LCRO 18/2011

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of Auckland Standards Committee
BETWEEN	**JO** Applicant
AND	**QP** Respondent

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

Introduction

[1] This is an application for review of a determination by Auckland Standards Committee to take no further action with regard to a complaint by JO alleging that QP had forged file notes and provided incompetent advice in a conveyancing transaction, and whose conduct in Court had been misleading.

[2] The allegation of forgery is an allegation that QP fabricated file notes to support evidence that he provided to the Court.

Background

[3] In 2003 JO and his wife entered into an agreement to purchase a unit. The agreement was conditional on their being satisfied with a building report, the sale of their existing property, and finance.

[4] QP's firm was instructed to act in connection with the transactions. QP is a sole

Practitioner and at the time employed QO. It was QO who had the day to day carriage of the files.

[5] The agreement for the purchase of the unit provided for the conditions to be satisfied by 4:00 p.m. on 4 February 2003.

[6] The building report was available to JO prior to that date and identified a number of issues with regard to the weathertightness of the unit.

[7] QO declared the agreement unconditional on 3 February. JO contends that he did not give instructions for that to occur. However, he was reassured by advice provided by QP the following day and the purchase was settled on 7 February.

[8] Subsequently, JO discovered the weathertightness issues with the unit were worse than he expected and he was obliged to expend significant sums of money in effecting repairs to the unit. He sought to recover those costs and instructed QN to act on his behalf. Proceedings were issued against the Auckland City Council only as the developer and the original builder of the unit had gone into liquidation.

[9] At a mediation convened to explore settlement, the Council alleged contributory negligence on the part of JO on the basis that he was aware of the condition of the unit at the time the agreement was declared unconditional. On QN's advice that it was likely the Council would succeed with this submission, JO settled his claim for a sum significantly less than the costs incurred in repairing the unit.

[10] He subsequently formed the view that he had made a mistake in settling and blamed QN for that. He sued QN for negligence.

[11] QP was called as a witness for JO. In his evidence QP produced two typewritten file notes dated 3 and 4 February 2003. The file note dated 3 February refers to a telephone conversation between QP and JO which concludes with the words "I was clear that he instructed me to go unconditional at that time".

[12] The second file note dated 4 February refers to the meeting between JO, his wife and QP on that morning. It records that JO denied that he had instructed QP to declare the agreement unconditional the previous day. It then goes on to record that JO acknowledged that what he was looking for was a reduction in the price but after advice from QP that the Body Corporate would share those costs, he appeared to be satisfied.

[13] JO submitted that the file notes referred to by QP were only created after the litigation against the Council commenced but Venning J dismissed that proposition as "an extraordinary suggestion".

[14] JO's action against QN failed.

[15] After the judgement in those proceedings had been issued, JO obtained QP's conveyancing file on which he located evidence which he contends supported his complaint against QP.

The complaint, the Standards Committee determination and the Application for Review

[16] In his complaint, JO submits that the reason why his action against QN failed is that Venning J had accepted QP's evidence, and in doing so had reached the wrong conclusion. JO alleges that QP lied in the file notes when he stated that JO had instructed him to declare the agreement unconditional. JO provided reasons why he considered the file notes to have been manufactured after the ligation against the Council had commenced.

[17] JO states that he had never met QP until the morning of 4 February and that he found out the agreement had been declared unconditional through the real estate agent whom he had instructed to negotiate a reduction in the price with the vendor. JO contends that he was compromised in these negotiations because the agreement had been declared unconditional prematurely.

[18] He also contends that he proceeded with the purchase following advice from QP which he considers was negligent. He accused QP of committing perjury and forgery to avoid compensating JO for his loss.

[19] In his complaint, JO sought repair costs of $300,000.00, legal costs of $200,000.00, court awarded costs of $80,000.00, and unemployment compensation of $100,000.00.

[20] The Committee took the following factors into account in determining to take no further action:

- The Standards Committee was not the appropriate forum for charges of forgery or fraud.

- The alleged forgery had been a subject of evidence given before Venning J and QP had been fully cross examined about the file notes in the course of the proceedings.
- It noted that the High Court decision had not been appealed.
- It did not consider there was any reason to come to a different view of the evidence than Venning J.
- Whilst the Committee noted JO's extensive submissions it did not consider that the evidence was such as would enable the Committee to determine that the threshold required to be met by the Law Practitioners Act 1982 had been reached.

[21] JO has applied for a review of the Standards Committee determination. He contends that the Standards Committee did not mention the evidence provided by him and therefore the review should focus particularly on the points that the Standards Committee did not address. He includes detailed comments on the evidence provided by him with his review application.

[22] In his review application he seeks actual repair costs of $420,000.00, legal costs of $200,000.00, court awarded costs of $80,000.00, and $200,000.00 for unemployment compensation. He also seeks that charges of perjury and forgery be pursued against QP.

The review

[23] After some difficulties with scheduling, a hearing was held in Auckland on 16 August 2012. JO was accompanied by his son, and QP attended with a support person.

[24] At the commencement of the hearing, I indicated to JO that I considered there was some difficulty with his application in that he was seeking a decision contrary to that of Venning J in the High Court proceedings where the matter had been fully addressed and QP had been subjected to detailed cross examination. It would be highly unusual if the findings of the Court on a question of credibility were not accepted.

[25] JO submitted that the judgement was wrong because JO was not aware of the evidence that he had discovered on his conveyancing file subsequently. He also submits that his counsel did not offer him advice with regard to an appeal.

[26] Previous decisions of this Office have made it clear that it is "improper to use the complaints process as a means to undermine or attack a decision of another Court or Tribunal".[1] In that decision, the LCRO went on to note that:

> The proper route for challenge of a decision of another Tribunal is appeal. This is further recognised in section 138(1)(f) of the Lawyers and Conveyancers Act which states that a Standards Committee may resolve to take no further action where there is an adequate right of appeal that the Complainant could exercise. Where proceedings are brought for a collateral purpose this will weigh in favour of them being found to be vexatious: L v W (no 3 [2003] NZFLR 961 per Heath J at para 55) (upheld on appeal [2004] NZFLR 429).

[27] This principle has also been addressed in the decision of Allan J in *Siemer v LCRO* [2]. In that case, Mr Siemer applied for judicial review of a decision by the LCRO in which the LCRO had confirmed the determination of the Standards Committee to take no further action in respect of a complaint.

[28] At paragraph 11 of his decision, the LCRO had stated as follows:

> [11] If the decision of the Court is based on an error the proper forum for correction of that error is appeal. Mr Siemer, in his complaint and this application for review is fundamentally arguing that the High Court (and the Court of Appeal) are wrong.
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> [12] It is entirely inappropriate for me to revisit on a review of a complaint against a lawyer a finding of fact of the High Court, let alone one which has been the subject of an appeal. The conduct of a lawyer in court may properly be the subject of a complaint and discipline in some cases. However, in this case Mr Siemer is seeking to argue that the very basis for the decision of the Court is flawed. This is a collateral attack on the decision of the Court. It is not appropriate for a complaints procedure to be used to undermine or revisit a decision of the Court. That is the function of the appeal process.
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> [13] Insofar as Mr Siemer has asked me to revisit the findings of the High Court I decline to do so.

[29] At paragraph 34 of his judgement, Allan J stated:

> Mr Siemer's principle contention is that the LCRO was not entitled to take shelter behind the findings of the High Court, and that in doing so, he took into account an irrelevant consideration.

[30] Counsel for the second defendant, being the person against whom Mr Siemer had complained, submitted that "the proceeding constitutes a thinly veiled collateral challenge to the judgement of the Full Court, and that it therefore amounts to an abuse of process, which, in the present proceeding, the Court has no jurisdiction to

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[1] See *Complainant P v Lawyer H* LCRO 02/09 at [11].
[2] HC Auckland CIV-2010-404-986 25, February 2011.

countenance".[3]

[31] In addressing this argument the Court held as follows:

> [47] At the heart of Mr Siemer's argument lies the proposition that Dr C had no proper grounds for bringing the contempt application at all. That proposition is completely inconsistent with a finding of the Court which held, in effect, that he did. Indeed, the Court expressly determined that Dr C as Applicant had met the high burden of proof required of those who allege a contempt of Court. A complaint that Dr C had no proper grounds for bringing the application is utterly at odds with the finding of the Court that a case for contempt had been made out.
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> [48] Mr Siemer's complaint therefore amounts to a collateral challenge to the judgement itself, and constitutes an abuse of process.

[32] Allan J went on to say:

> [51] In my opinion, the LCRO was right (as was the Standards Committee) to decline to consider Mr Siemer's complaint because to do so would necessarily entail the relitigation of matters already considered by this Court.
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> [52]That finding represents a complete answer to all of Mr Siemer's claims in this proceeding (save for his predetermination argument) because the principle of public policy which underpins findings of abuse of process is intended to catch all collateral challenges, no matter how they are framed in a procedural sense.

[33] It is also worth noting that Mr Siemer also claimed that there had been perjured evidence. In addressing that issue Allan J stated:

> An obvious ground for reviewing the Court's decision would be the identification of perjured evidence, or the making of untrue or misleading statements by counsel. Even then, however, the proper procedure would normally be by way of appeal, or, possibly, an application to recall or set aside the judgement.[4]

[34] The issues addressed by the Court in *Siemer v LCRO* are identical to the situation in this review. JO argues that the Court decision was wrong because relevant evidence was not put before it. If that is the case, then the decision of the Court ought to have been appealed. That is the proper process. The complaints procedure is not the correct forum in which to challenge the decision of the Court. That is an answer in itself to JO's application for review.

JO's application to the Court of Appeal

[35] JO advised that he had in fact made an application to the Court of Appeal for leave to appeal the judgement of the High Court out of time. That application had only recently been brought, and the Court of Appeal issued its judgement on 4 May 2012.

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[3] At para 34.
[4] At para [55].

[36] In declining the application, the Court considered the merits of the proposed appeal.[5] At paragraph [8] of the judgement their Honours made the following statement:

> The Applicants seek to advance evidence that the correct date of receipt of the report by the solicitors was 1 February 2003. The Applicants state that, based on the alleged forgery and perjury, the High Court hearing was not conducted under fair or correct procedures. Therefore a hearing based on the "true evidence" is needed.

[37] At paragraph [10] of the judgment Ellen France J stated as follows:

> No good reason is advanced as to how the documents pre dating 7 February 2003 could have affected the contributory negligence of the Applicants, or made any difference to the outcome.

[38] Finally at paragraph [11], the Court specifically addressed the file note of 3 February and found no reason to depart from the decision of Venning J.

[39] The Court came to the view that nothing raised by JO suggested that the proposed appeal had any merit. The application was therefore dismissed.

[40] At the review hearing, JO expressed the view that the Court of Appeal was wrong in this decision, and had ignored all of the evidence submitted by him. Contrary to JO's submissions, the Court specially referred to the evidence provided by JO. Having done so, it came to the view that there was no merit in his argument.

[41] The decision by the Court of Appeal adds further weight to my decision to confirm the Standards Committee determination.

Perjury

[42] JO advised that he had referred his allegations of perjury to the Police and that the Police also declined to take any action.

Summary

[43] In summary therefore, the judgement in *Siemer v LCRO* provides direct authority to support the determination of the Standards Committee. The High Court, the Court of Appeal and the Police have all determined that the evidence provided by QP is to be accepted. On this basis alone, I therefore consider that the determination of the Standards Committee should be confirmed.

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[5] CA837-2011 [2012 NZCA 172]

The evidence provided by JO

[44] Contrary to JO's submission that the Standards Committee did not refer to the evidence provided by him, the Committee specifically referred to "his extensive submissions as to the timing and intituling of fax communications" in paragraph [27] of its determination. To ensure that JO does not similarly labour under the impression that I too have ignored his evidence, I will address the issues raised by him.

[45] In his file note of the telephone discussion on 3 February, QP records that JO agreed to fax him the building report following that conversation. JO produced a fax coversheet which confirms that the building report was faxed to QP's office at 4:48 p.m. on 1 February. That was a Saturday. The document was date stamped 3 February by QP's office when it was no doubt received by the office staff.

[46] JO questions why he would say that he was going to fax the building report through to QP in the telephone conversation on 3 February, when he had already done that. In addition, he notes that at one stage during the High Court hearings, QP had confirmed that he did have the building inspection report before 3 February.

[47] The file note also records that JO was concerned about where he was going to live because the settlement of his sale was due on 7 February, whilst settlement of his purchase was not due until 28 February. He points out that his sale agreement contained a provision whereby he was able to continue to rent his existing property following settlement and so therefore he had no reason to be concerned about bringing the settlement date forward.

[48] JO also points to variations in QP's evidence before the High Court and the information provided to the Standards Committee with regard to the author of the file note. In the High Court, QP gave evidence that he wrote the file note, but advised the Standards Committee that QO had written the note. Both file notes of 3 and 4 February refers to "me" i.e. QP, whereas QP has told the Standards Committee that the file note of 3 February was written by QO.

[49] JO also refers to the fact that QO sent him a letter on 3 February confirming the details of the sale and purchase agreements. I am not sure that much can be read into that. The letter of 3 February seems to be a letter which would have been dictated when the agreements were received in the office, but possibly typed at a later date, when events had overtaken the relevance of the letter in some regards.

[50] Because of the inconsistencies noted by JO, he considers that the file note has no credibility and cannot be relied upon.

[51] He argues that the purchase contract was made unconditional without instructions from him. He then submits that because of this, QP should be liable for all of his costs. That submission presumes that if the agreement had not been declared unconditional he would not have proceeded with the purchase.

[52] I have some difficulty in accepting this proposition. JO has not denied that he met with QP on the morning of 4 February. He does not deny that the content of QP's file note of that date is correct. In that file note, QP records that JO was satisfied with his advice. Consequently, even if the agreement had been declared unconditional on 3 February without instructions, by the morning of 4 February, JO was aware of the fact that the agreement was unconditional and had confirmed that decision. In addition, all of his actions from then on are consistent with the fact that the agreement was unconditional and proceeding to settlement.

[53] If as JO asserts, the agreement was made unconditional without his instructions, and that he did not want to proceed with the purchase, it would have been expected that he would have placed the responsibility for the error in declaring the agreement unconditional on to QP and declined to settle. There is no indication that he adopted this course and indeed all of the evidence points to the fact that JO was proceeding with the purchase. In this regard, the hand written file note of 5:00 p.m. on 4 February refers to arrangements for JO to get early access to the property prior to settlement to store some of his goods.

[54] I also refer to the argument advanced by JP on JO's behalf at the High Court. JP's submission is referred to in paragraph [46] of the decision. He argued that JO was entitled to take from the building inspection report the fact that the property was in good condition and that he had acted reasonably in confirming the contract. JO's own counsel therefore acknowledges that the contract was confirmed by JO.

[55] The Judge casts further doubt on JO's contentions when he describes JO's contention that the file notes were manufactured after the litigation commenced as an "extraordinary suggestion" [6]. He notes that there was no reason why QO would have written the letter confirming the agreement unconditional if he did not have express instructions to do so. I also note, that all of JO's actions were consistent with the

proposal to bring the settlement date forward which in itself is an indication that he concurred with the terms of the 3 February letter.

[56] Having reviewed all of the evidence provided by JO (although I have not referred to it all in this decision given its voluminous nature) I do not intend to make any findings in respect thereof. At most, JO has pointed to some inconsistencies in QP's evidence. Weighed against this are the findings of the High Court and the Court of Appeal. The inconsistencies pointed to by JO cannot be sufficient in any circumstances to counter those findings to the degree necessary to reach an adverse disciplinary finding against QP.

Negligence

[57] JO also argues that the advice provided by QP on 4 February was negligent in that he did not properly review the building report and advise JO not to proceed. The only issue of a legal nature involved in this was whether JO could have terminated the agreement on the basis of the report.

[58] There is no suggestion that JO did not want to proceed and the separate correspondence sent through the agent to the vendor supports the statement recorded in the 4 February file note that all JO wanted to achieve was a reduction in the purchase price.

[59] Advice on the content of the building report is not something that a lawyer can be asked to provide. The obvious person to consult in this regard was the author of the report. There is no indication that JO did that.

[60] The file note does indicate that QP advised that the cost of repairing the exterior of the building was a Body Corporate responsibility and that JO appeared satisfied with his advice that the Body Corporate levy would go towards the cost of repairs. There is no evidence as to whether or not that occurred as it was only JO and one other unit owner who issued proceedings against the Council. However, the advice provided by QP is on the face of it, correct.

[61] Even if there could be said to have been negligence on QP's part, the advice was required to have been of such a degree as to reflect on his fitness to practice[7]. There is nothing to provide any indication that his advice was anything other than

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[6] At para [55].
[7] Section 106(2)(c), Law Practitioners Act 1982.

correct, let alone reach the level required to support such a finding.

The outcomes sought

[62] From the complaint made by JO to the Complaints Service, and the review application to this Office, it is clear that JO has a mistaken understanding of the nature of the complaints process. The complaints process focuses on the disciplining of lawyers for breaches of professional standards. Section 3 of the Lawyers and Conveyancers Act 2006 provides that the purposes of the Act 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;
>
> (c) [not relevant to this decision].

[63] It is not intended to be a primary means of recourse for clients to obtain compensation from lawyers. The maximum amount that can be awarded by a Standards Committee or this Office is $25,000.00[8]. Such orders can only be made following an adverse finding against the lawyer for breach of his or her professional obligations.

[64] JO has sought the following amounts by way of compensation:

- $420,000.00 actual repair costs
- $200,000.00 legal costs
- $80,000.00 Court costs
- $200,000.00 unemployment compensation

[65] In addition, JO seeks that charges of perjury be brought against QP. Perjury is a criminal offence and it is the Police who are responsible for the prosecution of criminal charges. JO has approached the Police, but they have declined to pursue the matter. This Office has no jurisdiction to promote the laying of charges of perjury.

[66] Therefore, even if there had been a finding adverse to QP, the outcomes sought by JO are not within the jurisdiction of either the Standards Committee or the LCRO.

Costs

[67] At the review hearing QP sought an award of costs against JO. The Lawyers and Conveyancers Act provides parties with a right of review. This Office will not make costs orders against a party exercising that right. As noted in the Costs Orders Guidelines issued by this Office, the power to award costs as between Complainant and Practitioner will only be ordered sparingly.

[68] In this regard a costs order will generally only be made where there has been some improper conduct in the course of the review, and it is the practice of this Office to make persons aware that they are facing a costs order against them if they persist with a certain course of action. This has not occurred in this instance, and there will therefore not be any order for costs against JO in favour of QP.

Decision

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

DATED this 27th 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:

JO as the Applicant
QP as the Respondent
The Auckland Standards Committee
The New Zealand Law Society

[8] Regulation 32, Lawyers and Conveyancing Act (Lawyers: Complaints Service and Standards Committee's Regulations 2008).