

I have not said that they (the lawyers) were dishonest. I never said that. What I have said is that there was a standard. A massive distraction here is the taking of a word from the standard and applying it in a different context.

You can argue about whether I got the standard right or wrong. The issue here is whether I said they were dishonest.

The standard applies generally to trust matters when you look at something that has gone wrong.

I am at a loss to understand what goes to state that Mr KB was necessarily dishonest.

The circumstances were such, that it was open to draw conclusion that there may have been possibility of inappropriate conduct.

I could have described the standard in a different way, but it is a standard used in other proceedings.

[125] In providing amplification of Mr PT's position, Ms CZ reinforced that a standard commonly adopted in pleadings was that of the honest and competent lawyer. She submitted that "honest" in the context of disciplinary proceedings, had evolved to encompass the more general concept of "integrity" in a lawyer's dealings. Ms CZ explained that Mr PT had "looked at specifics where he saw issues of competency, and where he saw issues of integrity – and he raised them in the alternate".

[126] As I understood the argument for Mr PT, it was that it was common place in circumstances where it was contended that there had been significant failings on the part of a lawyer acting for trustees, for those concerns to be pleaded in terms of reference to the standards required of an honest and competent lawyer.

[127] Mr PT was invited to refer me to relevant case law in which the standard on which he placed reliance had been applied.

[128] In the course of a brief adjournment, Ms CZ sourced a case which she submitted provided evidence of the court applying the standard relied on by Mr PT.¹⁵

¹⁵ *Wilkinson v ASB Bank* [1998] 1 NZLR 674.

[129] I have considered the case. It does not in my view provide authority for the argument advanced for Mr PT.

[130] Distilled to its essence, Mr PT's argument was that in drafting pleadings by reference to the standards of the honest and competent practitioner, he was not casting aspersions on the characters of the practitioners but referencing a standard which had proper application in circumstances where a lawyer's examination of the facts of a particular case led him or her to reasonably conclude that those facts disclosed possibility of:

- (a) A lawyer failing to have acted competently; or
- (b) A lawyer having failed to act with integrity.

[131] This inevitably raised question as to whether Mr PT had a reasonable evidential foundation to raise allegation of a lack of competency, and a foundation to link a perceived lack of competency to suggestion of possibility that a lawyer had failed to act honestly or with integrity.

[132] As noted by the Standards Committee, it is open to a lawyer to advance strong argument that a lawyer had failed to act competently, but another to speculate that a lawyer's actions were deceptive, dishonest, and motivated by self-interest.

[133] Critical to Mr PT's argument was contention not only that the standard relied on did not present as an attack on the lawyer's honesty (integrity), but also that he had a reasonable evidential foundation for raising concerns about the lawyer's conduct.

[134] What was Mr PT saying about the lawyers in his draft statement of claim?

[135] A careful examination of the draft indicates that his criticisms of the lawyers were not exclusively framed in specific references to the lawyers, but also collaterally couched in comments made concerning the alleged shortfalls of the trustees.

[136] It was Mr NT's contention that whilst it could be assumed that Mr PT's filing of a 57-page statement of claim would appear to give indication that the matter was one of some complexity, the crux of the dispute was relatively straightforward.

[137] Mr NT summarised the issues as claims that:

- (a) Mrs YW had not been properly appointed a beneficiary; and
- (b) Mr SZ had not been properly appointed a trustee; and

- (c) Distributions of trust funds had not been appropriately made; and
- (d) A decision made to sell the business was unwise.

[138] In my view, Mr NT provided succinct account of the critical issues.

[139] It is from the context of a consideration of those issues, that Mr PT's comments about the lawyers should properly be considered.

[140] Amongst the matters pleaded by Mr PT in the draft statement of claim were allegations that:

- (a) an honest and reasonably competent lawyer would have recognised that there was serious issue as to whether Mr HT's will contained an operative provision for the appointment of additional beneficiaries to his trust (p 68); and
- (b) [Law Firm A] failed to meet the standards of an honest and competent lawyer ([69]); and
- (c) the trustees ought to have suspected that [LAW FIRM A] might be using a deed to camouflage a defect in the will ([73]); and
- (d) an honest and reasonably competent lawyer would have recognised that steps taken to formalise the appointment of Mrs YW as a beneficiary were ineffective ([98]); and
- (e) [LAW FIRM A] failed to meet the standard of an honest and competent lawyer ([99]); and
- (f) Mr KB had misdirected himself as to what Mr HT's wishes had been ([158] and [174]); and
- (g) Mr KB had misdirected himself as to the terms of the trust, and the nature of Mr HT's wishes ([182]); and
- (h) Mr KB either did not have the necessary knowledge and competence to advise trustees and/or he deliberately misinformed the trustees to protect his firm ([277]); and
- (i) the trustees allowed Mr KB to cross the line from providing legal advice to substituting his judgement for that of the trustees and permitted Mr KB to become a "shadow trustee" ([280]).

[141] Putting to one side the question as to whether Mr PT, in drafting his statement of claim did so by reference to the adoption of a commonly accepted standard, it was nevertheless the case that if Mr PT was to advance allegation that both Mr KB and [LAW FIRM A] had failed to act competently, and that the evidence of those failings was so compellingly obvious as for it to have been reasonable for Mr PT to conclude that matters had gone seriously awry, Mr PT was required to lay a sound foundation for that argument.

[142] It was acknowledged by Mr PT that on occasions lawyers will have differing views on the application of the law to a particular set of facts. Mr PT accepted that disagreement between lawyers of this nature, could not reasonably prompt criticism from one lawyer of another that a lawyer had failed to act competently.

[143] There will be circumstances where a lawyer's understanding of the law relevant to a particular issue may be so demonstrably erroneous, that reasonable question can be asked of the lawyer as to whether the lawyer met the standard required of a competent practitioner.

[144] But legitimate disagreements over disputed points, in circumstances where contesting lawyers have reasonable grounds for the positions being advanced, do not provide a proper basis for advancing of accusation that a lawyer has acted incompetently.

[145] The step taken by Mr PT in preparing a draft statement of claim was acknowledgement of the obvious that in circumstances such as these where parties may be unable to agree on matters critical to the operation of a trust, intervention of the court may be required to resolve the dispute.

[146] Was there reasonable foundation for Mr PT to conclude that an examination of how Mr HT's trust had been managed could lead to no conclusion other than that the trust had not been competently administered?

[147] The commencing point for allegation that Mr HT had been poorly advised, was argument that he had been incorrectly advised when making his final will, that a provision could be inserted in the will which would on his death, allow for direction to be made that his surviving wife be appointed as a beneficiary of his trust.

[148] Steps taken by the trustees to formalise the appointment of Mrs YW as a beneficiary were at the crux of the dispute. Mr PT's client objected to Mrs YW being appointed a beneficiary. She considered her interests to be compromised by the appointment.

[149] Mr PT was emphatic in his view that the trust deed did not allow opportunity to Mr HT to appoint a beneficiary through the vehicle of his will.

[150] [LAW FIRM A] and Mr KB did not agree. They submitted that they had taken legal advice which supported them in their view.

[151] Irrespective as to whether the appointment of Mrs YW as a beneficiary under the provisions of the will were legitimate, [LAW FIRM A] submitted that the steps taken to formalise Mrs YW's appointment as a beneficiary (through execution of a deed(s)) were appropriate and proper, and consistent with Mr HT's expression of expectation that his wife be appointed a beneficiary. It was submitted for [LAW FIRM A] that advice provided to the beneficiaries of steps that could be taken to secure Mrs YW's position together with advice provided to the trustees as to recommendations for distribution of trust funds, were entirely consistent with instructions provided by Mr HT.

[152] It does not fall to the LCRO to make determinations on issues as to whether the operative trust deed provided a proper legal basis for the appointment of a beneficiary, or to reach an emphatic view as to whether subsequent steps taken by the trustees to formalise Mrs YW's appointment were the only steps available to the lawyers, but in examining the issues which are at the heart of this review, I cannot avoid a consideration of the question as to whether steps taken by [LAW FIRM A] presented as a reasonable approach for the lawyers to have taken.

[153] I am satisfied that [LAW FIRM A] considered that they had reasonable grounds to argue that the provision in Mr HT's will may have provided a legitimate basis for argument that Mrs YW's appointment as a beneficiary was legitimate. Nor can Mr PT be certain that his view would have prevailed if the matter had been tested in court.

[154] But the issue was contestable.

[155] A disagreement on the question as to whether Mr HT's will properly provided a mechanism for the appointment of beneficiaries to his trust, did not in my view provide a sufficient foundation for Mr PT to advance allegations of lack of competency.

[156] It was open to him and indeed required of him to advance his client's position vigorously, and he had considerable confidence that he had a strong case, but I am not persuaded that differences of opinion as to whether Mr HT's will provided proper basis for the appointment of his wife as a beneficiary of his trust, provided reasonable foundation for Mr PT to elevate his concerns to allegations of a lack of competency.

[157] Attention then turns to the steps taken by [LAW FIRM A] to regularise any concerns there may have been as to whether Mrs YW had been legitimately appointed.

[158] It is here that Mr PT's analysis of the steps taken by [LAW FIRM A] culminates in forceful conclusion that [LAW FIRM A]'s conduct had been improper.

[159] Mr PT does not simply allow for possibility that [LAW FIRM A], in preparing two deeds to appoint Mrs YW a beneficiary, were mistaken in steps taken to regularise the appointment. He contends that:

- (a) [LAW FIRM A] were attempting to deliberately conceal errors made; and
- (b) Mr KB was asserting improper influence over the trustees; and
- (c) [LAW FIRM A] were acting in their own interests rather than the interests of their clients.

[160] This is argument that is amplified not from a perspective that there is contestable argument as to whether steps taken were appropriate, but from firm conviction that Mr PT's assessment of the situation was correct.

[161] Whilst Mr PT accepted at hearing that if he had got the law wrong then he must take responsibility for that, his draft statement of claim is permeated with direct allegations that reinforce the strength of his certitude in his position.

[162] In providing explanation for his approach, Mr PT explained that "There is a possibility based on the evidence that I had...there is an issue there, there is a possibility that they ([LAW FIRM A]) deliberately obfuscated and tried to cover an error in the will".

[163] Underpinning the arguments as advanced by Mr PT in his statement of claim, is inference that his analysis is so compelling, so correct, so unchallengeable, that no other interpretation can be placed on the various steps taken by [LAW FIRM A], other than that [LAW FIRM A] had been grossly incompetent and motivated to conceal evidence of that incompetence.

[164] In ascribing to the lawyer's actions strong possibility of improper motive, Mr PT pays little regard to the fact that:

- (a) Mr HT had provided clear evidence of his wish for his wife to be appointed a beneficiary of his trust; and
- (b) It was the duty and obligation of the trustees to implement those wishes; and

- (c) Mr PT was not privy to the instructions that Mr HT had provided to his lawyers; and
- (d) Nor was he privy to the instructions that the trustees had provided to their lawyers.

[165] Even if it was the case that the lawyers had erred in taking the steps they had, Mr PT went some considerable distance too far in advancing argument that the lawyers had been incompetent and self-serving and motivated by a desire to cover up their errors.

[166] This goes beyond robust pleading of a client's position.

[167] Argument inevitably returns to the allegation of most concern to the lawyers, being suggestion that they had acted dishonestly.

[168] I am not persuaded that Mr PT was employing a commonly adopted standard when pleading that the lawyers had failed to meet the standards of an honest and competent lawyer, and that by doing so, the accusatory sting of the honest comment was diminished.

[169] Mr PT cautioned against putting what he described as an emotive overlay on the term "honesty". He submits that honest and integrity "have many shades".

[170] I do not conclude when considering both the manner in which Mr PT applied the term "honest" in his pleadings, and the context as explained above in which the pleadings were drafted, that it is either necessary to search for expansive meanings or take into account possibility of interpretation being confused by emotional overlay, when reaching conclusion as to what Mr PT intended when advancing argument that the lawyers had failed to meet the standards of an honest lawyer.

[171] Mr PT was suggesting that the lawyers had not acted honestly.

[172] He is suggesting that they had not been trustworthy.

[173] Ms CZ may be correct when she argues that honesty when examined in a disciplinary context has increasingly come to engage a consideration as to whether a practitioner acted with integrity, but concepts of honesty and integrity are closely intertwined. Integrity denotes qualities of honesty and adherence to firm principles.

[174] I do not consider that Mr PT was pleading a single unified standard when alleging that [LAW FIRM A] had failed to meet the standard required of an honest and competent lawyer.

[175] He was pleading a failure on two counts.

[176] Allegation that [LAW FIRM A] had behaved deceptively, had been deliberately misleading, had deliberately misdirected themselves in regard to their client's instructions and had attempted to cover up their mistakes were not simply arguments about competency. They were arguments about the honesty of their representation.

[177] Bluntly put, in advancing what he describes as the standard of an honest and reasonably competent lawyer, Mr PT was suggesting that the lawyers had behaved dishonestly.

[178] The force of blunt allegation is not diminished or obscured by attempts to ameliorate that force by hinting at possibility that the conduct alleged may not have occurred. When Mr PT pleads that the trustees "knew or ought to have suspected that [Law Firm A] might be using the Deed No 2 to camouflage a defect in the will", he is making allegation of gross impropriety. When Mr PT makes allegation that Mr KB had misrepresented and misdirected himself as to what his client's instructions had been, that is accusation that Mr KB had acted dishonestly.

[179] It is a serious matter to make allegation that a lawyer has failed to act honestly.

[180] I have no doubt that the allegations made would have caused unnecessary embarrassment and distress to the lawyers.

[181] Whilst it was argued for Mr PT that the potential for the lawyers to have been adversely affected was minimised by the limited extent to which the information had been disseminated, I do not consider that exculpates Mr PT from responsibility to ensure that he had a proper basis for the serious allegations made. The statement of claim was provided to practitioners who no doubt would have had a professional relationship with [LAW FIRM A] in the relatively small [City A] law community. It would have been concerning to [LAW FIRM A] that longstanding clients had been confronted with draft pleadings in which it was contended that [LAW FIRM A] had acted dishonestly and deceptively in advancing their interests over the interests of their clients. It is not to overstate the case to say that allegations of this nature strike at the heart of a lawyer's reputation.

[182] Having concluded that Mr PT had used a legal process, and that there was no reasonable foundation for him to have levelled the allegations made, consideration is to be given to the question as to whether the process was exercised for purposes of causing unnecessary embarrassment, distress or inconvenience to the lawyer's reputation, interests or occupation.

[183] The Standards Committee concluded that in electing to draft the statement of claim in such unacceptable, speculative and aggressive terms, Mr PT had intention to cause embarrassment, distress and inconvenience to [LAW FIRM A], Mr KB and the trustees.

[184] I consider it likely that Mr PT's assertive approach was motivated primarily by a desire to forcefully advance his client's position, and viewed in those terms, an attempt to assert leverage.

[185] A lawyer cannot be properly criticised for robustly advancing their client's position. That is their job. But it is difficult to escape conclusion that Mr PT's argument that steps taken by the lawyers were actions that would not have been taken by "honest" lawyers, together with argument that the lawyers had acted deceptively to protect their own interests, were intended to cause embarrassment or distress to the lawyers.

[186] I consider that the Committee was correct in determining that Mr PT had used a legal process for an improper purpose, but if I am wrong on that, in the alternative, I consider that it was open to the Committee to find that Mr PT's conduct was unsatisfactory by reference to s 12(b) of the Act, in that it was conduct that would be regarded by lawyers of good standing as being unacceptable and unprofessional.

[187] I am satisfied that lawyers of good standing would consider that levelling of allegation that a lawyer had failed to meet the standard required of an honest lawyer, and had engaged in conduct that was intended to deceive and divert attention from errors made, absent evidence of a solid foundation for such serious allegations, would constitute unsatisfactory conduct in the terms as contemplated by s 12(b) of the Act.

Conclusion

[188] Whilst I agree with the Standards Committee that Mr PT breached r 10.2 in writing directly to Mr SZ, it is my view that, considered in context, plausible explanation had been advanced by Mr PT for his decision to write directly to Mr SZ. The breach had minimal consequence. The breach did not require a disciplinary response.

[189] The draft statement of claim prepared by Mr PT was a legal process and amounted to a breach of r 2.3.

[190] If I am in error in concluding that Mr PT's drafting of a statement of claim (considered in context) constituted a legal process, in the alternative, Mr PT's conduct constituted unsatisfactory conduct as defined in s 12(b) of the Act.

[191] As Mr PT has had partial success on review, it is appropriate that there be some reduction in the fine imposed by the Standards Committee. I consider a modest reduction is appropriate. The fine imposed is reduced from \$3,000 to \$2,500.

Costs

[192] When an adverse finding is made or upheld, costs will be awarded in accordance with the Costs Orders Guidelines of this Office. Mr PT has had some success, but a cost award is appropriate to reflect the upholding of the more serious conduct complaint. Mr PT is ordered pursuant to s 210(1) of the Act, to pay costs in the sum of \$900.00 to the New Zealand Law Society within 30 days of the date of this decision.

Enforcement of costs order

[193] Pursuant to s 215 of the Act, the order for costs made by me may be enforced in the civil jurisdiction of the District Court.

Anonymised publication

[194] Pursuant to s 206(4) of the Act, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and bereft of anything as might lead to their identification.

Orders

- (a) Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the Committee's determination that there was unsatisfactory conduct requiring a disciplinary response for Mr PT's breach of r 10.2 in making direct contact with a party that he should have been aware was represented, is reversed.
- (b) Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the Committee's determination that Mr PT had breached r 2.3 is confirmed, but with additional finding that in the alternative, Mr PT's conduct in preparing a draft statement of claim, constituted unsatisfactory conduct pursuant to s 12(b) of the Lawyers and Conveyancers Act 2006.
- (c) Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the Committee's determination that Mr PT pay a fine of \$3,000 to the New

Zealand Law Society is modified to provide that Mr PT is to pay a fine in the sum of \$2,500.

- (d) Pursuant to s 210(1) of the Lawyers and Conveyancers Act 2006, Mr PT is to pay \$900.00 in respect of costs incurred in conducting this review, those costs are to be paid to the New Zealand Law Society within 30 days of the date of this decision.
- (e) In all other respects the decision of the [Area] Standard Committee is confirmed.

DATED this 28th day of April 2022

R Maidment
Legal Complaints Review Officer

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

Mr PT as the Applicant
Messrs UT and RL t/a [Law Firm A] as the Respondent
Ms CZ as the Applicants counsel
Mr NT as the Respondents counsel
[Area] Standards Committee
New Zealand Law Society