

LCRO 15/2011

**CONCERNING**

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

**AND**

**CONCERNING**

a determination of Auckland Standards Committee 1

**BETWEEN**

**JU**

Applicant

**AND**

**QH**

Respondent

**Introduction**

[1] On 17 December 2010 Auckland Standards Committee 1 determined that QH's conduct in his dealings with JU constituted unsatisfactory conduct as defined by section 12(c) of the Lawyers and Conveyancers Act 2006. It made orders pursuant to section 156(1) of the Act that QH be reprimanded, fined and pay costs to the New Zealand Law Society.

[2] JU has applied for a review of that determination, seeking that it be modified by ordering QH to return to him all of the documents provided by him to QH in relation to the case in which QH was representing JU, and also ordering QH to provide JU with documents prepared by him (including a draft application and memorandum) in connection with the case. These had been offered by QH during the Standards Committee investigation.

**Background**

[3] At the beginning of June 2009 QH accepted instructions from JU to act on his behalf in connection with an application to the Court pursuant to the Costs in Criminal

Cases Act 1967.

[4] On 18 June 2009 JU sent material to QH to assist him with the preparation of the application.

[5] QH failed to progress the application and JU complained to the New Zealand Law Society Complaints Service.

[6] In his response to the Standards Committee dated 27 July 2010 QH advised the Committee that he had reviewed all of the material provided by JU and had prepared a draft application and memorandum in support. He advised that the memorandum was substantial but incomplete.

[7] He concluded his response by indicating that it was his intention to do various things. He stated:

As far as [JU is concerned] it is my intention to do the following:

...

2) I have [JU]'s bundle of documents. I retained them to complete the documents I was preparing. Subject to any comments by the Law Society I will return them to [JU] as soon as I hear from you.

3) If [JU] wants them I will also send the draft documents I have prepared.

5) In the circumstances - I am also prepared to let [JU] use the draft documents I have prepared if he wants to chase the matter himself. ... If [JU] still wanted us to act for him I will complete the research myself. I undertake to complete it within 14 days of [JU] contacting us.

[8] In its determination, the Standards Committee "took into account [QH]'s offer to allow JU to use the documents he had prepared on his behalf".

[9] In his complaint to the Law Society JU sought (amongst other outcomes) the return of all material and the brief prepared by him which he had provided to QH to assist with the preparation of his case.

[10] Following receipt of the Standards Committee determination JU lodged an application for review, in which he sought modification of the Standards Committee determination to provide for the return of the material. It was implicit in this application that QH had not returned JU's documents, the brief prepared by JU or the application and memorandum prepared by QH.

**Review**

[11] Following receipt of the review application this Office wrote to QH on 18 January 2011 enclosing a copy of the application. No response was received from QH.

[12] On 12 May 2011, the Case Manager wrote to QH in the following terms:

The LCRO has now received and reviewed the Standards Committee file.

You will note from the copy of the application for review forwarded to you that [JU] seeks return of the documentation he provided to you as well as to receive the documents you offered to provide to him in your letter to the Complaints Service dated 27 July 2010, in particular in paragraphs 2, 3 and 5 on page 2 of your letter.

The documents he provided to you are of course his property and he is entitled to have these returned immediately. Please confirm that this has been done.

[13] No response was received from QH, but unfortunately it was not until 18 May 2012 that this Office wrote again to QH noting his lack of response and notifying him that a teleconference had been scheduled with the parties for 17 July 2012 at 10.00 am.

[14] In a subsequent telephone conversation with the Case Manager on 14 June 2012 QH advised that he would provide a response to the review application by 18 June 2012. That reply was not received and the Case Manager reminded QH of this by email on 19 June. A further reminder was sent by email on 9 July 2012.

[15] In addition, a total of seven telephone calls were made to QH's office between 6 June and 19 June by the Case Manager without contact, and messages left for him to return the calls were not responded to.

[16] On 16 July the Case Manager made contact with QH on his cellphone at which time QH advised that he was unable to attend the telephone conference scheduled for the following day due to the fact that he was engaged in a trial.

[17] The Case Manager advised QH that a written request for an adjournment of the telephone conference was required. This was received by email at 1:29 p.m. on 16 July.

[18] As a result, the telephone conference was rescheduled for 18 July at 12 noon. JU advised that he was unable to attend at that time but requested that the telephone conference proceed without him.

## The telephone conference

[19] The telephone conference proceeded on 18 July with QH, following which I issued a Minute. In that Minute I recorded the following:

[5] I sought comment from [QH] as to why he had not provided the material sought by [JU]. He advised that he had no objection to providing same if [JU] asked for it. I noted that [JU] had effectively requested same in his application for review and was surprised that he had not provided the material to bring an end to the review.

[6] [QH] advised, without the benefit of his file, that he thought he had sent all material he had to [JU]. I noted that we had not received any advice from [JU] that he had received the material.

[7] [QH] then undertook to me that he would by the end of this week – i.e. by Friday 20 July 2012, forward to [JU] all material that he has on his file or which is held electronically. That undertaking is specifically recorded in this Minute and if [QH] disputes the terms thereof he is to advise this Office immediately on receipt of this Minute.

[8] The review is therefore adjourned on the following basis:-

- a. That [QH] is to forward to [JU] at [JU's address] by 5 p.m. Friday 20 July 2012, all material which he holds on his file including any electronic material. It is noted that this will include the bundle of documents provided to [QH] by [JU] and his draft proceedings all as referred to in his letter of 27 July 2010 to the New Zealand Law Society.
- b. A copy of the letter forwarding that material (which is to identify specifically the material provided) is to be forwarded to this Office.
- c. [JU] is requested to advise this Office following receipt of the material, whether there remains anything outstanding that he is aware of that [QH] has in his possession.

[9] If [QH] does not comply with the undertaking recorded in this Minute the review will proceed and a decision will be issued.

[20] On 23 July 2012 QH wrote to this Office in the following terms:

Following the telephone conference with the LCRO I received a minute directing me to forward all documents belonging to [JU] to [JU]. All documents from this office belonging to [JU] were sent to him by Track and Trace Courier on February 9, 2011.

A copy of the cover letter containing the track and trace courier sticker is attached.

I spent quite a lot of time trying to assist [JU]. [JU] is litigious and I now understand he has complained against every lawyer who has ever tried to assist him. I had prepared draft documents in readiness to file. They were not complete but were almost complete. These included a detailed memorandum.

I am unsure as to whether these documents were sent to [JU] or not. If they were he has them. If they were not I have sought advice and these documents belong to me. I was never paid and [JU] has made it clear he does not want my

services. If the LCRO is directing that I send these to [JU] the LCRO exceeds its jurisdiction.

[21] I note that although QH had sent the documents on 9 February 2011 i.e. after the initial letter sent to him from this Office on 18 January 2011 advising of the review application, QH had not advised this Office that his letter of 9 February had been sent. That letter was also sent to a different address from that provided by JU in his application which I understand resulted in some delay in the letter being received by him.

[22] I also note however that JU did not himself advise this Office that he had received the letter.

[23] I refer subsequently to this lack of communication when addressing the issue of costs.

### **The outstanding documents**

[24] JU has advised by letter dated 4 August 2012 that he has not received the documents prepared by QH and offered by him in his letter to the Standards Committee dated 27 July 2010 and confirmed in the telephone conference with me on 18 July 2012.

[25] In his letter of 23 July 2012 QH now claims that the documents belong to him and that I would be exceeding my jurisdiction by making any order to forward those documents. I do not agree with QH. Section 156(1)(h) of the Lawyers and Conveyancers Act 2006 provides that a Standards Committee (and the LCRO) may:

(h) order the practitioner or former practitioner or incorporated firm or former incorporated firm or employee or former employee of a practitioner or an incorporated firm -

- i. To rectify, at his or her or its own expense, any error or omission; or
- ii. Where it is not practicable to rectify the error or omission, to take steps to provide, at his or her or its own expense, relief, in whole or in part, from the consequences of the error or omission.

[26] However, I do not wish to prolong this review further by making an Order that QH may in fact not be able to fulfil, if he cannot locate the documents which he says he prepared and would make available.

[27] When coming to its decision as to the Orders to be made following the finding of unsatisfactory conduct, the Standards Committee specifically noted that it took into

account QH's offer to allow JU to use the documents which he had prepared. That offer was of some value to JU and the logical consequence of these documents not being provided would be to compensate JU accordingly.

[28] However, a compensatory order would be complicated by the fact that JU will presumably qualify for legal aid and/or the fact that he may not proceed with his application.

[29] The Standards Committee did not give any indication of how its Order would have differed if QH had not made his offers. An option open to me therefore would be to return the matter to the Committee for it to amend its Orders given that the documentation has not been supplied. However, again, that would be prolonging this matter when it would be preferable for it to be resolved immediately.

[30] The Standards Committee imposed a fine of \$1,000.00. In paragraph 16 of its determination the Committee noted that this fine was imposed "having regard to all of the circumstances". I therefore conclude, that the Committee would have been minded to impose an increased fine if QH had not made his offer and accordingly propose to adopt this course.

[31] I have given some thought as to whether the imposition of a further fine should be deferred to enable QH to make good on his offer. However, he has had ample time within which to do this and has made it clear in his letter to this Office on 23 July 2012 that he no longer considered that he was obliged to fulfil his offer, notwithstanding that he undertook to do so in the telephone conference with me, which undertaking was recorded in the Minute of the same date.

[32] In the circumstances, I consider that the fine imposed by the Standards Committee should be increased by \$750.00. I emphasise that this increased fine is not imposed for failing to fulfil the offer or the apparent breach of his undertaking to me, but to recognise that the Committee took into account this offer when determining the level of fine to be imposed, which offer has not in fact been fulfilled.

[33] For the sake of completeness the Standards Committee determination will be confirmed as to its finding of unsatisfactory conduct.

**Decision**

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

[35] Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006, the Order of the Standards Committee is modified by increasing the fine to \$1,750. The additional amount of \$750.00 is to be paid to the New Zealand Law Society within four weeks of the date of this decision.

**Costs**

[36] In an email from this Office to QH dated 16 July 2012, QH was advised that the difficulties being encountered in progressing this review application would be taken into account when considering costs. In addition, the review application has been successful which will also usually result in a costs order being made against the Practitioner.

[37] If QH had advised this Office that he had forwarded the documents to JU on 9 February 2011, and the matter had been readily resolved by him providing all of the documents offered by him, then a costs order would not have been appropriate.

[38] However, this Office has encountered significant difficulties in progressing this review as referred to above. The Office of the LCRO is funded by levies on legal practitioners. It is unfair that practitioners should bear the additional burden imposed on them as a result of failures in communication and lack of cooperation by a practitioner who is party to review proceedings. In the circumstances, I consider that it is appropriate that an Order for costs be made against QH.

[39] Accordingly, QH is ordered pursuant to section 210(1) of the Lawyers and Conveyancers Act 2006, to pay the sum of \$600.00 by way of costs to the New Zealand Law Society, such sum to be paid within four weeks from the date of this decision.

**DATED** this 13<sup>th</sup> day of September 2012

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O W J Vaughan  
**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:

JU as the Applicant  
QH the Respondent  
Auckland Standards Committee 1  
The New Zealand Law Society