LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2021] NZLCRO 132

Ref: LCRO 80/2019

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a decision of the [Area] Standards Committee [X]
BETWEEN	**ZB** Applicant
AND	**YC** Respondent

DECISION

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

Introduction

[1] Mr ZB has applied to review a decision made by the [Area] Standards Committee [X], dated 8 May 2019, to take no further action in respect of his complaint concerning the conduct of Mr YC.[1]

[2] The Committee based the majority of its decision on s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act), which allows a Committee to take no further action on a complaint if it considers that it is neither necessary nor appropriate to proceed further.

[1] At the review hearing before me on 23 June 2021 Mr ZB indicated that he did not intend to pursue the issues described by the Committee as Invoice 1430 and the threatening phone call issue. I am nevertheless satisfied that the Committee's conclusions about those two issues were correct. Therefore, I do not propose to deal with them in this decision and will omit reference to them when summarising Mr ZB's complaint, the Committee's decision and Mr ZB's review application as initially filed by him.

[3] However, in relation to one aspect of Mr ZB's complaint, which I will refer to in this decision as the in-house counsel issue, the Committee commenced an own-motion investigation. In doing so it took no further action on Mr ZB's complaint about that issue, on the grounds that he did not have a sufficient personal interest in the subject matter.[2]

[4] Mr ZB also challenges that process and conclusion in his review application.

Background

Mr YC

[5] Mr YC is employed by an incorporated insolvency practice [PK] as an in-house lawyer. [PK] has two directors, and neither is a lawyer. The directors are regularly appointed as liquidators in corporate insolvencies; usually, although not always, jointly.

[6] Mr YC carries out legal work on behalf of [PK], at the direction of its directors. That legal work can include drafting and filing pleadings, predominantly in the High Court, and appearing on behalf of the liquidators in related hearings.

Mr ZB

[7] Mr ZB owns and operates an insolvency practice. He is not a lawyer, and his business does not employ an in-house lawyer.

[8] [PK] and Mr ZB both operate in the same insolvency and liquidation marketplace.

The [XD] proceedings

[9] In 2015 [WE] entered into a construction contract with [XD] Limited [XD], the owner of residential land, to build a number of apartments.

[10] Disputes arose between [WE] and [XD] as to completion of the contract, payments and set-offs.

[11] In [month] 2017 [WE] was placed into liquidation, and [PK]'s directors were appointed as liquidators.

[12] Through the liquidators, [WE] asserted that [XD] owed it a substantial sum of money. [XD] denied this.

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[2] Section 138(1)(e) of the Act.

[13] The liquidators resolved to apply to the High Court for a freezing order over [XD]'s assets (the [XD] proceedings).

[14] Mr YC acted for the liquidators and in [month] 2017 made a without-notice application to the High Court for an interim freezing order (the interim freezing order).

[15] The court initially declined[3], but later granted the interim freezing order.[4]

[16] On [date] the court heard argument as to whether to continue the interim freezing order. In a judgment delivered on [date], the court discharged the order.

[17] In [date] XD] was placed into liquidation, and during [date] Mr ZB was appointed liquidator, replacing an earlier appointment.

[18] Mr ZB considered that Mr YC's conduct in the [XD] proceedings raised professional and ethical concerns, and had cost [XD] in excess of $100,000.

The complaint

[19] Mr ZB lodged his complaint about Mr YC's conduct with the New Zealand Law Society Complaints Service (Complaints Service) on 22 August 2018.

[20] As foreshadowed above, there were two main aspects of Mr ZB's complaint. First, he had a general complaint about Mr YC's role and conduct across a number of matters, as an in-house lawyer employed by [PK] – the in-house counsel issue. Secondly, he complained more specifically about aspects of Mr YC's conduct during the [XD] proceedings.

In-house counsel issue

[21] As to the in-house counsel issue, in essence Mr ZB complained that Mr YC was providing regulated services to persons other than his employer, and that he was holding [PK] out as a provider of legal services to the public. Mr ZB provided examples of where he said that had occurred.

[22] As earlier explained by me, the Committee dealt with the in-house counsel issue by launching an own-motion investigation pursuant to s 130(c) of the Act. In so doing, it decided to take no further action on Mr ZB's complaint about that issue, on grounds that

[3] *[WE] Ltd (in liquidation) v [XD F] Ltd* HC Auckland CIV-[redacted], [date] per [Judge].
[4] *[WE] Ltd (in liquidation) v [XD F] Ltd* [20xx] NZHC [xxx] (date).

commercially sensitive information might emerge, and Mr ZB had no personal interest in the in-house counsel issue.

[23] The practical effect of those procedural steps was to keep the in-house counsel issue alive, but remove Mr ZB as the complainant.

[XD] proceedings

[24] Mr ZB's complaint about Mr YC's conduct in the [XD] proceedings was:

(a) Mr YC failed to inform the court of all available defences when he filed [WE]'s without-notice freezing order application. In particular, he did not inform the court that [XD's] position was that it had made all payments due to [WE] under the construction contract.

(b) Mr YC failed to inform the court of all material facts when he filed the without-notice freezing order application. This included not pointing out a number of instances of defective workmanship, failed reports and/or inspections, construction errors and drainage failures (to mention but a few).

(c) Mr YC filed an undertaking signed by only one of the liquidators. Both should have signed the undertaking.

[25] Mr ZB said that if Mr YC had faithfully discharged the duties of absolute honesty and candour that as a lawyer he owed the court, the High Court would not have granted [WE] an interim freezing order in [month] 2018. Mr ZB argued that the [month] 2018 decision of the High Court to discharge the freezing order, makes that clear.

[26] Mr ZB complained that as a result of Mr YC's conduct, which he submitted amounted to the more serious category of misconduct, [XD] suffered a loss of over $100,000.

Responses

[27] Mr YC responded to Mr ZB's complaint, in his letter to the Complaints Service dated 26 September 2018.

[28] In relation to the in-house counsel issue, Mr YC denied that he was providing regulated services to anyone other than his employer, and he denied that he was holding out his employer to members of the public, as providing regulated services.

[29] In relation to the [XD] proceedings, and after setting out the procedural background, Mr YC said:

(a) Mr ZB was attempting to relitigate the [XD] proceedings through the vehicle of the complaints process.

Misleading the court

(b) At the time that he made the [month] 2018 application for an interim freezing order, [XD] had not provided documentation in which it denied [WE's] claims of debt. Self-evidently, that was not available to be disclosed as part of the application.

(c) However, once that information had been provided and before the [month] 2018 hearing in the High Court, it was disclosed to the court by [WE].

(d) Mr YC otherwise "provided all material defences and facts as required" and did "not accept that the [application for an interim freezing order] was misleading and/or deceptive."

Proceedings for an improper purpose

(e) The purpose of the interim freezing order was to prevent dissipation of assets, and given that there was a debt owed by [XD] to [WE], there was a fear that [XD] might self-liquidate.

(f) Indeed, that is what subsequently happened, demonstrating that the application for the interim freezing order had been prudently made.

(g) There was no intention to cause unnecessary embarrassment, distress, or inconvenience to [XD's] reputation, interests or occupation. Legal proceedings are inherently uncomfortable.

Competence

(h) Mr YC advised the liquidators, and the liquidators based their instructions on the advice given. The appropriate course in all of the circumstances was to make application for an interim freezing order.

Comment by Mr ZB

[30] In his letter to the Complaints Service dated 18 October 2018, Mr ZB commented on Mr YC's response to the complaint, as follows:

(a) Counsel instructed by [XD] for the [date] hearing, at the conclusion of which the interim freezing order was discharged, identified several significant deficiencies in the original without notice application.

(b) In particular, [XD] had made it plain to [WE] that it disputed owing any money, and that it had a proper basis for doing so. [WE]'s liquidators had the correspondence from [XD] relating to this.

(c) This should have been disclosed to the High Court when the without notice application was made. The failure to do so puts Mr YC's conduct in the more serious category of misconduct.

Further information from Mr YC

[31] Mr YC instructed Mr VG to represent him. Mr VG provided the Committee with additional information in his letter to the Complaints Service dated 28 November 2018. He submitted:

(a) Mr YC and his employer [PK] were not in breach of the in-house counsel provisions of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

(b) Mr YC did not owe a duty to [XD], as he did not act for that company and owed it no duty of care. Mr ZB cannot comment on whether Mr YC's representation of the liquidators of [WE] was competent.

[32] In relation to the in-house counsel issue, Mr UH, one of the directors of [PK] (and one of the two liquidators of [WE] provided the Complaints Service with a description of the employment arrangements between [PK] and Mr YC.[5]

Standards Committee decision

[33] The Standards Committee identified the following issues of complaint:[6]

(a) Whether, as an in-house lawyer, Mr YC has provided regulated services to persons other than his employer and, if so, whether he has breached r 15.2.3 of the Rules;

(b) Whether [PK's] in-house counsel division is operating illegally? Whether Mr YC has been a party to the holding out of [PK] as a provider of legal services to the public;

[5] Letter from Mr UH to the Complaints Service (30 November 2018).
[6] Standards Committee decision at [11].

> (c) Whether, when acting as counsel for [the liquidators] in High Court proceedings seeking a without notice interim freezing order against [XD], Mr YC failed to disclose all material facts and all material defences and, if so, whether he breached rr 13 and/or 13.1 of the Rules;
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> (d) ….
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> (e) Whether, in seeking the [interim freezing order], Mr YC attempted to exert improper pressure on [XD] to settle a disputed claim and, if so, whether he used a legal process for an improper purpose contrary to r 2.3 of the Rules;
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> (f) Whether, in representing [WE] and its liquidators, Mr YC acted competently consistent with the terms of the retainer and the duty to take reasonable care and, if not, whether he breached r 3 of the Rules;
>
> (g) ….

The in-house counsel issue

[34] The Committee made the following conclusions about the in-house counsel issue:[7]

> [32] On a strict interpretation of the legislation and rules, Mr YC is only entitled to provide regulated services to [PK] … It is clear that Mr YC has gone beyond that. It is Mr UH personally who is appointed as liquidator, not [PK]. In none of the proceedings referred to was [PK] an actual party.
>
> [33] There are clearly issues as to whether Mr YC is entitled to act for the parties identified by Mr ZB. The Committee was not entirely satisfied with the explanations given to date by Mr YC. It wished to investigate these issues further with input from the NZLS regulatory team. However, it was uncomfortable that Mr ZB is a direct competitor of [PK] and that there was information which had been given by [PK], and further information which may be required from [PK], which is confidential and inappropriate to supply to a competitor.
>
> [34] The Committee noted that these two issues concerned [PK's] general operations and that Mr ZB did not have a personal interest. These are issues which relate to the protection of the public in general. The Committee reached the view that these two issues should more appropriately be investigated by way of an own motion investigation. The Committee was grateful to Mr ZB for bringing these matters to its attention.
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> [35] Accordingly, the Committee decided to take no further action in relation to these issues of complaint … upon the grounds that [Mr ZB] does not have sufficient personal interest in the subject matter of the complaint. It further resolved pursuant to s 130(c) of the Act to open an own motion investigation in relation to these two issues.

[35] As indicated, Mr ZB challenges the Committee's decision to remove his involvement from this issue of complaint and instead launch an own-motion investigation. I deal further below with that ground of review.

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[7] Set out by me at [33](a) & (b).

The [XD] litigation:

Failure to disclose all material facts and defences

[36] The Committee noted that rr 13 and 13.1 of the Rules provide that, first, a lawyer's overriding duty is to the court and that secondly a lawyer has an absolute duty of honesty to the court and must never mislead or deceive it.

[37] As part of that, when making a without-notice application a lawyer must inform the court of all relevant facts, which includes potential defences that might be available to the respondent.

[38] Mr ZB's complaint was that in making the second without-notice application for an interim freezing order in early [year], Mr ZB failed to inform the court about a material fact relevant to the dispute between [WE] and [XD]. In particular, what [WE] had alleged as being monies owed by [XD] was in fact disputed and had been rejected.

[39] Mr YC's position was that the evidence of rejection by [XD] had not been provided until after the court had granted the interim freezing order in [date].

[40] In examining the issue, the Committee referred to the court's judgment in [month] 2018, in which it discharged the interim freezing order.[8] In particular, the court said:

> "REDACTED"

[41] The Committee said that "it would be inappropriate for it to attempt to look behind this statement" and that "the judge, having heard all the evidence and submissions from counsel, was in a better position than the Committee to make [and] assessment [as to whether Mr YC breached rr 13 and 13.1 of the Rules]".[9]

[42] As well, the Committee observed that judges not infrequently refer potential conduct issues to the Complaints Service, but the judge elected not to do so in this case.

Using legal processes for an improper purpose

[43] The Committee noted that this issue of complaint engaged a consideration of r 2.3 of the Rules. This prevents a lawyer from

> [using], or knowingly assisting in using, the law or legal processes for the purpose of causing unnecessary embarrassment, distress, or inconvenience to another person's reputation, interests, or occupation.

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[8] *[WE] Ltd (in liquidation) v [XD F] Ltd* [xxxx] NZHC [xxx] (date).
[9] Standards Committee decision at [42].

[44] Examples of such misuse are provided in a footnote to the rule; namely issuing a statutory demand under the Companies Act 1993 in circumstances where the debt is bone fide disputed, or registering a caveat on a title to land where there is no caveatable interest or serving documents in a way which causes unnecessary embarrassment or damage to a person.

[45] Mr ZB's complaint was that Mr YC used the without-notice process in order to exert improper pressure on [XD] to settle what was a disputed claim.

[46] Mr YC denied this and said that the application was made to prevent dissipation of assets which might otherwise be available to satisfy the debt. There was a concern that [XD] might liquidate itself to prevent recovery of debts by creditors.

[47] The Committee's view was that although the application for an interim freezing order was "somewhat misguided" it was nevertheless "brought for a proper purpose … to prevent dissipation of funds."[10]

Competence

[48] Rule 3 of the Rules requires a lawyer, when providing regulated services, to act competently, consistent with the terms of the retainer and the duty to take reasonable care.

[49] Mr ZB took issue with Mr YC's competence in the [XD] proceedings. He pointed to the fact that the required undertaking as to damages had only been signed by one of the liquidators, thus diminishing its effectiveness.

[50] The Committee noted that the court in its [date] judgment had made comment about the fact that the undertaking had only been signed by one of the liquidators. The judge had said that she "REDACTED"

[51] The Committee's view was that it was "poor practice" by Mr YC not to have obtained the signature of both the liquidators, and that it was a matter that ought to have been picked up by court staff when the application was filed. However, the Committee did not consider that there had been any prejudice to [XD] because "the undertaking had not been called upon".[11]

[52] In the end, the Committee did not consider that this conduct warranted a disciplinary response.

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[10] At [51].
[11] Standards Committee decision at [57].

Application for review

[53] Mr ZB filed his review application on 20 June 2019. He submitted:

(a) The Committee was wrong to say that he lacked sufficient personal interest in the in-house counsel issue. In particular, Mr ZB was subsequently the liquidator of [XD], the company on the other side of the [XD] proceedings.

(b) In the second without notice application for a freezing order, Mr YC misled and deceived the High Court by:

(i) Filing an undertaking as to damages signed by only one of the two liquidators; and

(ii) Failing to disclose relevant information.

(c) There were no proper grounds for a freezing order to have been made.

(d) Mr YC's conduct caused an additional sum of $130,000 to be incurred in the liquidation.

[54] By way of outcome Mr ZB asked for the matters to be referred to the Lawyers and Conveyancers Disciplinary Tribunal (Tribunal). He seeks compensation of $130,000 on [XD] 's behalf. As well, he seeks Mr YC's suspension from practise, the imposition of a substantial fine, an order that he undertakes ethics training and further education whilst suspended.

Response by Mr YC

[55] Mr VG responded to the review application on Mr YC's behalf, in his letter dated 30 July 2019. He submitted:

In-house counsel issue

(a) Mr VG largely rehearsed the submissions that had been made to the Committee about this issue. He noted that the matter was now the subject of an own-motion investigation by the Committee.

Failure to disclose all material facts and defences

(b) Issues about the interim freezing order were fully canvassed by the High Court in the [date] hearing. Although the judge noted that there were "REDACTED" she did not consider that "REDACTED."

(c) Judges not infrequently refer issues about lawyer conduct to the Complaints Service, but the judge did not do so in this case.

(d) This issue of complaint is an attempt to relitigate the freezing order issue.

Using legal processes for an improper purpose

(e) The fact that [XD] went into liquidation in [date], some three months after the [date] interim freezing order was granted, indicates that the freezing order application had been brought for a proper purpose.

Competence

(f) The duty to act competently "is for the benefit of the client and not for that of another person, particularly one with whom the client is in dispute."

(g) The liquidators of [WE] do not consider that Mr YC acted incompetently.

(h) In connection with the issue of the undertaking as to damages having been signed by only one of the liquidators, the judge in the [date] hearing said that she "REDACTED"

(i) Mr VG noted the Committee's observation that "Mr YC should ensure that this does not happen in future",and said that Mr YC acknowledges this.

[56] Finally, Mr VG submitted that, despite Mr ZB's urging, the conduct complained about was clearly not in the more serious category of misconduct.

Comment by Mr ZB

[57] In his letter to the Case Manager dated 16 August 2019, Mr ZB provided comprehensive response to Mr VG's submissions. However, his response largely rehearsed the material that he had put before the Committee and which he included in his review application.

[58] It fairly summarises Mr ZB's comments to say that he firmly maintains that Mr YC is in breach of the strict in-house counsel requirements of the Rules. Further, that

the [XD] proceedings were brought for an improper purpose and during the course of those proceedings, Mr YC misled and deceived the High Court.

Further exchanges

[59] Both parties provided further extensive material. I mean no disrespect when I say that it is unnecessary to summarise their further submissions. They largely repeat what has already been comprehensively covered both before the Committee, and in the initial review and response material.

[60] I would only add, to ensure balance, that as firmly as Mr ZB holds to his position, Mr YC is equally adamant that his conduct has been professional and ethical.

Nature and scope of review

[61] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[12]

> … 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.
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> 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.

[62] More recently, the High Court has described a review by this Office in the following way:[13]

> 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.

[12] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].
[13] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[63] 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.

Hearing in person

[64] Mr ZB's application for review was progressed before me at a hearing in Auckland on 23 June 2021.

[65] Mr ZB appeared in person. Mr TJ QC and Mr VG appeared on behalf of Mr YC, who also attended the hearing.

[66] Prior to the hearing commencing, both parties filed memoranda of submissions and bundles of relevant documents.

[67] At the hearing itself, submissions were made respectively supporting and opposing the review application.

[68] I confirm that I have read Mr ZB's complaint, the responses to that, Mr ZB's comments about those responses and the Committee's decision. I have also read the review application and the response to that, subsequent submissions and the written submissions filed by the parties for the hearing.

[69] I have also heard from Mr ZB in person, as well as Mr TJ (and Mr VG) on behalf of Mr YC.

[70] There are no additional issues or questions in my mind that necessitate any further evidence, information or submissions from either of the parties.

Discussion

[71] There are two issues for me to determine:

(a) Whether it was appropriate for the Committee to take no further action on Mr ZB's in-house counsel issue complaint, on the grounds that he lacked sufficient personal interest in its subject matter, and instead initiate an

own-motion investigation of the systemic issues pursuant to s 130(c) of the Act.

(b) Whether any conduct issues arise in relation to Mr YC's management of the second freezing order application in the [XD] proceedings.

Analysis

The in-house counsel issue

[72] Clearly, by initiating an own-motion investigation into the in-house counsel issue, the Committee considered that, despite Mr YC's comprehensive explanations about his employment arrangements, there were still unanswered questions about those arrangements.

[73] The Committee's rationale for launching an own motion investigation, rather than considering the issue as part and parcel of Mr ZB's complaint, was that the answers to what I have described as the unanswered questions, might involve Mr YC and [PK] providing commercially sensitive information about its employment and business arrangements.

[74] So concluding, the Committee considered that Mr ZB, to use the language of s 138(1)(e) of the Act, did "not have sufficient personal interest in the subject matter of the complaint."

[75] Mr ZB's response was that he had a compelling personal interest in the subject matter of whether Mr YC conducted himself strictly in compliance with the in-house counsel rules.

[76] Mr ZB said that his practice, and [PK]'s practice, competed in the same marketplace and they both carried out very similar work, and that a "ruling" from a Standards Committee or Review Officer would provide him with considerable assistance in connection with the management of his own practice.

[77] Mr ZB noted that his practice's expenditure on legal fees was considerably less than, for example, Mr YC's salary and that a preferable business model might be to employ an in-house lawyer.

[78] It was principally for this reason that Mr ZB argued that he had a compelling personal interest in the subject matter of his complaint, now an own motion investigation.

[79] As well, Mr ZB submitted that because his and Mr YC's and the liquidators' paths all intersected from about [date], when he was appointed as liquidator for [XD] , he was personally engaged in the issues arising out of Mr YC's in-house counsel role.

[80] To "have [a] personal interest in the subject matter of [a] complaint" is, of course, not the same as being interested in the subject matter of a complaint. "Personal interest", in my view, carries with it the requirement of a close relationship between the parties (such as lawyer/client), and that relationship is central to the subject matter of the complaint.

[81] There is, in my view, no "relationship" between Mr ZB's practice and [PK], beyond the fact that they operate in the same marketplace and may even from time to time find themselves involved acting in the same matter.

[82] That is a matter of chance rather than being indicative of a close relationship between the two practices. Each works independently of the other, and even if involved in the same matter, each would be acting according to the interests of their respective appointments.

[83] In essence Mr ZB in seeking a "ruling", as he put it, as to the parameters of in-house counsel's role, is asking for legal advice.

[84] If he intends to employ in-house counsel in his practice, and is unsure about the limitations of that role, then he should do what anyone else might do when there is uncertainty about legal issue, and obtain legal advice.

[85] The complaints process is not a proxy for legal advice.

[86] I accept the Committee's assessment that in pursuing an own motion investigation into the in-house counsel issue, there is a risk that commercially sensitive (indeed confidential) information may need to be disclosed by either or both of Mr YC and [PK].

[87] Mr TJ gave the example of Mr YC's employment agreement, and it is difficult to quibble with argument that this is a document confidential to the parties to it.

[88] Mr ZB – and anyone else for that matter – can be completely confident that a Standards Committee pursuing an own-motion investigation into a conduct issue, will do so with scrupulous fairness and in accordance with the law. The presence of a complainant does not sharpen that focus.

[89] For those reasons I do not intend to interfere with the Committee's decision about that issue of complaint.

The [XD] proceedings

[90] Despite the voluminous amount of paper that this issue of complaint has generated, in my view the pathway to resolving the issue is clear.

[91] In short, the entire circumstances behind the [date] application for a freezing-order were aired before the High Court in [date], when the court was tasked with considering whether to continue with or discharge the interim freezing-order.

[92] Those circumstances included the background facts that Mr ZB has extensively set out in both his complaint and review application, including a pivotal issue as to whether [XD] could be said to have had a defence to [WE]'s money claims against it.

[93] Resolution of the conduct issues raised by Mr ZB's complaint does not require me to undertake a close analysis of the [XD] proceedings, as Mr ZB urges. Indeed, it would be quite wrong of me to do so.

[94] First, Mr TJ correctly submitted that this is an unsatisfactory forum in which to get to the bottom of what was, was not or should have been disclosed in proceedings before the High Court.

[95] I would go further and say that as a Review Officer I do not have the jurisdiction to consider the rights or wrongs of contested issues arising out of the liquidation of a company.

[96] Secondly, those issues have been comprehensively dealt with by the High Court in its [date] judgment. That judgment, not having been appealed or otherwise recalled or reviewed, must remain the last word on the procedural, factual and legal issues at large in those proceedings.

[97] Nevertheless, Mr ZB argues that the facts as he has laid them out, admit for no other conclusion than Mr YC acted unethically, unprofessionally and dishonestly in those proceedings.

[98] In support, Mr ZB has referred to passages from the High Court's [date] judgment in which the judge was critical of arguments advanced by Mr YC on the liquidators' behalf, as follows:

"REDACTED"

[99] In my view, those criticisms are expressed by the judge in conventional terms, consistent with how decision-makers routinely express rejection of one side's argument in a case.

[100] An adversarial process will produce a decision in which one side prevails, meaning that arguments of the other side have not been accepted.

[101] That is an entirely different matter from a decision-maker criticising the conduct of a lawyer. Rejection of a lawyer's arguments does not necessarily mean that the lawyer has acted in an unprofessional or unethical way.

[102] I do not read the judge's criticisms in her [date] judgment, as reflecting upon Mr YC's conduct of those proceedings in a way which raises ethical or professional concerns.

[103] Indeed, the judge explicitly addressed the issue about inaccuracies in the liquidators' affidavits by holding that those inaccuracies "overall … [did not breach] the strict requirements of candour in seeking a freezing order on a without notice basis".[14]

[104] I am not prepared to go behind those comments. Indeed, in my view, it would not be proper for me to do so.

[105] Moreover, the judge indicated that the level of costs she was "minded to award" [XD], was the conventional 2B basis. There is no suggestion of an uplift on account of the way in which Mr YC ran his case.[15]

[106] Finally, in the passages from the [date] judgment referred to by me above at [98], the judge raises concern about the fact that the undertaking as to damages filed by Mr YC was only signed by one of the liquidators. This issue has been a recurrent theme in Mr ZB's complaint and review application.

[107] However, and omitted from the extract above, the judge added a footnote to that comment as follows:

> "REDACTED"

[108] Mr ZB was unable to explain what the judge meant by that footnote, and it is not entirely clear to me either. That is not to be taken as a criticism of the judge's comments; rather, the comment is very fact-specific and clearly responded to material that was before the judge but which is not before me.

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[14] At [46(a)].
[15] Mr TJ informed me, and I accept, that the parties agreed costs and these were at scale.

[109] I do not think that the footnote advances the undertaking issue any further one way or the other, except to the extent that it contains no criticism of Mr YC and did not result in the judge referring that aspect of his conduct of the [XD] proceedings, to the Complaints Service.

[110] Indeed, Mr TJ advanced argument to the effect that although best (and probably High Court Rules based) practice was to secure the signatures of all liquidators to an undertaking as to damages, as a matter of law the signature of one liquidator will bind the other/s. Moreover, the undertaking is enforceable against the assets of the liquidated company.

[111] I do not need to decide that legal issue. It may be contestable.

[112] However, I do observe that Mr YC, through Mr VG, has acknowledged that the undertaking as to damages was not compliant with the requirements of the High Court Rules and has given an assurance that he will ensure proper compliance in the future.

[113] I do not consider that it is necessary for me to elevate that into a conduct issue requiring a disciplinary response. The Standards Committee was of the same view. For me to conclude otherwise, I would need to be satisfied that the Committee's conclusion was – in effect – not one which a reasonable Committee could have reached.

[114] That is patently not the case. An isolate lapse such as that – which, on one reading of the judge's footnote, may have been entirely inconsequential, does not call for a finding of unsatisfactory conduct.

[115] A decision-maker who has concerns about a lawyer's conduct and its impact on the hearing, will invariably draw attention to those concerns in their decision. Further, and as Mr VG observed, it is not uncommon for decision-makers to refer those concerns to the Complaints Service.

[116] The regulatory regime, be it Standards Committee or Review Officer, is not an alternative forum for litigating matters which have already been heard and decided by a court or tribunal in another jurisdiction.

[117] Decision-makers retain control of proceedings before them, and this includes ensuring that lawyers who appear before them conduct themselves well within their ethical and professional obligations. In terms of litigation, a lawyer's fundamental obligation as an officer of the court is to conduct themselves with scrupulous honesty.

[118] Any departure from that by a lawyer represents a serious ethical and professional lapse which would generally be deserving of disciplinary inquiry if not sanction.

[119] However, only the decision-maker before whom a lawyer is appearing is able to measure the lawyer's conduct of the proceedings against their obligations, and express an opinion as to whether there may have been a lapse.

[120] It will be the expression of that opinion which triggers disciplinary inquiry.

[121] It is not for the regulatory regime to step in and form an opinion about a lawyer's conduct in proceedings, when the decision-maker himself or herself has not raised an issue about that conduct.

[122] Mr ZB's complaints about Mr YC's conduct in the [XD] proceedings were:

(a) That the proceedings were brought for an improper purpose.

(b) That Mr YC secured only one signature to the liquidators' undertaking as to damages.

(c) That Mr YC misled the High Court by failing to disclose all potential defences and other relevant information.

(d) That overall, Mr YC failed to act competently in the [XD] proceedings.

[123] The high point of Mr ZB's arguments would appear to be that the High Court discharged the interim freezing order, and in so doing was critical of [WE]'s arguments and evidence.

[124] However, as I have been at pains to point out, the judgment was expressed in conventional terms of analysis, reasoning and conclusion which inevitably involved some arguments being rejected. I do not read anything said by the judge in her judgment as raising ethical or professional conduct issues on Mr YC's part.

[125] I see no grounds which could persuade me to depart from the Committee's decision.

Decision

[126] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

Anonymised publication

[127] 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 18th day of August 2021

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 ZB as the Applicant
Mr YC as the Respondent
Mr UH as a Related Person
Messrs TJ QC and VG as counsel for the Respondent
[Area] Standards Committee [X]
New Zealand Law Society