

CONCERNING

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

AND

CONCERNING

a determination of Auckland Standards Committee 4

BETWEEN

MR OT

Applicant

AND

MR PI

Respondent

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

DECISION

Introduction

[1] Mr OT complained to the New Zealand Law Society in April 2009 about an opinion provided by Mr PI to an English law firm (BAJ). BAJ had sought the opinion from Mr PI in connection with proceedings which Mr OT had issued against Mr OU (his half brother for whom BAJ acted) for the return of funds held by Mr OU in a Swiss bank account.

[2] The opinion was provided to support Mr OU's defence to the claim by Mr OT that he should not release the funds which he had received following liquidation of a company (SPL) until he was sure that the funds were not 'tainted' with any tax fraud.

[3] In his opinion, Mr PI concluded that Mr OT, a director and shareholder of the company, may be liable for tax offences committed by the company. His opinion was specifically expressed to be based on certain assumptions of fact as advised to him by BAJ.

[4] Mr OT asserts that these facts were not correct and he contended that Mr PI had a duty to verify the facts before issuing his opinion. In particular, he contended that Mr PI had an obligation to verify the shareholding in the company as the material supplied to him by BAJ indicated some discrepancies in that regard.

[5] The Standards Committee resolved to take no further action in respect of Mr OT's complaint on the grounds that Mr PI had acted in good faith and provided an opinion based on information presented to him. It also noted that at the time of the complaint Mr PI had withdrawn his opinion.

[6] Mr OT sought a review of that decision by this Office.¹ The LCRO agreed with the Standards Committee that there had not been any wrong doing by Mr PI.

The new complaint

[7] On 20 February 2011, Mr OT wrote to the New Zealand Law Society Complaints Service seeking that the Standards Committee review its September 2009 determination on the grounds that "new evidence [had become available] that BAK [Mr PI] did not verify/test BAJ brief" and had "ignored [the] true facts as well as misrepresenting to the [Standards Committee] that the legal opinion had been "unqualifiedly withdrawn".

[8] The Standards Committee issued its determination on 13 April 2011 and recorded its findings in the following way: -

[17] The Committee noted this complaint had been dealt with previously and had also been the subject of a review to the LCRO. The issue for consideration for the Committee was whether there was any evidence to support the allegation that Mr PI had misled the Standards Committee or whether the advice provided relating to the withdrawal of the opinion was inaccurate in any way.

[18] In relation to the allegation that Mr PI had misled the Committee, the Committee could find no evidence in the material provided by Mr OT to support this allegation. In the Committee's view, BAK's opinion was based on documents provide [*sic*] by the English solicitors who instructed the firm. The "true facts" sent through by Mr OT did not, in the Committee's view, alter the fact that BAK provided their opinion based on information provided to them and that they were entitled to assume that information as correct. The Committee further noted that the alleged breach of Rule 8.04 had been dealt with by the LCRO and that it was unnecessary to canvas this issue of complaint again.

[19] In relation to the second issue of complaint, being the allegation that Mr PI had misled the Committee by stating that the legal opinion had been withdrawn, the Committee noted that at the time of Mr PI's response to the initial complaint,

¹ LCRO 157/2009

the legal opinion had been withdrawn. This was because BAK's fees had not been paid. The "new evidence" email provided by Mr OT dated 21 December 2010 was not evidence that Mr PI had misled the Committee. All that email did was confirm that the withdrawal no longer applied as their fees had now been paid. In the Committee's view, Mr PI had not misled the Committee.

[9] Mr OT has applied for a review of that determination.

Review

[10] The Standards Committee treated the correspondence from Mr OT as a request for the Standards Committee to review its earlier determination. It did not refer the correspondence to Mr PI for a response and the matter was put before the Standards Committee for its determination. A copy of that determination was provided to Mr PI.

[11] When advised of this application for review, Mr PI responded by letter dated 24 May 2011 in which he stated:-

Having considered the application, I confirm that I am content to rely on the material I have already submitted in this matter.

However, should the Complaints Committee require my response to any specific issue now raised by Mr OT, I would be happy to assist.

[12] On 7 September 2011, this Office sought consent from the parties for the review to be completed on the basis of the material provided. Mr PI provided his consent.

[13] Before responding to the request, Mr OT sought confirmation of what had been provided to this Office by Mr PI and referred to material which had been provided in relation to the first review.

[14] Nothing had been received in connection with this review from Mr PI other than the letter dated 24 May 2011 referred to above. After some correspondence, Mr OT was satisfied that this was the only correspondence received from Mr PI in connection with this review.

[15] Mr OT did not however consent to this review being completed on the papers and advised that he wished to attend in person in support of his application.

[16] An applicant only hearing was held in Auckland on 14 August 2012.

[17] It became apparent during the review hearing that Mr OT considered the present review to be something in the nature of an appeal against the earlier LCRO decision. He disagreed with the statement by the LCRO in that decision that Mr PI's

suggestions of possible tax offences by Mr OT, were carefully and moderately framed and not presented as final conclusions. He advised that Mr PI's suggestions had in fact been treated by Mr OU and the English High Court as statements of fact causing him and his family significant distress.

[18] Mr OT is incorrect in his view of the review process. This review is not to be considered in any way a form of appeal from the decision in the previous review. The decision of the previous LCRO stands and if Mr OT wishes to challenge that decision he needs to take legal advice as to the means of doing so.

[19] This review is a review of the inquiry and determination by the Standards Committee as expressed in its determination dated 13 April 2011.

[20] All of the material provided by Mr OT seeks to discredit Mr PI's opinion on the grounds that it was based on incorrect facts. He asserts again, that a lawyer has an obligation to ensure that all facts presented to him or her by a party seeking an opinion should be verified by that lawyer. As such, Mr OT's submissions amount to a restatement of his allegation in the first complaint that Mr PI was in breach of rule 8.04 of the Rules of Professional Conduct for Barristers and Solicitors which were in force at the time.

[21] That allegation was dealt with by the LCRO in the previous decision. At [10] of that decision the LCRO stated:-

[10] I do not consider that there has been any wrongdoing by Mr PI in this instance. He provided a legal opinion based on documents provided by the English solicitors. It was reasonable for him to rely on the professionalism of those solicitors to provide all information needed to complete the opinion. There is no obligation to second-guess such instructions or to be suspicious of professional instructions. Mr PI was careful to state the basis upon which the opinion was provided. He states that in providing the opinion he acted in good faith in reliance on material that had been provided to him. There is no evidence that this is not the case. There has been no professional breach by Mr PI in this instance.

[22] Mr OT objects to this, and says that if this is the case, then a lawyer can make any statements he or she likes in an opinion (or other legal writing) without needing to verify the facts on which the opinion is based.

[23] That is not the case. There are various options available to an aggrieved person to challenge any such document depending on the context and use to which it is put. Mr OT will need to seek advice in that regard.

[24] I note in this instance, that Mr OT did have an opportunity to challenge the assumptions on which the opinion was provided when the matter came before the Court. He was legally represented in those proceedings and the opinion was presented as evidence and therefore available to be challenged in the context of those proceedings.

[25] Mr OT has provided a vast amount of documentary evidence all of which shows (he says) that Mr OU remained a shareholder in the company and that he (Mr OT) could not therefore be accused of tax fraud by claiming losses which would be forfeited if indeed Mr OU had disposed of his shares.

[26] However, the disciplinary process is not the appropriate forum in which to argue his case. Whether Mr OT is correct or not, does not alter the fact that Mr PI provided his opinion specifically and explicitly expressed as being based on certain assumptions. If those assumptions were not correct then the opinion ceased to have any validity. This does not however mean that Mr PI had a professional obligation to seek to verify all of the factual data provided to him by BAJ. That was not his brief and indeed, BAJ would be somewhat aggrieved if Mr PI took it upon himself to conduct an independent investigation into the correctness of the facts provided to him. At the very least, Mr PI could not expect to be paid by BAJ to carry out investigations outside of his brief.

[27] I agree with the previous LCRO when he stated that “Mr PI was careful to state the basis upon which the opinion was provided. He [Mr PI] states that in providing the opinion he acted in good faith in reliance on material that had been provided to him. There is no evidence that this is not the case. There has been no professional breach by Mr PI in this instance.”

[28] In any event, even if I did not agree with the previous LCRO, I have no jurisdiction to vary that decision.

[29] The other aspect of the Standards Committee determination under review relates to the stated withdrawal of the opinion. As noted by the Standards Committee, at the time of Mr PI’s response to the initial complaint, the legal opinion had been withdrawn. It was quite clear to the Standards Committee that the reason it had been withdrawn was because Mr PI’s bill had not been paid. Mr PI did not mislead the Committee in any way in this regard and I concur with the determination of the Standards Committee.

[30] As noted above, Mr OT has presented a significant amount of documentation both to the Standards Committee and to myself which he puts forward in support of his contention that Mr OU remained a shareholder in the company. He says that the material in Mr PI's possession, and in particular a letter from BAJ to BAL (the English law firm representing Mr OT) dated 25 April 2007, supports Mr OT's contentions.

[31] Unfortunately, that material does little to assist Mr OT in this review. It may mean that the facts on which the opinion was based were different from those on which Mr PI proceeded and that the validity of the opinion can be called into question. However, that is not a disciplinary matter and it is not the role of the LCRO to venture an opinion on the validity of Mr OT's assertions.

[32] The fact remains that Mr PI provided his opinion based on certain assumptions. These assumptions were based on material provided to him and there are no grounds for considering that he acted otherwise than in good faith. Mr OT will need to seek advice as to the appropriate way in which his concerns can be addressed.

Summary

[33] Mr OT has produced a significant amount of carefully documented material and travelled from Australia to present his oral submissions. All of the material is directed at providing evidence in support of his view of the facts. He seeks that I should review that evidence and make findings of fact which are at odds with the facts as recorded in Mr PI's opinion. In this regard, Mr OT seeks to revisit the original complaint, and the LCRO review of that complaint.

[34] It must be restated, that the Standards Committee determination to be reviewed by me, is simply that there was nothing to support Mr OT's claim that Mr PI had misled the Standards Committee in his responses to the first complaint. Nothing Mr OT has provided leads to any different conclusion and the determination of the Standards Committee is concise and accurate.

Decision

For the reasons stated above I concur with the determination of the Auckland Standards Committee 4 and confirm the determination pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006.

DATED this 20th day of August 2012

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:

Mr OT as the Applicant
Mr PI as the Respondent
Auckland Standards Committee 4
The New Zealand Law Society