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

[2021] NZLCRO 54

Ref: LCRO 50/2020

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| **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** | **M and N PQ**<br>Applicants |
| **AND** | **WR**<br>Respondent |

## DECISION

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

### Introduction

[1] Mr and Mrs PQ have applied for a review of a decision by the [Area] Standards Committee to take no further action in respect of their complaint concerning the conduct of the respondent, Mr WR.

### Background

[2] Mr and Mrs PQ were the directors and shareholders in a company [Company A].

[3] The company owned land in [district].

[4] In 2008, resource consent was obtained to subdivide the land into four allotments. Each of the allotments was permitted to accommodate a residential building, provided that each allotment retained three hectares of land for horticultural development.

[5] A horticultural consultant, Mr SF, was engaged to provide advice on a proposal to establish a [redacted] orchard. Mr SF operated a company, [Company B].

[6] In April 2012, Mr SF arranged for spraying contractors to spray one of the allotments with herbicide. Mr SF engaged Mr BL and his firm [Company C] to carry out the spraying.

[7] The allotment was planted with [redacted] trees in early 2012.

[8] Residue from the spray caused the trees to die.

[9] In 2013 attempts were made to replant the block that had been compromised by the spraying, but unfortunately, a number of the replacement trees purchased were undersize. Problems with developing the proposed orchard continued as a consequence of the residual problems arising from the initial spraying.

[10] Mr WR was instructed to represent Mr and Mrs PQ's company. [Company A] issued proceedings against Mr SF and his company, and Mr BL and his company.

[11] In the proceedings filed, the Plaintiff sought:

(a) In respect to all defendants, damages for loss suffered as a consequence of the spraying causing the loss of the trees planted in 2012; and

(b) damages from Mr SF and his company for loss suffered as a consequence of inadequate advice said to have been given in respect to orchard preparation, and losses incurred arising from problems with inadequate replacement trees.

[12] The dispute was taken to mediation in December 2018.

[13] A settlement was reached at mediation.

**The complaint and the Standards Committee decision**

[14] Mr and Mrs PQ (the complainants) lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 19 August 2019. The substance of their complaint was that:

(a) the proceedings fell into two parts, the first engaging spray damage to prepare lot 3 for planting, the second, a failure on Mr SF's part to mitigate problems caused to lot 3, and resulting damage to lot 2; and

(b) Mr WR had given them optimistic expectation of success on the first limb of their claim and indication that the second limb would be more contestable; but

(c) Mr WR had provided them with incorrect information at the mediation conference; and

(d) had failed to promote the second limb of their claim at the conference; and

(a) was responsible for delay in progressing their claim; and

(b) as a consequence of Mr WR's failure to promote their claim at mediation, the recovery achieved was 26 per cent of what accountants had estimated would constitute a reasonable sum to reflect the extent of losses suffered; and

(c) Mr WR had mistakenly advised them at mediation that judges were required to "accept the word of company directors unless proved false"; and,

(d) this misrepresentation had intimidated them into accepting a settlement figure well below what they were entitled to; and

(e) Mr WR's failure to ensure that the mediation was recorded, was a deliberate ploy on his part to avoid incrimination; and

(f) Mr WR had failed to take sufficient steps to source evidence of Mr SF's continuing involvement that was highly relevant to their case; and

(g) this failure, together with Mr WR's failure to record the mediation conference, constituted negligence on his part; and

(h) Mr WR had delayed progressing their case in order to allow Mr SF opportunity to mitigate problems that Mr SF had caused; and

(i) Mr WR's failure to consider the second limb of their claim at mediation, "constitutes his major negligence, and the principal reason for our dissatisfaction"; and

(j) Mr WR had acted in collusion with opposing counsel (Mr ZT); and

(k) the mediation had been managed for the benefit of the insurers.

[15] Mr WR provided a response to the complaint on 26 September 2019.

[16] In that response, he submits that:

(a) he had considered that his clients claims for damages arising from allegation that initial planting had been damaged by herbicide spray to be strong; and

(b) claims for compensation on the back of argument that the losses suffered extended beyond one year were arguable; and

(c) Mr and Mrs PQ had been competently advised; and

(d) he had not advised Mr and Mrs PQ that judges were required to accept the evidence of company directors unless the evidence could be disproved; and

(e) extensive efforts had been made to establish the extent of Mr SF's involvement at the time of the 2013 planting; and

(f) the weight of the evidence was that by the time of the 2013 planting, Mr SF was not involved; and

(g) he had not colluded with the defendants, their counsel, or their insurer, nor had he endeavoured to advance those parties' interests over the interests of his clients; and

(h) the settlement reached was not inadequate; and

(i) evidence provided by Mr and Mrs PQ was not of assistance in establishing that Mr SF had continued involvement in the orchard property; and

(j) he had not sought to delay the mediation by advocating mitigation steps; and

(k) steps taken to mitigate did not have relevance to the issue of quantifying loss; and

(l) it would have been unrealistic to attempt to settle the first limb of the claim, without, at the same time, attempting to settle the second; and

(m) the settlement negotiated constituted a settlement of all outstanding issues, and the sum achieved reflected that; and

(n) it would not be common practice for mediation proceedings to be recorded; and

(o) the settlement achieved reflected a favourable outcome for his client, particularly with reference to the loss calculations prepared by the parties' respective accounting experts; and

(p) the settlement reached presented as a preferable outcome to that of continuing with the proceedings; and

(q) request had been made of Mr and Mrs PQ for instructions to disperse settlement funds.

[17] In concluding his submission, Mr WR emphasised that the allegation of collusion was "unfounded and untrue".

[18] Following receipt of the complaint, Mr WR wrote to counsel who had represented the defendants at the mediation, (Mr ZT ) and invited him to provide his recollection of the events that had transpired at the 2018 mediation. Mr ZT was specifically invited to comment on accusation that he had colluded with Mr WR.

[19] In correspondence to Mr WR of 24 September 2019, Mr ZT advised that:

(a) his client had been reluctant to attend mediation, but had eventually agreed to do so; and

(b) the mediator had provided a comprehensive account of the process to the parties at commencement; and

(c) in the course of attending hundreds of mediations he (Mr ZT) had never had a mediation recorded or experienced a mediation being recorded; and

(d) he struggled to understand the point being made about judges and directors, and could not recall the issue being discussed at mediation; and

(e) he was surprised at suggestion that he had played little part in the mediation; and

(f) he distinctly remembered that Mr and Mrs PQ had difficulty hearing during the mediation; and

(g) his client had paid approximately twice what it considered its financial exposure to be, this decision taken as a pragmatic commercial decision to avoid future litigation costs; and

(h) it was patently absurd to suggest that a settlement was predetermined; and

(i) suggestion of collusion was not only absurd, but also offensive; and

(j) he had no doubt that Mr WR's client had freely and willingly entered into the settlement agreement.

[20] Mr WR also sought a response from the [accounting firm] accounting experts (Ms QM and Mr ET) who had been instructed to provide expert evidence as to the quantum of loss suffered by Mr and Mrs PQ.

[21] Both accountants attended the mediation. Both provided Mr WR with their account as to how they recalled matters had progressed at the mediation.

[22] Ms QM, an associate director with [accounting firm], explained that she considered that Mr WR had presented at mediation as very calming and professional. She believed that Mr WR had gone to some lengths to put everyone at ease and to ensure that the mediation process was well understood by all.

[23] She reported that Mr WR had been very patient with his clients and that he had taken considerable time to ensure that questions raised by them were addressed.

[24] Ms QM could not recall Mr WR making any comment to the effect that judges were required to accept statements made by company directors, unless the statements were proven to be false.

[25] Ms QM saw no evidence of collusion between Mr WR and Mr ZT. She considered that both lawyers had treated each other with courtesy and respect.

[26] She had formed a view that Mr WR had responded to queries from his clients in a quiet and courteous way and concluded that Mr WR, during the course of the mediation, "came across as knowledgeable and confident in a considered thoughtful manner".

[27] Mr ET, a [accounting firm] director, also attended the mediation.

[28] In his response to Mr WR, Mr ET advised that:

(a) he had no recollection of Mr WR advising his clients that judges were required to accept the word of company directors, unless statements made were proven to be false; and

(b) when Mr WR left the mediation room to speak with Mr ZT, Mr WR would on returning, bring Mr and Mrs PQ up-to-date on what had been discussed; and

(c) he saw no evidence to support allegation that there had been collusion between Mr WR and Mr ZT.

[29] Mr and Mrs PQ responded to Mr WR's response to their complaint. Those submissions also replied to the information provided to Mr WR by Mr ZT and the accountants.

[30] Their response, in part, reiterated the concerns detailed in their initial complaint. They described Mr WR's account of the factual context as a "mix of fact and fiction".

[31] Mr and Mrs PQ argued that they had provided evidence which indicated that a settlement had been reached before the mediation.

[32] They considered that Mr WR had endeavoured to shift the timeframe in which Mr SF had been involved in the orchard project in order to negate the evidence that they had produced. They reiterated that they had reluctantly accepted the settlement negotiated, because of the statement they allege to have been made by Mr WR at mediation.

[33] In responding to Mr WR, Mr and Mrs PQ also commented on Mr ZT's conduct. They argue that Mr ZT's robust response to their suggestion that he had colluded with Mr WR could be quickly resolved, as all Mr ZT was required to do to make this element of their complaint go away, was for him to prove that there was no collusion.

[34] On a number of occasions when advancing their submissions, Mr and Mrs PQ displayed a lack of understanding of the obligations that rest on the shoulders of a party advancing a complaint, to provide credible evidence to support the complaint made.

[35] This is well illustrated in the approach they adopt when levelling serious accusation of misconduct at a lawyer who is not the subject of their complaint. It is not for Mr ZT to prove that he did not collude with Mr WR. Responsibility rests with Mr and Mrs PQ to provide evidence to support such serious allegation.

[36] From the raft of submissions filed, the Standards Committee identified the focus of its investigation as being a consideration as to whether:

(a) Mr WR provided competent advice to his clients; and

(b) Mr WR was responsible for delaying the proceedings; and

(c) Mr WR colluded with Mr ZT which had resulted in the complainants achieving an unsatisfactory outcome at mediation; and

(d) the mediation proceedings were required to be recorded; and

(e) Mr WR had misled his clients by providing them with incorrect advice as to how judges consider evidence given by company directors; and

(f) Mr and Mrs PQ's complaints were supported by legal opinion.

[37] The Standards Committee delivered its decision on 19 February 2020.

[38] The Committee determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) that no further action on the complaint was necessary or appropriate.

[39] In reaching that decision the Committee concluded that:

(a) complaint that Mr WR had delayed the process was not supported by evidence; and

(b) there was no evidence to support allegation of collusion; and

(c) explanation provided by Mr WR as to what he had advised his clients regarding issues relating to how evidence would be determined by a judge, was consistent with what a competent lawyer would advise; and

(d) Mr WR's account of the advice that was given prior to, and at the mediation, was consistent with what a competent lawyer would provide; and

(e) evidence provided by the complainants to support allegation of Mr SF's continuing involvement in the orchard project was not compelling; and

(f) the settlement reached presented as a good one for the complainants in the circumstances; and

(g) there was no evidence to support allegation that the complainants had signed the settlement agreement under duress.

**Application for review**

[40] Mr and Mrs PQ filed an application for review on 17 March 2020.

[41] The submissions filed in support of the application were comprehensive. The submissions in significant part amplified on concerns earlier raised. The submissions also referenced matters which had not been raised as part of their initial complaint.

[42] They submit that:

(a) they considered that the Standards Committee had simply accepted the "excuses" proffered by Mr WR and failed to address the problems they had raised; and

(b) with the passage of time they have arrived at a better understanding of how Mr WR had manipulated the process; and

(c) a meeting of the expert accountants prior to the mediation had reached agreement on a settlement figure; and

(d) they now have an understanding as to why the mediator interrupted proceedings at a critical juncture; and

(e) they wished to raise a further matter that had emerged during the advancing of their complaint which they were unable to progress, as the Complaints Service had informed them that they were unable to raise fresh issues; and

(f) the fresh matter raised concerned an apparent oversight to register an easement which had resulted in a caveat being registered over their property; and

(g) the caveat issue raised conduct issues for both Mr WR's firm and another [city] based law practice; and

(h) they had obtained a second opinion which was emphatic in its conclusion that they had been given incorrect information at the mediation hearing; and

(i) no argument had been advanced by Mr ZT at mediation that would have persuaded them to reduce their claim; and

(j) they retained a firm conviction that they had strong evidence of Mr SF's continued involvement in the orchard project in 2013; and

(k) their reluctance to authorise release of settlement funds was in part linked to concern that the release required their agreement to release Mr WR's firm from a "long line of commitments", and

(l) Mr ZT's failure to advance an argument for the low level of compensation awarded makes Mr WR's denial regarding comments alleged to have been made about judges' practices when hearing evidence from company directors "suspect in the extreme"; and

(m) the Complaints Service was unduly hasty in reaching its conclusions, particularly in failing to consider the opinion provided by Mr KH[1]; and

(n) the manner in which Mr WR had set about to deceive them was "complex and largely successful"; and

(o) they had been inhibited from taking Mr WR to Court to achieve a satisfactory outcome, as they had been unable to secure borrowings over their home property as a consequence of problems which had been caused by Mr WR's firm's failure to register an easement over the property; and

(p) it was only after the Committee had released its decision that they became aware that the accounting experts had attended a meeting without their knowledge.

[43] Mr WR was invited to comment on the review application.

[44] He submits that:

(a) he places reliance on his response filed with the Standards Committee; and

(b) Mr and Mrs PQ were given sound advice; and

(c) he had not colluded with any party; and

[1] One of the lawyers consulted by Mr and Mrs PQ.

(d) the settlement reached was not inadequate; and

(e) the meeting of experts referred to by the applicants, references a Court directed expert conference, the requirement for that conference to proceed recorded in a minute of the High Court of 19 June 2018; and

(f) it was not appropriate for counsel to attend the expert conference; and

(g) expert witnesses have a duty to confer; and

(h) the experts were unable to reach agreement; and

(i) Mr and Mrs PQ were provided with a copy of the Court minute; and

(j) he had not provided advice to Mr and Mrs PQ in terms as alleged by them; and

(k) Mr and Mrs PQ had not provided any legal opinion to support their complaints; and

(l) extensive efforts had been made to obtain information to support allegation of Mr SF's continued involvement in the orchard project; and

(m) issues raised by Mr and Mrs PQ concerning an easement lodged over their land were outside the scope of the review; and

(n) Mr and Mrs PQ have continually overstated the level of fees charged; and

(o) none of the material advanced by Mr and Mrs PQ on review provides good reason for departure from the conclusions reached by the Standards Committee.

[45] In what was the last of the submissions filed in advancing their complaint and review applications, Mr and Mrs PQ provided a response to Mr WR's review submission. Much of the material rehearsed arguments that had been traversed in earlier submissions.

[46] To the extent that the final submission adds to the earlier information, they submit that:

(a) their first impression of the mediation was that the lawyers were involved in collusion, but they now believe that the mediator may have been led to

believe that there was only a single issue to be determined at the mediation; but

(b) the issue of collusion had "not gone entirely"; and

(c) if Mr WR had not made the remark concerning the manner in which judges considered evidence, what evidence was there of arguments that had been advanced by Mr ZT that could have persuaded them that they should accept a lesser sum in settlement; and

(d) if they were (as they suggest Mr ZT had implied) incompetent in managing the mediation, why did Mr WR encourage them to mediate;[2] and

(e) they had reported little about the second opinion they had obtained as it was their understanding that the Complaints Service would contact the lawyer they had consulted; and

(f) Mr WR had not conducted a "merits of the case" analysis; and

(g) the attendance of the accounting experts at the mediation was of little value, their presence appearing to be "decorative rather than functional"; and

(h) they step back from their earlier suggestions that the mediator may have been involved in the alleged collusion; but

(i) if that was the case, why had Mr ZT not advanced his client's position more vigorously at the mediation; and

(j) they now stand corrected regarding accusation that there had been a meeting of the accounting experts which was improper; and

(k) they reject Mr WR's suggestion that issues regarding the caveat are outside the scope of the review.

[47] Whilst the final submissions filed appeared to initially step back from accusation that Mr WR and Mr ZT had colluded, in the conclusion to their submissions, Mr and Mrs PQ argue that the failure of the mediation to address the second and "larger" part of

[2] Mr ZT had not made any comment which reflected on the competency of Mr and Mrs PQ. He had said that he had formed a view that Mr and Mrs PQ had difficulty hearing what was being said at the mediation.

their claim, was " … facilitated by the collusion of Mr WR and Mr ZT. Apart, that is, from Mr WR's assertion that there was no collusion, but without any proof of that claim".[3]

**Review on the papers**

[48] The parties have agreed to the review being dealt with on the papers.

[49] Section 206(2) of the Act allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[50] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party. On the basis of the information available I have concluded that the review can be adequately determined in the absence of the parties.

**Nature and scope of review**

[51] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[4]

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
>
> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
>
> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[52] More recently, the High Court has described a review by this Office in the following way:[5]

> 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

[3] Mr and Mrs PQ, concluding submissions to the LCRO (15 May 2020).
[4] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].
[5] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

> 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.

[53] 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**

[54] The issues to be considered on review are:

(a) did Mr WR breach any professional obligations or duties owed to Mr and Mrs PQ by failing to make arrangements to have the mediation recorded; and

(b) is the Review required to address the caveat issues; and

(c) should the Committee have given weight to a legal opinion obtained by Mr and Mrs PQ; and

(d) did Mr WR collude with Mr ZT; and

(e) did Mr WR fail to take steps to obtain relevant evidence; and

(f) did Mr WR make a statement at mediation to the effect that judges would accept the word of company directors unless there was evidence to the contrary; and

(g) did the mediation fail to address the second limb of the PQ's complaint?

*Did Mr WR breach any professional obligations or duties owed to Mr and Mrs PQ by failing to make arrangements to have the mediation recorded?*

[55] Mr and Mrs PQ have, in advancing their complaint and review application, filed comprehensive submissions.

[56] A core component of their complaint is concern that Mr WR had made an inaccurate statement in the course of the mediation which was instrumental in

encouraging them to accept a settlement offer well below what they considered they were entitled to.

[57] In the face of Mr WR's consistent rejection of him having made such statement, Mr and Mrs PQ accept that it is their word against Mr WR's.

[58] Mr and Mrs PQ argue that if Mr WR had arranged (as they considered he should have done) to have had the mediation proceedings recorded, there would be concrete evidence to support their argument that Mr WR had made the statement they allege had been made.

[59] In their concluding submissions to the LCRO, Mr and Mrs PQ state that Mr WR "fails to mention that he arranged not to record the mediation".

[60] It was not Mr WR's task to arrange for the mediation proceedings to be recorded. It is not common practice for a mediation conference to be recorded.

[61] The purpose of a mediation is to provide parties with opportunity to discuss issues openly and freely. Those discussions are confidential. If the dispute is unable to be settled and proceeds to court, no statements made in the course of the mediation can be given as evidence in the court proceedings.

[62] Mr ZT, when informed that there had been criticism that the mediation had not been recorded, noted that "in my career I have done hundreds of mediations. I have never had a mediation recorded and I have never heard of a mediation being recorded. It goes right against the spirit of a frank "without prejudice" conversation".[6]

[63] In suggesting that Mr WR had failed to inform them that he had arranged not to record the mediation, Mr and Mrs PQ imply that Mr WR had both neglected to inform them of a matter relevant to the mediation, and that he had taken specific steps to ensure that the mediation was not recorded. This leading to inference that Mr WR had acted improperly. There is no force in this argument.

[64] It was not Mr WR's role to organise for the mediation to be recorded and it would have been inappropriate for him to have endeavoured to do so.

[65] Mr WR would, as did Mr ZT, have had expectation that the mediation would proceed conventionally, with focus on the forum providing opportunity for the participants to express their views in confidence that their freedom to express those views would not

[6] Mr ZT, correspondence to Mr WR (24 September 2019) at [6].

be compromised or fettered by need to ensure that statements made could not be used against them in future proceedings.

[66] It would be expected, and I think it likely the case here, that both counsel and the mediator would have ensured at the commencement of the mediation, that all the attending parties fully understood the process.

[67] Support for conclusion that the mediation proceeded on conventional lines can be found in the statement of Ms QM, one of the accounting experts who attended the mediation.

[68] Her recollection of the meeting was that Mr WR had "explained the process at length". She noted that the mediator had taken his time and "explained the process and answered their questions".[7]

[69] No disciplinary issues arise as a consequence of the mediation not being recorded.

*Is the Review required to address the caveat issue?*

[70] No.

[71] The jurisdiction of a Legal Complaints Review Officer is confined to addressing the matters which were the subject of the complaint(s) put before the Standards Committee. The LCRO review guidelines (provided to parties at the commencement of the review) reinforce that no new complaints may be made at the review stage, and that, in general, the LCRO will not consider new information which should have been placed before the Standards Committee.

[72] Mr and Mrs PQ complain that the Committee was not prepared to include their concerns about the caveat issue as an additional conduct complaint, when the matter was raised in the latter stages of the conduct investigation.

[73] In their final submission to the LCRO, Mr and Mrs PQ argued that it would be appropriate that the Review Officer address their concerns regarding the caveat, as they had likely been impeded in their attempts to raise finance to pursue proceedings against the insurers, as a result of the encumbrance on the title to their property.

[7] Ms QM, correspondence to Complaints Service (26 September 2019).

[74] Issue as to whether the lodgement of a caveat had impeded the PQ's ability to raise finance, is not an issue that falls to be considered on review. The complaint was not addressed by the Committee.

*Should the Committee have given weight to a legal opinion obtained by Mr and Mrs PQ?*

[75] Mr and Mrs PQ make repeated reference to what they describe as a legal opinion that they had secured from two practitioners.

[76] They argue that these opinions provide emphatic support for their view that Mr WR had misled them at the mediation by giving them incorrect advice as to how judges deal with evidential issues. They submit that this advice had been instrumental in their decision to accept a significantly reduced settlement.

[77] Mr and Mrs PQ consulted two lawyers.

[78] They provided both with an account of what they recalled Mr WR as having said at the mediation conference. They advise that both lawyers agreed that if Mr WR had made a statement at the mediation conference in terms as alleged by them, that Mr WR would have got the law wrong.

[79] Mr and Mrs PQ provide no evidence from the lawyers to support what was purportedly said by the lawyers consulted. They simply report what they say they were told and have expectation that the Committee should place reliance on the account they provide of their discussions.

[80] I accept that lawyers consulted by Mr and Mrs PQ may have expressed reservations about a statement that had reportedly been made by Mr WR, but the obvious rejoinder to the criticism that is made of Mr WR, is that Mr WR denies ever having made a statement in the nature of that alleged by Mr and Mrs PQ.

[81] Mr and Mrs PQ's recollection of what was purportedly said by Mr WR, does not become established, authoritative, or accurate, simply because they provide account of what two lawyers had said about what they report Mr WR had said.

[82] Nor, with every respect to Mr and Mrs PQ, does their account of the advice they were said to have received from the two lawyers, remotely approach a situation where the views reported could legitimately be described as constituting a "legal opinion".

[83] In arguing that they had obtained a legal opinion upon which the Committee should have placed reliance, Mr and Mrs PQ are suggesting that the opinions they had obtained carried the force of a legal analysis. Such an analysis, if it was to carry the

weight which Mr and Mrs PQ seek to ascribe to it, would commonly set out the context, salient facts, an analysis of the facts by reference to relevant legal principle, all drawn together in a reasoned conclusion. It would be in writing.

[84] Mr and Mrs PQ provide no written account of the advice said to have been received, and I do not consider that to be at all surprising.

[85] If either lawyer had been prepared to commit their views to paper, the best that an experienced QC and a prudent lawyer could likely offer would be to suggest that "if Mr WR said this at the mediation, we would disagree with his interpretation as to how judges address evidence received from company directors".

[86] Mr and Mrs PQ had not secured legal opinions in the sense that the term is commonly used. The opinions on which they seek to place such reliance are no more than their personal account of what they say they had been told. I do not suggest that Mr and Mrs PQ are not providing accurate account of what they had been told by the lawyers consulted, but the information they provide falls well short of constituting a legal opinion on which the Committee could have, and should have, placed reliance.

*Did Mr WR collude with Mr ZT?*

[87] Mr and Mrs PQ contend that Mr WR colluded with opposing counsel (Mr ZT) with purpose to achieve a significant reduction in the level of their claim.

[88] This most serious of allegations is repeatedly advanced and amplified.

[89] Accusation is made that Mr WR:

(a) manipulated the mediation; and

(b) contrived to make the mediation a scam.

[90] Accusation of improper conduct does not touch solely on Mr WR. Mr ZT is said to be complicit in the deception. The conduct of the independent accounting experts was also brought into question.

[91] In the early stages of advancing their complaint, Mr and Mrs PQ, whilst avoiding direct accusation, nevertheless hinted at possibility that the mediator may also not have acted in good faith. This suggestion, unsupported by any evidence, was prudently stepped back from when filing their final submissions.

[92] Absent from these stinging accusations of serious professional misconduct is any explanation as to why Mr WR would compromise his ethical and professional

obligations in such egregious fashion. No plausible explanation is provided as to why Mr WR would flagrantly compromise the duties he owed to his clients.

[93] Conduct in the nature of that alleged by Mr and Mrs PQ, if established, would constitute serious breaches of a number of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules). I need not touch on all of them here but will identify those of most relevance.

[94] A lawyer's first obligation, as an officer of the court, is owed to the court. Hard on the heels, are the fundamental and unassailable duties owed by lawyers to their clients.[8]

[95] A lawyer is obliged to uphold the rule of law, and to facilitate the administration of justice.[9]

[96] A lawyer must be independent and free from compromising influences or loyalties when providing services to his or her clients.[10]

[97] The relationship between lawyer and client is one of confidence and trust that must never be abused.[11]

[98] In acting for a client, a lawyer must, within the bounds of the law and the conduct rules, protect and promote the interests of the client to the exclusion of the interests of third parties.[12]

[99] A lawyer must promote and maintain proper standards of professionalism in the lawyer's dealings.[13]

[100] A Standards Committee or Review Officer may make a finding that a lawyer's conduct has been unsatisfactory. The conduct of which Mr and Mrs PQ make complaint would not constitute unsatisfactory conduct. An allegation of acting in collusion with opposing counsel, if established, would inevitably fall within the more serious range of conduct breaches such as to constitute misconduct.[14]

[101] Mr WR has responded to accusation of collusion with simple denial.

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[8] Rule 2.1 of the Rules.
[9] Rule 2.
[10] Rule 5.
[11] Rule 5.1.
[12] Rule 6.
[13] Rule 10.
[14] Issues of misconduct fall to be determined by the Lawyers and Conveyancers Disciplinary Tribunal.

[102] It is difficult to see, in the absence of evidence to support such serious allegation, that he could respond in more expansive terms.

[103] Mr ZT, who was accused of improperly colluding with Mr WR, responded in more forthright fashion. He described it as "patently absurd" to suggest that a settlement had been predetermined. He rejected suggestion of him having colluded with response that such suggestion was "not only absurd but offensive. Indeed it is defamatory".[15]

[104] In their final submission filed on review, there is indication of Mr and Mrs PQ giving more careful consideration to the consequences of levelling accusation of such serious professional impropriety. They make apology if they had inadvertently included the mediator amongst those whom they concluded had acted improperly. In responding to Mr WR's further rejection of argument that he had engaged in collusion, they make grudging admission that if Mr WR's position was accepted, "that may be so, but it was the impression we gained from the mediation".

[105] However, indication that Mr and Mrs PQ may have softened their stance is undercut by the concluding paragraph of their final submission, when, in returning to familiar ground, they argue that "the mediation and Mr WR's presentation mainly avoided the second and larger part of our claim, and this was facilitated by the collusion of Mr WR and Mr ZT".

[106] It is understood that Mr and Mrs PQ were disappointed at the outcome of the mediation. Having achieved a settlement figure considerably less than anticipated, they sought explanation as to why they had received less from the settlement than they had anticipated.

[107] However, absent from any explanation for outcome achieved, is concession from Mr and Mrs PQ that they had any role in determining the final outcome, or that they could freely reject any settlement proposal that they were unhappy with.

[108] Rather, they appear to have formed a strengthening view as time progressed, that they had been seriously let down by Mr WR. Their concern that they had not been ably or competently represented at mediation did not primarily focus on identifying specific instances where Mr WR was said by them to have made mistakes, but rather in the emergence of what appears to have developed into the firmest of firm convictions, that Mr WR had deliberately set out to sabotage the mediation.

[109] Bluntly put, it is accusation that is entirely lacking in any evidence to support it.

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[15] Mr ZT, correspondence to Mr WR (24 September 2019).

[110] There is not a shred of evidence in the voluminous submissions filed by Mr and Mrs PQ to support serious accusation that Mr WR (and Mr ZT) engaged in collusion. Nor, as I have noted, is there any explanation provided as to what would have motivated the lawyers accused of such serious misconduct, to put their professional reputations at such risk.

[111] It is well recognised that when accusations of this degree of seriousness are made, cogent evidence is required to support the accusation.

[112] But it is not the case that the evidence provided by Mr and Mrs PQ simply fails to meet the robust level required to establish such serious allegations. Rather there is, in my view, a total absence of any credible evidence to sustain the allegations made.

*Did Mr WR fail to take sufficient steps to obtain relevant evidence?*

[113] Mr and Mrs PQ contend that Mr WR failed to obtain evidence that would have supported their contention that Mr SF had been involved in the orchard project for longer than he maintained that he had been.

[114] The relevance of this was that Mr and Mrs PQ considered that they could sheet home to Mr SF responsibility for ongoing problems that had occurred in attempts to re-establish the orchard, if it was established, as they believed it to be the case, that Mr SF had continued to be involved in the orchard project throughout 2013.

[115] Mr WR did not consider that the evidence that Mr and Mrs PQ had provided him (invoices, emails, diary notes) assisted them in establishing that Mr SF was involved in the 2013 planting.

[116] Mr and Mrs PQ provided the Committee with a copy of correspondence and emails they had obtained which they believed provided firm evidence of Mr SF's ongoing involvement. The Committee concluded that the evidence provided did not establish that Mr SF had continued to be involved.

[117] I agree with the Committee that the evidence provided fell short of establishing the position argued for by Mr and Mrs PQ but in my view, argument as to the duration of Mr SF's involvement cannot properly be resolved through the vehicle of a professional disciplinary complaint.

[118] It is not the role of a Review Officer to determine contested matters of fact in a civil dispute.

[119] In arguing that Mr WR failed to conduct their case in a competent fashion, and that this failure on Mr WR's part[16] had resulted in substantial financial loss, Mr and Mrs PQ are raising the spectre of a negligence claim.

[120] Negligence is a cause of action that is well-understood by traditional civil courts. Its ingredients include a duty of care, a breach of that duty, and a measurable loss that has been caused by the breach of duty. Findings of negligence may only be arrived at after comprehensive – sometimes expert – evidence has been given. Issues that often arise in claims of negligence include whether a person has breached their duty of care, or whether there is a connection between the alleged loss and the breach of duty. Complex arguments often arise about whether any loss has been suffered.

[121] Neither a Standards Committee nor the LCRO is equipped to make findings of negligence. The default position for a Standards Committee is to conduct their hearings on the papers. A negligence analysis is simply not possible with that process.

[122] This Office is not a Court. It does not hear evidence; parties are not cross-examined.

[123] Mr and Mrs PQ attach to their submissions a substantial amount of evidence to support their claim that considerable loss was suffered as a consequence of Mr SF's failure to professionally manage their orchard development.

[124] To the extent that these criticisms of Mr SF overlap with argument that Mr WR had breached obligations and duties owed, the argument is that Mr WR failed to recover evidence that would have assisted Mr and Mrs PQ in advancing their claim against Mr SF.

[125] But this argument falters at first step as the evidence advanced by Mr and Mrs PQ to support argument that Mr WR failed to discover relevant evidence falls well short of establishing any demonstrable failure on Mr WR's part.

[126] If allegation that Mr WR had failed to obtain relevant evidence was to be established, that would require:

(a) evidence of a conclusive nature to establish that Mr SF had continued to be engaged in the orchard project as an advisor; and

(b) evidence that Mr SF had provided negligent advice; and

[16] Being losses suffered as a consequence of them accepting a reduced settlement, attributable in part to Mr WR's failure to obtain relevant evidence.

(c) that loss had been suffered as a consequence, that loss to be properly quantified likely with the assistance of expert evidence; and

(d) that the evidence of Mr SF's involvement was evidence that would have been properly discoverable by a lawyer acting competently.

[127] This type of inquiry is one properly proceeded by advancing an action in negligence.

*Did Mr WR make a statement at mediation to the effect that judges would accept the word of company directors unless there was evidence to the contrary?*

[128] Accusation that Mr WR had made a statement at mediation that was incorrect, formed a critical component of the complaints advanced by Mr and Mrs PQ.

[129] It was their view that Mr WR's statement had misled them and encouraged them to accept a settlement that did not properly reflect the sum to which they were entitled.

[130] Mr WR denies making the statement as alleged.

[131] It is impossible to resolve with total certainty whether Mr WR did, or did not, advance the proposition at the mediation conference that judges would be likely, at first step, to accept evidence given by company directors, but I consider there is a high probability that no such statement was made.

[132] I consider it very possible that Mr and Mrs PQ may have genuinely misunderstood advice that Mr WR had proffered touching on evidential issues.

[133] I think it unlikely that an experienced practitioner would make such a fundamental error in erroneously explaining how judges weigh the evidence that is put before them in the court.

[134] Nor can I see any reasonable explanation as to why Mr WR would make such a fundamental error.

[135] If Mr and Mrs PQ are suggesting that Mr WR had, in making the statement alleged to have been made, deliberately set out to mislead them, I see no evidence of that, nor is there any sensible explanation as to why Mr WR would have made such a statement.

[136] I have, for reasons explained, rejected suggestion that Mr WR had engaged in collusion.

[137] Nor do I consider that the statement, if made, would reasonably have carried the degree of significance that Mr and Mrs PQ now ascribe to it.

[138] The statement that judges accept the word of company directors unless there is evidence to disprove what they say, does no more than emphasise that if Mr SF was called on to give evidence in court, the onus would rest with Mr and Mrs PQ to establish their claim to the required standard of proof. That process would inevitably require them to mount successful challenge to Mr SF's evidence.

[139] A complainant — whatever the jurisdiction — is obliged to support their claim with evidence to the required standard; in this case, the balance of probabilities.

[140] Mr and Mrs PQ carried the burden of establishing, on the balance of probabilities, that the allegation made concerning Mr SF's conduct was established. In other words, they would be required to provide evidence which tipped the scale towards it being more probable than not that Mr SF had continued to be involved in the orchard operation in 2013.

[141] I consider it unlikely that an experienced practitioner would misstate or misrepresent issues relating to evidential burden and cannot see plausible explanation as to why Mr WR would choose to do so.

[142] Mr and Mrs PQ were aware that Mr SF disputed the allegation that he continued to have involvement in the orchard project post 2012.

[143] It could reasonably have been expected of them, that they would, as a first step in establishing that Mr SF was liable for continuing losses, have understood that if the matter proceeded to court, that they would be required to produce evidence to rebut Mr SF's argument that he had no involvement in providing advice to Mr and Mrs PQ after 2012.

[144] In attempting to bolster argument that Mr WR had made the statement alleged to have been made, Mr and Mrs PQ argue that Mr WR must have made the statement that had forced them to accept an inadequate settlement, because opposing counsel, Mr ZT, had not, in the course of the mediation, advanced any argument of merit such as would have persuaded them that it was in their best interest to accept a lesser sum.

[145] This is a novel argument and one heavily relied on by Mr and Mrs PQ, but it is argument entirely lacking in merit.

[146] With every respect to Mr and Mrs PQ, it is approaching the perverse to argue that an error made by Mr WR must have been responsible for them accepting an offer they were unhappy with, because Mr ZT's presentation of his client's case in mediation was unconvincing.

[147] The argument is convoluted, difficult to understand and difficult to explain, but what Mr and Mrs PQ appeared to be saying is that:

(a) they had been misled by Mr WR; and

(b) they would not have agreed to settle if reliance had not been placed on the erroneous statement made by Mr WR; and

(c) evidence that they had relied on Mr WR's statement is supported by their contention that Mr ZT had not advanced any argument of sufficient forces that would have persuaded them that they should compromise their claim.

[148] Mr and Mrs PQ alleged that Mr ZT said very little at the mediation. Mr ZT expresses surprise at suggestion that he played a minor role, noting that he had led the case for the defendants. His recollection was that he had spoken at length in the course of the mediation. He considered that the mediation was "no different from many others I have been involved in over the years. It was hard fought and both sides ended up compromising their positions".[17]

[149] When responding to allegation that Mr WR had made comment that judges tended, at first step, to accept evidence given by company directors, Mr ZT indicated that he "struggled to understand the point about judges and directors and cannot recall that being raised at all in the mediation".

[150] Neither of the [accounting firm] accountants who attended the mediation could recall Mr WR having made the comment he was alleged to have made by Mr and Mrs PQ.

[151] I think it possible that Mr and Mrs PQ may have genuinely misunderstood a comment made by Mr WR regarding the approach adopted by judges in weighing evidential matters.

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[17] Mr ZT, correspondence to Mr WR (24 September 2019).

[152] In consistently advancing argument that Mr WR was responsible for them settling on terms that they now regard as unfavourable, Mr and Mrs PQ totally disregard the processes which underpin a mediated settlement conference, and absolve themselves of any responsibility for exercising their independent judgement.

[153] Parties cannot, at mediation, be compelled to settle on terms that they considered to be manifestly unfavourable. They cannot be compelled to settle at all.

[154] I have noted that there is evidence that the mediator explained at the commencement of the conference, how the mediation process worked.

[155] I am also satisfied that Mr WR, as he would have been required to do, took steps to ensure that Mr and Mrs PQ clearly understood the mediation process. In providing her recollection of the conference, Ms QM advised that she considered that Mr WR had been very professional in his approach. She emphasised that Mr WR had gone to considerable lengths to put the parties at ease, and that he had explained the process at length.

[156] Mr ET noted that the accountants had been well briefed and prepared by Mr WR. It was also his recollection that Mr WR had taken care to ensure that Mr and Mrs PQ were carefully briefed. He noted that the settlement figure agreed was arrived at after lengthy discussions and contemplation by the PQ's, and that the mediator had also directly addressed the risk/cost factors if the dispute was to proceed to court.

[157] Mr ZT indicated that from his client's perspective, the settlement reached was approximately twice what his clients considered their exposure would have been if the matter had proceeded to court.

[158] It is not established on the evidence, that Mr WR made comment that judges accept (unless proved false) evidence given by company directors. It necessarily follows that I am not persuaded that Mr and Mrs PQ were induced to agree to an unfavourable settlement as a consequence of statements made by Mr WR.

*Did the mediation fail to address the second limb of the PQ's complaint?*

[159] It is not possible to state with any degree of certainty what percentage of time was apportioned to discussing specific issues at the settlement conference.

[160] What Mr and Mrs PQ are arguing, is that a substantial element of a claim which had been the subject of a lengthy and costly dispute, a claim which had been specifically pleaded in proceedings filed in the High Court, was overlooked or given minimum attention in a settlement conference.

[161] I am not persuaded that in the course of what was clearly a lengthy mediation, that the second limb of Mr and Mrs PQ's claim was, as they describe it, "mainly avoided".

[162] I accept Mr WR's evidence that the settlement reached was intended, and clearly understood by Mr and Mrs PQ, to achieve a settlement of all matters. I also accept his argument that it would have been unrealistic to have attempted to achieve a partial settlement.

[163] Mr WR's position is supported by the evidence of Mr ZT.

[164] It is also important to emphasise, that Mr and Mrs PQ were supported throughout not only by Mr WR, but by their accounting experts.

[165] There is compelling evidence to support conclusion that mediation process was carefully explained to Mr and Mrs PQ. The mediation was lengthy and punctuated by frequent breaks during which the parties had opportunity to consult with their solicitors and accounting experts.

[166] None of the evidence lends support to the proposition that there had been any degree of inattention to addressing all issues of significance to Mr and Mrs PQ. In a process which is specifically designed to encourage the participation of the parties, it presents as unlikely that Mr and Mrs PQ and their counsel would not have, in the course of a lengthy mediation, presented a full account of what the claim was about.

[167] Mr and Mrs PQ do not believe that they achieved the level of compensation that they considered the second limb of their claim warranted, but lack of success does not automatically equate to a failure to consider the claim.

[168] I do not think it probable that two experienced counsel, both supported by independent accounting experts, would not have given sufficient attention to a major part of the claim that was in dispute.

[169] Mr ET explains that it was he and his colleague's task at the mediation to provide expert evidence as to the financial losses suffered. He explains that the settlement figure agreed was arrived at after lengthy discussions which included assessment as to costs that would likely be incurred if the matter proceeded to court.

[170] None of this would support conclusion that a significant component of the PQ's claim was ignored or overlooked.

*Remaining Issues*

[171] I have given careful consideration to all of the arguments raised.

[172] The fact that I have not addressed a particular argument in this decision is not to be construed as indication of having overlooked a specific argument.

[173] A decision maker is not obliged, when giving reasons for his or her decision, to traverse every argument submitted.[18]

[174] For completeness I record that having carefully considered the nature of the dispute and the issues engaged by the dispute, I do not conclude that Mr WR was responsible for delay in advancing the proceedings. I accept Mr WR's explanation that whilst it would have been possible to have settled the first part of the claim more expeditiously if the first element of the claim had been approached from the stance that it was a "standalone claim", it would have been problematic to have adopted this approach as the two aspects of the claim were clearly closely interrelated. It would have been unrealistic to attempt to settle one part of the claim whilst leaving the other unresolved.

[175] Nor is there sufficient evidence to support contention that Mr WR's advice to his clients to take steps to mitigate their loss was inappropriate. Advice to immediately take steps to remedy the damage done, particularly bearing in mind the planning restrictions which had potential to impede the plans for residential development, presented as sensible and appropriate advice. It was regrettable for Mr and Mrs PQ that attempts to mitigate were hampered by residual problems, but advice to mitigate in the circumstances could never, in my view, amount to advice so seriously deficient as to merit a disciplinary response.

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[18] *R v Nakhla* (No 2) [1974] 1 NZLR 453 (CA).

**Conclusion**

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

*Anonymised publication*

[177] 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.

**Decision**

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

**DATED** this 23rd day of April 2021

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**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 and Ms PQ as the Applicants
Mr WR as the Respondent
Mr GB as a Related Person
[Area] Standards Committee
New Zealand Law Society