

LCRO 149/2015

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

ZH

Applicant

AND

VL

Respondent

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

DECISION

Introduction

[1] Mr ZH has applied for a review of a decision by the Area Standards Committee (the Committee) to take no further action in respect of his complaint concerning the conduct of Mr VL.

[2] The Committee's decision was based upon s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act), which allows a Standards Committee to take no further action on a complaint if it is considered unnecessary or inappropriate to do so.

Background

[3] Mr VL is a lawyer who was instructed to appear for ACC in an appeal to the District Court brought by Mr ZH challenging a decision in an ACC review delivered on [XX] 2012 (the [XX] 2012 ACC decision). Mr ZH's challenges included allegation that

the ACC reviewer (who happened to also be a lawyer) had breached his statutory duty of independence in conducting the ACC review. Mr ZH was unsuccessful in his appeal to the District Court and applied for leave to appeal that decision to the High Court. Mr VL was again instructed by ACC to appear in the High Court, in the course of which he prepared, filed and served on Mr ZH written submissions opposing Mr ZH's application for leave to appeal (Mr VL's submissions).¹

[4] Mr VL's submissions referred to a decision of the Court of Appeal dated [Day] [Month] 2012 concerning an earlier application by Mr ZH to ACC for cover for medical misadventure, holding that Mr ZH was not entitled to cover (the Court of Appeal's [Month] 2012 decision).² Mr VL's submissions also referred briefly to Mr ZH's District Court challenge to the [Month] 2012 ACC decision, and submitted it had "no substance".³

[5] The District Court considered Mr ZH's appeal against the [Month] 2012 ACC decision after the Court of Appeal's [Month] 2012 decision had been delivered, applied the latter decision to the issue it was considering, and dismissed Mr ZH's appeal.⁴

The complaint

[6] Mr ZH complained to the Lawyers Complaints Service in a letter dated 22 August 2015.

[7] The substance of Mr ZH's complaint was that Mr VL:

- was aware of and complicit in Mr RB's "crime" in sitting "illegally" on the [Month] 2012 review;
- lied in his submissions to the High Court about Mr RB's involvement in the [Month] 2012 review;
- was in possession of documents when he made the submissions to the High Court that clearly showed that Mr RB had sat illegally on the [Month] 2012 review; and
- took advantage of Mr ZH as an unrepresented layperson.

¹ Written submissions of Mr VL in opposition to Mr ZH's application for leave to appeal to the High Court, dated [DAY] [MONTH] 2015.

² At [2.0].

³ At [3.3] and [3.4].

⁴ Above n 3.

[8] Mr ZH's complaint was assessed by the Lawyers Complaints Service's early intervention process. This process involves an initial assessment of the complaint by a legal standards officer to see whether any response might be required from the lawyer complained about. The process is designed to identify complaints in which there are no obvious professional conduct issues. Rather than delay matters by seeking a response from the practitioner concerned, the complaint is put directly before a Standards Committee for it to make a determination. The legal standards officer does not provide a report or opinion; the matter is simply fast-tracked to a Standards Committee.

[9] For completeness I would add that if a Standards Committee takes a different view and concludes that a response is necessary, it would request the lawyer complained about to provide one.

[10] In relation to Mr ZH's complaint, the legal standards officer did not ask Mr VL to provide any response. The complaint was referred directly to the Committee for consideration.

The Standards Committee's decision

[11] The Committee considered Mr ZH's complaint and delivered the decision under review on 25 June 2015. The Committee determined the complaint pursuant to s 138(2) of the Act on the basis that further action with regard to the complaint or any issue involved in the complaint was not necessary or appropriate.

[12] The Committee identified the issue to be considered was whether it could review evidence or submissions presented to a Court.

[13] In reaching the decision to take no further action the Committee noted the following:

- Mr ZH was concerned about ACC's response to his application for leave to appeal a decision of the District Court, to the High Court.
- It is for a Court to rule on those submissions.
- There is a limit to the Lawyers Complaints Service's ability to consider matters that are subject to Court proceedings and judicial determination.

- The LCRO has held that:⁵

it is improper to use the complaints process as a means to undermine or attack the decision of another court or tribunal. The proper route to challenge the decision of another tribunal is appeal.
- It is not the Committee's role to reconsider submissions that have been presented to a Court.
- The proper remedy for Mr ZH is to challenge the submissions during the court proceedings by way of his own submissions to the judge.⁶

[14] Mr ZH disagreed with the decision and applied for a review.

Application for review

[15] Mr ZH's application for review dated 21 July 2015 relies on the following grounds:

- Mr VL failed to table all documents in the case in order to pervert the outcome.⁷
- By failing to submit those documents to the District Court, Mr VL has lied to that Court.
- The actions of the ACC reviewer in conducting the [XX] 2012 review impact upon a consideration of the complaint against Mr VL.

[16] Mr VL responded to the application for review by rejecting Mr ZH's allegations of dishonesty. He submitted that the Committee's decision adequately dealt with Mr ZH's complaint against him.

Hearing in person

[17] Mr ZH attended a review hearing in Auckland on 12 July 2016. Mr VL was not required to attend and the hearing proceeded in his absence with his consent.

⁵ *OR v PL* LCRO 88/2011

⁶ At [3] – [6].

⁷ Those documents were attached to Mr ZH's application for review to this Office as W1, W2, W3, A1, A2 and a letter to Mr ZH from Firm A dated 16 April 2015.

Nature and Scope of LCRO Review

[18] The nature and scope of a review have been discussed by the High Court,

which said of the process of review under the Act:⁸

... 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.

[19] More recently, the High Court has described a review by this Office in the following way:⁹

A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[20] 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.

⁸ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

⁹ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

Analysis

[21] Mr ZH says Mr VL failed to table all documents in the case in order to pervert the outcome.¹⁰ That is essentially an allegation that Mr VL misled the Court by concealing relevant evidence. Although that is a serious allegation to make, it misconceives Mr VL's role as counsel for ACC in the proceeding. It is not part of counsel's role in an adversarial process to adduce evidence in support of the opposing party's case. If Mr ZH considered that evidence was relevant, the usual course would be for him to adduce it. Mr VL would then have to make a judgement call on whether it was necessary to his client's case to challenge the evidence. The same explanation also disposes of the second ground, that by failing to submit those documents to the District Court, Mr VL has lied to that Court. There is no merit in either review ground.

[22] The third aspect of Mr ZH's application for review asserts that Mr VL is complicit in wrongdoing by the ACC reviewer which led to a perversion of justice, namely that Mr ZH has been unable to obtain the ACC cover he considers is due to him. That review ground relies on conclusion that the ACC reviewer lacked independence when he made the [XX] 2012 ACC decision.

[23] The evidence on which Mr ZH relies to support that assertion is that the ACC reviewer did not disclose his involvement in 2007 in another claim by Mr ZH, although there are documents that include the ACC reviewer's name (these are the documents Mr ZH believes Mr VL should have tabled to the Court).

[24] The fact that the ACC reviewer's name appears on those documents, and that he did not disclose his earlier involvement in that claim does not lead logically or inevitably to the conclusion that the ACC reviewer was partisan when he had a statutory duty to be independent in a review in relation to a later claim made by Mr ZH.

[25] Mr ZH's arguments are not sufficiently compelling to enable me to conclude that the ACC reviewer did wrong. As it is not possible to conclude that there was wrongdoing by the ACC reviewer as alleged by Mr ZH, it is not possible to conclude that there was any wrongdoing for Mr VL to be complicit in, which in turn disposes of the third aspect of concern to Mr ZH.

[26] I have carefully considered the documents and submissions that Mr ZH has provided in support of this review, and which he says demonstrate the corruption of the reviewer and Mr VL. Mr ZH also provided copies of documents that relate to a

¹⁰ Above n 7. .

separate complaint he has made more recently about Mr VL's conduct. He says they support his assertion that Mr VL lacks integrity.

[27] To ascertain whether there is any reason to accept that assertion I have carefully read those documents. The documents record Mr VL's explanation for not having read submissions sent by email by Mr ZH in relation to a particular ACC related proceeding. The subject heading to the email Mr VL says he received did not correspond to the subject matter of the submissions. Without determining the issue, I comment only that the documents Mr ZH handed up at the review hearing do not appear to demonstrate a pattern of conduct by Mr VL that raises disciplinary concern. Those documents also do not appear to be directly relevant to this review. In the circumstances, those documents have not been passed on to Mr VL in the course of this review, but have been retained on the LCRO file.

[28] On the basis of all the material before me, I am unable to conclude that Mr VL's conduct engages any professional concern that suggests I should depart from the Committee's decision.

[29] For completeness I note that although the regulations require NZLS to notify a complaint to the practitioner concerned,¹¹ Mr VL does not object to having missed the opportunity to comment at that early stage, and no substantive issue arises from that diversion from the usual process.

Decision

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

DATED this 20th day of July 2016

D Thresher
Legal Complaints Review Officer

¹¹ Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, reg 9(1)(c).

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr ZH as the Applicant

Mr ZL as the Respondent

Ms TY as a Related Party

Area Standards Committee

The New Zealand Law Society