

LCRO 14/2011

**CONCERNING**

An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006

**AND**

**CONCERNING**

a determination of the National Standards Committee

**BETWEEN**

**MR DG**

of Auckland

Applicant

**AND**

**MR WV**

of Auckland

Respondent

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

**DECISION**

**Application for review**

[1] The National Standards Committee declined to uphold complaints that Mr DG (the Applicant), had made against Mr WV (the Respondent). The complaints concerned conduct that had occurred while the former Law Practitioners Act 1982 was in force. The transitional provisions of section 351 of the Lawyers and Conveyancers Act 2006 provides that a Standards Committee shall have jurisdiction to consider a complaint made under this Act about conduct that occurred prior to its commencement only if proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act.

[2] The Standards Committee concluded that the subject matter of most of the complaints failed to reach the high threshold required for disciplinary action to be taken. With respect to the remainder of the complaints, the Standards Committee concluded

that the subject matter of the complaints was trivial and the complaint was frivolous and vexatious.

[3] The Applicant sought a review but provided no reasons, stating that these would be provided later. In response to the Case Manager's request that reasons had to be provided, the Applicant reiterated his original complaint. The Applicant was informed that it was not necessary for him to re-state the reasons for his original complaint to the Law Society, but rather that clarification was sought about the reasons for his review application.

[4] The Applicant replied that he had no idea of what was being asked of him and therefore felt unable to respond. He expressed the view that the LCRO appeared to be unlawfully preventing him from accessing his statutory right of review and he would just bring proceedings against the Office and her personally in the High Court if this continued. It is not appropriate to include his further comments.

[5] I simply note that the Applicant is a lawyer and is therefore well positioned to provide reasons for a review application.

[6] In this case the Standards Committee had dismissed the major part of his complaint on the basis that it concerned conduct predating the Lawyers and Conveyancers Act and did not reach the high threshold for disciplinary action to have been commenced under the Law Practitioners Act. I would have expected to receive submissions relating the conduct with reference to the applicable standards.

[7] The Applicant sought to be personally heard on the application and an Applicant-only hearing was arranged. The Respondent was entitled to participate but not required to do so and elected not to attend.

[8] At the hearing the Applicant was again reminded that the manner of his engagement with this office was inappropriate and I record here that he has agreed that he would not engage in that manner with this Office in the future. It is reassuring to have this agreement.

#### *Nature of LCRO review*

[9] It appeared from the various submissions made by the Applicant that his understanding of the disciplinary processes and the role of the LCRO, are not altogether clear. Misconceptions are not uncommon and I therefore take this opportunity to include some explanation so as to assist any future applications that he, or any other practitioners, may be considering.

[10] By virtue of the Lawyers and Conveyances Act, the LCRO is required to undertake reviews of Standards Committee decisions. Notwithstanding that this is stated to be “a review”, it also confers on the LCRO the power to step into the shoes of a Standards Committee where it is considered appropriate to do so and conduct an investigation.

[11] The procedures of this office are set out in the LCRO Guidelines. These cover most of the usual situations applying to review applications. There are on occasions circumstances that are not covered by the Guidelines and these can be addressed by a procedural direction.

[12] The review applicant is expected to identify areas where the Standards Committee decision is considered to be wrong. This is a requirement of the Regulations. It is necessary in order to inform the respondent about the basis of the review application.

[13] The standard procedure of this office is to obtain a copy of the Standards Committee file immediately on receiving a review application. The respondent is sent a copy of the review application and invited to respond.

[14] On assessing the above information the LCRO issues directions on what further inquiries should be made before setting the matter down for a hearing.

[15] If the information before the LCRO does not disclose an error by the Standards Committee it is open to the LCRO to arrange an Applicant-only hearing in order to get a better understanding of the Applicant’s reasons for the review. Should this disclose a basis for further inquiry, the LCRO will take such further steps as are considered appropriate.

[16] The objective at all times is to ascertain whether any part of the conduct complained of reaches a threshold upon which an adverse disciplinary finding should be made against the practitioner.

[17] It is important to make clear that the process is inquisitorial, and should not be perceived by the parties as an adversarial contest that results in a ‘winner’ and a ‘loser’. The sole purpose of the investigation and review is to consider whether disciplinary concerns arise in connection with the complaint.

[18] An adverse outcome may lead to orders being made against the practitioner. These are unlikely to affect the original complainant where no consumer-related interests arise.

### *Review*

[19] The first category of complaints concerned conduct that had occurred in early 2008. It arose out of a hearing before Judge D J McDonald who was hearing submissions from the Applicant and the Respondent, counsel for opposing parties, on an application by the Applicant's client for an extension of time to file a Statement of Defence.

[20] The complaint was that the Respondent had led evidence from the bar. A further complaint was that the Respondent has misled the Applicant in Court which led to him unnecessarily withdraw a statement and apologise.

[21] The second category of complaints concerned information that the Respondent had sent to the Standards Committee, in connection with an earlier complaint that had been made by the Respondent against the Applicant and also in connection with the Respondent's answer to the Applicant's complaints against him.

### *Complaint about leading evidence from the bar*

[22] The complaint was that the Respondent had led evidence from the bar, and had admitted doing so, and that this conduct was in his view such an important breach that it should lead to a disciplinary finding.

[23] The Applicant had provided a transcript of the Court hearing. This was a transcript of submissions before Judge McDonald in 2008, and as noted concerned an application by the Applicant's client to file a Statement of Defence out of time. The transcript runs to some 82 pages. The portion that led to the Applicant's complaint appears on page 62 wherein the Respondent is recorded as stating "*Sir, just before I make my final submission. What I haven't addressed and it is only because I have become aware of it recently, is the Plaintiff's wife has cancer and is going to have treatment in the UK ...*".

[24] The Respondent did not deny having said this, but did not believe his statement to the Court in that regard would have any practical effect on the outcome of the Court's decision. He stated "*I am unable to recall that [the Applicant] had raised any objection.*"

[25] I have read the transcript and noted that a good many submissions were made by both the Applicant and the Respondent, each arguing the case for his client. I noted

numerous examples where the Applicant himself had provided information to the Court that appeared to be equivalent to the submission of the Respondent and could, on his definition, be described as 'evidence'. I referred the Applicant to some examples of this. He intimated that his submissions would have been supported by evidence already before the Court. However, the nature of many of the submissions indicate that it is highly unlikely that they would have been supported by the affidavits of parties to the proceeding. My additional enquiry into the background also indicated that the 'voice' of the Applicant's client was singularly absent from the proceedings. The Applicant had not provided any evidence to support his explanation and I do accept that he has explained away his own submissions that would appear to be of a similar or at least equivalent character.

[26] I put it to the Applicant that he appeared also to have led evidence from the Bar. His response was that he was not under scrutiny. I accept that this is so. However, when a lawyer files a complaint against another lawyer about conduct that he has himself engaged in, there is a proper basis for questioning whether the complaint was made in good faith. This is a material question in a forum that considers the conduct of lawyers in a disciplinary context, and it is also material to note that section 138 (1)(c) of the Lawyers and Conveyancers Act makes specific provision for complaints to be dismissed on the ground of being frivolous, vexatious or not made in good faith.

[27] The Applicant further submitted that in the event the Respondent's evidence was material to the outcome of the case. As I did not have a copy of the judgment I asked him to inform me of the reasons for the Court's ultimate decision declining to grant his client's application. He was unable to provide such evidence. He then submitted that the outcome could only be explained on the basis of the Respondent's evidence which is the subject of this complaint.

[28] The Applicant was asked to forward a copy of the judgment to my office which has since been done. Having read that judgment it is abundantly clear that the application was declined due to tardiness of the third defendant (the Applicant's client) who had repeatedly failed to meet timetables to file a statement of defence, the judge describing their attitude to the Plaintiff's claim as 'cavalier'. His Honour continued that the Plaintiff was prejudiced because it had not been able to advance its claim against the third defendant because of their attitude and failures, noting that a claim filed over a year ago had stalled, and balancing the rights of a litigant to obtain access to justice and the objective of avoiding injustices arising from dilatory or defaulting conduct on

behalf of one of the parties, the balancing came down “*firmly on the side of the plaintiff.*” There is no mention of the plaintiff’s health or any reference to the Respondent’s submission that is complained of.

[29] In these circumstances I find it difficult to reconcile the Applicant’s submission with the reasons for the Court’s decision declining his client’s application. It is most unhelpful to have submissions made at a review hearing that the Applicant himself must know are not correct, and are speculative at best. Being under disciplinary scrutiny is a serious and stressful experience for most lawyers and I need to express my concern about the motives of a review applicant who misrepresents the true state of affairs.

[30] I asked the Applicant why the disciplinary machinery of the New Zealand Law Society should be exercised in respect of matters occurring in the Court which appeared to be well within the ability of a Judge to deal with. He submitted that a Judge had no recourse to having that information corrected. This is clearly not right since it is well within the power of the Judge to evaluate what evidence is accepted or disregarded and insist on affidavit evidence if there is a concern that submissions from counsel that include matters of evidence are relevant to the substantive proceeding. There is nothing here to suggest that the Judge objected to the information that he received from either party, and there is no suggestion in the transcript that he required either counsel to produce affidavit evidence to support their submissions.

[31] Aside from the above, the Applicant has not explained how in any event the Respondent’s submission to the Court could, albeit evidence, amount to conduct that could properly be described as ‘reprehensible’. As noted, he provided no reason for his review application, and would be aware that the Standards Committee decision had considered that the conduct did not reach the threshold required by section 351 of the Act. The complaint could only have been supported if the conduct was of a degree of seriousness that could have led to disciplinary proceedings against the Respondent. The Applicant has forwarded no useful argument to show that the Committee’s decision was wrong.

[32] For all of the above reasons there is no basis for amending the Standards Committee decision which will be confirmed.

[33] The second category of complaints concerned the complaint that the Respondent had made against the Applicant. This alleged that the Respondent’s complaint was based on misleading information given to the Standards Committee. The

Respondent's complaint has been dealt with a Standards Committee, and was declined. I have no access to that file since no review application was made. However, there are sufficient details on this review file provided by the Standards Committee to understand the nature of the complaint.

[34] It was alleged by the Applicant that the Respondent lied to the Standards Committee. This concerned the way that the Respondent had described events in the Court on the day that the parties presented their submissions to the Court in February 2008, which was the basis of the Respondent's complaint.

[35] The background was that a party (in the proceeding) had filed an application to have the proceeding transferred to another Court (successfully) and there were questions about whether other parties had been served with the application. An earlier decision of the Court had stated that the application had been made by the plaintiff, who was represented by the Respondent. This was incorrect because the application had been made by the second defendant. However, relying on the information (unknown to be erroneous) an affidavit was filed by a colleague of the Applicant who had originally handled the file. It appears that the Applicant's colleague had included personal criticisms of the Respondent. These did not impress the Judge who commented in his judgment (following the 2008 hearing) that serious allegations of impropriety had been made by the Applicant and his colleague against the Respondent and that at the conclusion of the (2008) hearing he (the Judge) had invited the Applicant to consider not only his own submissions but also his instructing solicitor's affidavit.

[36] After the decision was issued the Respondent filed a complaint that the Applicant had not withdrawn his serious allegation concerning the transfer of the proceeding.

[37] The Applicant's complaint that the Respondent had lied rested on a comparison between the transcript of the hearing on the one hand, and the Judge's written decision, the latter having been referenced by the Respondent for his complaint. The Applicant said that he had withdrawn the allegation that the Respondent's client had applied for the transfer of proceedings so it was wrong of the Respondent to say that he had not. He also said that the Judge had not invited him (the Applicant) "*to withdraw and/or apologise*".

[38] I noted that the Respondent's complaint had not suggested that the Judge had invited the Applicant to apologise so I am not clear why the Applicant should have suggested that he had. However, it is clear that in his judgment the Judge had

included statements that properly supported the complaint. Whether or not that was a verbatim record of the hearing transcript is immaterial because the complaint rested on the content of the judgment. Furthermore, the Judge's comments appear to have related to the tone and nature of the affidavit rather than the matter of an error in who had in fact applied for a transfer of the proceeding.

[39] This concerned a complaint that the Respondent had made against the Applicant. I must consider that the Applicant had the opportunity to have clarified this matter to the Standards Committee when given the chance to respond to the complaint. I have no doubt that the Committee was capable of considering these matters. There is no reason to suppose that the Committee was in any way misled on the matter.

[40] In one respect the Respondent accepted a criticism made by the Applicant concerning a comment which the Respondent accepted was inappropriate, and forwarded an apology to the Applicant. As noted the Standards Committee dismissed these complaints under section 138 (1)(b) and 138(1)(c), having decided that the subject matter of the complaint was trivial and the complaint was frivolous and vexatious.

[41] The fact that a cross-complaint follows a prior complaint filed by the Respondent should be immaterial where the conduct complained of discloses wrongdoing of a kind that should attract the attention of the disciplinary machinery of the New Zealand Law Society. In this case, however, the allegations against the Respondent depend predominantly if not wholly on the Applicant's perspective and interpretation of matters.

[42] Furthermore, individuals ought not to be deterred from filing legitimate complaints by the risk of confronting a complaint about making the complaint. The investigative procedures of the Standards Committee provide sufficient opportunity for a respondent to correct any misimpressions or incorrect information as they may wish to do. A complaint of this kind may be appropriate if there was no evidence of any kind to support a serious allegation. That is not the case here, however.

[43] I take into account that it is the task of the Standards Committee to receive and evaluate information provided to it. Any objections that the Applicant had to information provided by the Respondent could simply have been dealt with in his responding comments.

[44] I see no basis for taking a different view to that taken by the Committee.



*Concluding comments*

[45] The Applicant did not provide any reasons for his review application, and there was no part of his submission that amounted to any suggestion that the required threshold was capable of being reached in respect of his complaints on the pre-1 August 2008 conduct. This was an important preliminary matter because as the complaint primarily concerned conduct that had occurred prior to the commencement of the Lawyers and Conveyancers Act, a high threshold was required before the Committee had jurisdiction to consider the complaint. He provided no reasons for his review application and had been unable to produce any reasonable foundation for pursuing the review of the Standards Committee's decision.

[46] Given the absence of any reasonable grounds for the review application I have questioned why this application was made. While any party to a Standards Committee inquiry may apply for a review, it is expected that the review process will be used appropriately and for purposes which are intended. It is appropriate to draw the Applicant's attention to the LCRO Guidelines on costs, in particular the power of the LCRO to impose costs against a practitioner. The power of the LCRO to impose costs is set out in section 210 of the Lawyers and Conveyancers Act, and allow such costs orders to be made as the LCRO thinks fit. The LCRO Guidelines give notice that costs may be awarded against any party who has acted vexatiously, frivolously, improperly or unreasonably in the conduct of the review. This could arise where the review is pursued in a manner that is unreasonable, inappropriate and generally unsupportable.

**Decision**

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

**DATED** this 24<sup>th</sup> day of June 2011

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Hanneke Bouchier  
**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 DG as the Applicant  
Mr WV as the Respondent  
The National Standards Committee  
The New Zealand Law Society