

LCRO 158/2011

**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**

**RI**

Applicant

**AND**

**MR B HART**

Respondent

**The names and identifying details of the parties in this decision (with the exception of the Respondent) have been changed.**

**DECISION AS TO PUBLICATION**

**Introduction**

[1] On 13 July 2012 I issued a decision in which I found that Mr Hart's conduct constituted unsatisfactory conduct and made certain orders in respect thereof. At the conclusion of the decision I sought submissions from the parties as to whether there should be publication of the decision and Mr Hart's name. Both parties have responded.

**The Law**

[2] Section 206(1) of the Lawyers and Conveyancers Act 2006 provides that "every review conducted by the Legal Complaints Review Officer under this Act must be conducted in private."

[3] Whilst it is the common practice of this Office to publish decisions on its website, unless there is an order as to publication, no identifying details of the parties or events which could lead to the identification of the parties, or any other person referred to in the decision will be published.

[4] Section 206(4) of the Act provides as follows:

The Legal Complaints Review Officer may, subject to sub section (3), direct such publication of his or her decisions as he or she considers necessary or desirable in the public interest.

[5] Public interest is the predominant factor in determining whether there should be publication or not. In this instance, the issue is whether Mr Hart's name should be published.

[6] In addition to the statutory direction as to public interest, the other factors to be taken into account when considering whether to publish the name of a Practitioner are set out in the LCRO Publication Guidelines. These are: -

- a) the extent to which publication would provide protection to the public including consumers of legal and conveyancing services;
- b) the extent to which publication will enhance public confidence in the provision of legal and conveyancing services;
- c) the impact of publication on the interests and privacy of-
  - i. the complainant;
  - ii. the practitioner;
  - iii. any other person;
- d) the seriousness of any professional breaches; and
- e) whether the practitioner has previously been found to have breached professional standards.

### **The submissions of the parties**

[7] RI's submissions, insofar as they relate to publication, included only her request that she not be identified, as publication of her name would lead to her daughter being identified. In accordance with the standard practice of this Office as noted in [3] there will be no publication of RI's name.

[8] Apart from that, RI's submissions refer to other matters which will be dealt with in correspondence with her which will be copied to Mr Hart along with a copy of her submissions.

[9] Mr Hart makes the following submissions: -

- a) He notes the extreme divergence of my findings from the findings of the Standards Committee. He notes that at the very least, it is clear from this divergence that the issues are such that qualified opinion differs.
- b) He further notes that the issues identified by me in the Findings Decision centre around issues of delay rather than what he refers to as “the more serious allegations of deception, manipulation and threats.”
- c) He further notes that at [44] of the determination I found that there was no evidence that his conduct was deliberate.
- d) He also considers that “in general orders for censure, and publication will be more appropriate to findings at the level of misconduct rather than of unsatisfactory conduct.”
- e) Further, he notes that notwithstanding his position of overall responsibility, “publication would not adequately account for the fact that the conduct the LCRO has found to be unsatisfactory rests at least in part in the hands of another independent practitioner”.
- f) Finally, he advises that he intends to apply for a judicial review of the Findings Decision.

## **Discussion**

[10] Decisions of the Court and the Tribunal<sup>1</sup> are helpful when considering issues as to publication. However, it must be borne in mind that the presumption in Tribunal and Court hearings<sup>2</sup> is that of publication, and the question arises in the context of whether or not suppression orders should be made. In contrast, proceedings of the Standards Committees and this Office are private, unless publication orders are made. This is a subtle but important difference.

[11] The factors referred to in the LCRO Publication Guidelines are drawn from Court and Tribunal decisions, and the relevance to the decision to be made by the LCRO is subject always to the public interest factor referred to in section 206(4).

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<sup>1</sup> The New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

<sup>2</sup> Section 238 Lawyers and Conveyancers Act 2006.

## **Public interest**

[12] The purposes of the Lawyers and Conveyancers Act relevant to this discussion are contained in sections 3(1)(a) and (b). They are “(a) to maintain public confidence in the provision of legal services and conveyancing services; (b) to protect the consumers of legal services and conveyancing services”.

[13] At this point, it is relevant to refer to the significant media interest in Mr Hart as a result of other proceedings in which he is currently involved. I am acutely aware that should publication of Mr Hart’s name be ordered in this matter, it is likely that media interest will be greater than perhaps would otherwise have been the case.

[14] Publication by this Office (unless specific orders are made) is generally effected by the New Zealand Law Society in LawTalk as well as including the relevant publication information in the decision published on the LCRO website. Whether such publication is noted or published more widely by the media or other parties is at the discretion of those parties. The exercise of that discretion affects whether publication is more widely disseminated or not. To that extent, whether or not the publication attracts wider interest is not a fact that I should take into account. The sole issue is that of the public interest and the need for public protection. It is either in the public interest to publish or not.

## **The Findings Decision**

[15] It is important to briefly address the facts and findings in the earlier findings decision particularly in relation to the matters raised by Mr Hart in his submissions.

[16] The following paragraphs of that decision are pertinent to this discussion

[63] It is hard to see that Mr Hart has fulfilled the obligations imposed by Rule 3 to provide the services in a timely manner, consistent with the terms of the retainer. There were times when Mr Hart did not promptly answer requests for information or other enquiries by [RI] (Rule 7.2). There was no comprehensive summary of the position or advice provided to [RI] to enable her to provide informed instructions in terms of Rule 13.3 and in generally failing to progress the proceedings, Mr Hart did not act in the best interests of [RI] and/or her daughter (Rule 13) or generally protect and promote his client’s interests.

[64] In failing to make any progress in respect of [RI’s] instructions for a period of four and a half years (which involved periods of nearly one year in total when nothing was done at all), Mr Hart has failed to promote and maintain the standards of professionalism breaching Rule 10.

[65] Although Mr Hart and [LT] appear to have complied with Rule 3.3 in advising [RI] of the ongoing delays being occasioned in progressing this file, the

main reasons provided were that they were otherwise occupied. This destroyed [RI's] trust and confidence in them (Rule 5.1) and did nothing to enhance the reputation of the legal profession (Rule 11). It is difficult to see why [RI] would be interested in the details of the trials and other matters in which they were engaged when her own matters were not being attended to.

[66] The nature of the emails were often self serving and although acknowledging on a number of occasions that they were aware that [RI's] matters were not being progressed, one gains the overall impression that much of the activity that did occur was designed to give the impression that some activity was occurring on the file, when in reality little of substance was being achieved. I consider for example, that the draft Statement of Claim was little more than a generic document. [RI] asserts that it was based largely on a document prepared by her, and I note that it includes a claim for both compensatory and exemplary damages. If [RJ]'s advice to [RI] is correct, then whether or not [RI's] daughter had ACC cover would dictate what could be claimed. Given that it would appear that she had not at that stage lodged a claim, it is difficult to see how a damages claim could be formulated at this stage.

[17] Mr Hart sought and received payment of \$15,000.00. Little if anything of substance was achieved by him over a period of four and a half years. Is it in the public interest that the identity of the lawyer who took a client's funds and acted in this way be published?

#### **Mr Hart's submissions**

[18] Mr Hart notes the divergence in findings between the Standards Committee and myself. At [43] of the Findings Decision I commented that:

[43] I have given careful consideration to these comments. I have noted that the Convener of the Standards Committee is a person with considerable litigation experience and members of the Committee also comprise practitioners with experience in litigation. However, I am unable to accept the Committee's determination that it was acceptable for Mr Hart to assume this knowledge of [RI].

[19] The Committee had made what I described as a "striking assumption"<sup>3</sup> in determining that RI "ought to have been aware of the ACC limitations on civil proceedings". As noted in [72] I gave careful consideration as to whether charges should be laid against Mr Hart in the Tribunal.

[20] The Standards Committee process is a summary jurisdiction and Standards Committees have a considerable work load. In a review by this Office, the LCRO has the opportunity to review all of the material before the Committee and to devote considerably more attention and time to a complaint than the Standards Committee.

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<sup>3</sup> Paragraph 41.

[21] The LCRO is then expected to form an independent view on the material before him or her.<sup>4</sup> In the course of doing so the LCRO will of course carefully consider the determination of the Standards Committees and the reasons provided by it and this has been frequently stated in LCRO decisions.

[22] However, if the LCRO comes to a view that is different from that of the Standards Committee then that decision is not diminished in any way because it is different from that of the Standards Committee. It is the view that the LCRO has formed and reasons are provided for that in the decision.

[23] Consequently, the fact that my decision in this regard diverges from that of the Standards Committee it is not a factor to be considered when considering publication.

[24] Mr Hart describes my findings as centring around “delay” rather than what he describes as the more serious allegations of deception, manipulation and threats. In the paragraphs of the Findings Decision referred to above, I note that Mr Hart did not fulfil his obligations to provide services in a timely manner consistent with the terms of his retainer. There were times when he did not promptly answer request for information or other enquiries by RI. There was no comprehensive summary of the position or advice provided to her to enable her to provide informed instructions and in generally failing to progress the proceedings Mr Hart did not act in the best interests of his client, or generally protect and promote their interests. He failed to make any progress for a period of four and a half years during which time there was a period of nearly one year when nothing was done at all. I noted that Mr Hart has thereby failed to promote and maintain the standards of professionalism required of a lawyer.

[25] To describe this conduct as centring on delay, is a somewhat benign view of Mr Hart’s conduct. A more apt description would be that Mr Hart “failed” in his obligations to RI. He did not do what he was retained to do and in not advancing the matter, he compromised her case and caused considerable distress. The effect of his conduct on his client is something that Mr Hart fails to acknowledge and it is relevant that other potential clients should be aware of Mr Hart’s conduct and take this into account when considering whether he should be briefed or not.

[26] Mr Hart also submits that his conduct was not deliberate. That is certainly a factor to be taken into account when considering whether to lay charges in the Tribunal

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<sup>4</sup> *Deliu v Hong High Court Auckland* CIV 2011-404-3758 [2012] NZHC 158 para 41.

or not. However, it is not a significant factor when considering publication of the Findings Decision and Mr Hart's conduct. The important facts for the public are that Mr Hart received payment of \$15,000.00 from RI and failed to deliver the service that he had been retained for. Whether that conduct was deliberate or not is irrelevant to the client.

[27] Mr Hart also submits that "in general orders for censure and publication will be more appropriate to findings at the level of misconduct rather than of unsatisfactory conduct."

[28] Publication of a practitioner's name is mandatory where his or her name is struck from the Roll<sup>5</sup> and only the Tribunal can take this step. In other cases, suppression orders are made at the discretion of the Tribunal where there is a presumption of publication. On this basis, it would be expected that there would be more publication of Tribunal proceedings and the names of the practitioner's charged than LCRO reviews.

[29] As noted above there is a presumption of privacy in respect of proceedings before the Standards Committee and the LCRO. However, the Act specifically provides the LCRO with a discretion to order publication where it is in the public interest to do so. In the majority of reviews undertaken by this Office, no orders as to publication of identity or details are made. However, where the facts of the matters under review require a consideration of whether publication should be effected or not, then the LCRO has a discretion to do so provided he or she is satisfied that the statutory requirements are fulfilled.

[30] If therefore I am satisfied that the criteria for publication are met, then the frequency with which publication is ordered by either the Tribunal or this Office is irrelevant as is Mr Hart's submission that publication is generally ordered where there is a finding of censure or misconduct. That is the case by reason of the publication requirements of the Act.

[31] Finally, Mr Hart has noted that publication would not "adequately account for the fact that the conduct the LCRO has found to be unsatisfactory rests at least in part in the hands of another independent practitioner, who has not been a subject of enquiry by the LCRO." In this regard, I refer to my comments in [71] of the Findings Decision

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<sup>5</sup> Section 256(1) Lawyers and Conveyancers Act 2006.

[71] In reaching this decision, I have had due regard to the fact that [LT] has been responsible for a large part of the conduct about which [RI] complains. However, Mr Hart was the person who [RI] consulted and who was named in the Letter of Engagement as the person instructed by her and to whom the payment of \$15,000 was made. Mr Hart has not suggested in any of his submissions that he was not the person who had overall responsibility for the matter, and indeed resumed direct control of the matter following [RI's] complaint about the lack of progress in February 2008. I therefore consider that Mr Hart had responsibility for the file and for the conduct of [LT].

[32] Mr Hart has not until now sought to excuse his conduct on this basis. For the reasons noted by me in [71] of the Findings Decision I do not accept his submission now.

[33] Whilst not necessarily specifically referring to the LCRO Publication Guidelines in the forgoing comments I have nevertheless addressed each of the factors set out therein.

### **Conclusion**

[34] After considering all of the factors and submissions of the parties, I consider that the facts of this decision and Mr Hart's name should be published, whilst any details which could identify either RI or her daughter are to be removed.

### **Decision**

1. Pursuant to section 206(4) of the Lawyers and Conveyancers Act 2006, I direct that the details of the Findings Decision dated 13 July 2012 and this Publication Decision shall be published in LawTalk and on the LCRO website, but any details which could identify either RI or her daughter shall be removed.

2. The implementation of this decision is deferred for a period of 1 month from the date hereof. If Mr Hart has filed and served a copy of his application to the Court for Judicial Review of either or both of the Findings Decision and this decision within this time, publication shall be suspended until those proceedings are determined and shall be subject to any orders of the Court.



**DATED** this 29<sup>th</sup> day of August 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:

RI as the Applicant  
Mr B Hart as the Respondent  
The Auckland Standards Committee 1  
The New Zealand Law Society