

CONCERNING

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

AND

CONCERNING

a determination of [Area] Standards Committee

BETWEEN

NW

Applicant

AND

YD

Respondent

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

Introduction

[1] Mr NW has applied for a review of the determination by [Area] Standards Committee to take no further action in respect of his complaint against Ms YD.

Background/Application for review

[2] Ms YD was instructed by a lawyer about whom Mr NW had made a complaint. Ms YD's client had been criticised by the High Court and ordered to contribute towards the indemnity costs which the Court ordered the lawyer's client to pay. The Court suppressed the name of the lawyer.

[3] The lawyer successfully appealed to the Court of Appeal. The Court of Appeal confirmed the suppression order.

[4] Mr NW identified the lawyer when making the complaint about the lawyer to the Lawyers Complaints Service.

[5] When responding to Mr NW's complaint on behalf of her client, Ms YD submitted that Mr NW was potentially in contempt of Court for breaching the suppression order

[6] Mr NW complained about Ms YD accusing him of being in contempt of Court.

[7] The Committee determined:¹

... it was not likely that NW breached the terms of the suppression order, or that he was in contempt of court, when he identified the practitioner's name in his original complaint. It noted, however, that it did not automatically follow that Ms YD was in breach of the obligations imposed by rules 13.8 and 13.8.1 ...

[8] Mr NW has applied for a review of the determination. He submits:²

1. The Committee failed to take into account his obligation (or discretion) to report fellow colleagues for misconduct (or unsatisfactory conduct) and/or the supporting materials.
2. The Committee gave no reasons for reaching the view that Ms YD had had a proper basis to accuse him of contempt.
3. The Committee erred in law because the threshold for serious allegations and/or allegations against officers of the Court is higher than "arguable" and so applied the wrong test.
4. The Committee acted irrationally in concluding that Mr NW was not in contempt, but then holding that it was arguable.
5. The Committee was plain wrong to say that Mr NW had revealed the lawyer's name. The suppression order was to prevent the lawyer's name being revealed to the public not to individuals who were already aware of the lawyer's identity, which was known to the profession, the Courts and to Ms YD.

Review

[9] Both parties have consented to this review being completed on the material to hand.

[10] Mr NW's complaint to the Lawyers Complaints Service read:³

I wish to complain against Ms YD for without foundation accusing me of acting in contempt of Court ... and also for refusing to withdraw this scandalous allegation in spite of me giving her an opportunity to do so on 17 December 2014 per the e-mail infra.

¹ Standards Committee determination (24 June 2015) at [8].

² NW review application (5 August 2015).

³ Email from NW to Lawyers Complaints Service (25 February 2015).

As we know per the full Bench decision in *Orlov* lawyers must exercise extreme caution before accusing fellow officers of any wrongdoing. Contempt is obviously an extremely serious allegation and so if Ms YD had no proper basis to assert this against me then she needs to be sanctioned accordingly.

[11] There is some illogicality about Mr NW's complaint in that he accuses Ms YD of wrongdoing on the basis that she had "no proper basis" to make the assertion against him. He has no greater basis for making this complaint about Ms YD.

[12] The Standards Committee considered that "it was not likely that Dr NW breached the terms of the suppression order ...".⁴ Its reasoning was that the complaints process is confidential "and the disclosure was for the very limited purpose of drawing the professional conduct issue to the attention of the Law Society".⁵

[13] Mr NW's complaint was not made as a "confidential report" as provided for in rr 2.8 and 2.9 of the Conduct and Client Care Rules.⁶ He specifically referred to the content of his email as being a "complaint". Given Mr NW's contributions to the complaints process, it is a reasonable inference that he used that word advisedly.

[14] The precise terms of the name suppression order were not provided but it is likely that it was not restricted in any way. In making the complaint, Mr NW made the lawyer's name known to all members of the Complaints Service and the Standards Committee who considered the complaint. In absolute terms, Mr NW probably has breached the suppression order and to this extent I do not agree with the Committee. Ms YD's allegation was "arguable".

[15] I address each of the grounds of review provided by Mr NW:

1. The Standards Committee failed to take into account Mr NW's obligation or discretion to report misconduct or unsatisfactory conduct. These obligations are provided in rr 2.8 and 2.9 of the Conduct and Client Care Rules. They oblige a lawyer to make a "confidential" report upon receipt of which a Standards Committee exercises a discretion to investigate the complaint on its own motion or not. After considering Mr NW's complaint the Standards Committee determined to take no further action. The outcome is the same. Whether or not Mr NW was obliged to make the report or complaint is irrelevant.
2. The Standards Committee gave no reasons why Ms YD had a proper basis to accuse Mr NW of contempt. In the first instance, it was not

⁴ Above n 1.

⁵ At [10].

⁶ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

necessary for the Standards Committee to give reasons why Ms YD had a proper basis to make her allegation. The facts speak for themselves. The Court of Appeal had confirmed the High Court suppression orders. Mr NW identified the lawyer to the Lawyers Complaints Service, its staff and the Standards Committee. That constituted a breach of the order. Ms YD's allegation was arguable. It was more than arguable.

3. The Standards Committee erred in law because "the threshold for serious allegations ... is higher than 'arguable' ...".⁷ The seriousness of an allegation does not affect the standard of proof. What is affected by the seriousness of the allegation, is the standard of proof before an adverse finding may be made. This is reflected in the Supreme Court judgment in *Z v Dental CAC* where the majority held that the standard of proof is the balance of probabilities, applied flexibly, according to the seriousness of the matters to be proved.⁸ That standard was not met.
4. The Standards Committee acted irrationally by concluding Mr NW was not in contempt but then noting that Ms YD's argument was arguable. I do not agree with the Standards Committee that Mr NW was not in contempt. He may well have been. The decision is not irrational or illogical.
5. The Standards Committee is plain wrong because the lawyer's name was not a secret to the profession and because the suppression order was for the public and not the legal profession. This is a novel view of a suppression order and one that cannot be sustained. There is no evidence that any person other than those who were closely associated with the case and the court hearing were aware of the identity of the lawyer. The court suppression order applied to any person who knew of the lawyer's identity from communicating it to others. Mr NW did that. Ms YD's allegation was valid.

Conclusion and decision

[16] Mr NW's complaint lacked merit in the first instance. It has achieved nothing more on review. Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

⁷ Above n 2 at [C].

⁸ *Z v Dental CAC* [2008] NZSC 55.

DATED this 29th day of September 2017

D Thresher
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 NW as the Applicant
Ms YD as the Respondent
[Area] Standards Committee
The New Zealand Law Society