

CONCERNING

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

AND

CONCERNING

a determination of the Otago Standards Committee

BETWEEN

MR YAXLEY

of South Island

Applicant

AND

MR FALKIRK

of South Island

Respondent

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

DECISION

Application for review

[1] An application was made by Mr Yaxley (the applicant) for the review of a determination made by the Otago Lawyers Standards Committee declining to take any further action in respect of his complaint against Mr Falkirk (the practitioner).

[2] The complaint arose out of a dispute between the applicant and a client of the practitioner. The applicant had transferred a leasehold property to a third party without completing the assignment insofar as lessor consent was not obtained. The practitioner's client was the lessor who claimed rent arrears. The applicant had raised questions about the lessor's title. In July 2008 there was a meeting at the practitioner's office, attended by the applicant, the practitioner

and another lawyer from the practitioner's law firm. The applicant subsequently filed a complaint in respect of the practitioner's conduct at that meeting.

[3] It was clear from the evidence of the parties that each had gone into the July meeting with quite a different understanding about the meeting and that this had a bearing on their different expectations. The applicant explained that he had approached someone who represented the lessor and proposed that there should be a meeting, and he had assumed and expected that the meeting would be attended by individuals personally involved in the dispute with the aim of discussing the disputed issues. However, the practitioner had been instructed to attend on his client's behalf. The applicant therefore found himself in a meeting with the practitioner.

[4] The applicant's complaint arising from the meeting was that the practitioner had talked over him and raised his voice, cut him off in mid-sentence and countered his every argument with his superior knowledge, accused the applicant of fraud, threatened litigation if he did not make payment allegedly owed to the practitioner's client, and acted in an aggressive manner calculated to create fear in the applicant and cause him to submit to the practitioner's will. The applicant said that after the meeting he had suicidal thoughts, felt humiliated and became depressed. All of the allegations were denied by the practitioner.

[5] The Standards Committee was of the view that the complaints raised issues of credibility which could not be resolved by a hearing on the papers. An oral hearing was arranged, and was attended by both parties and the other lawyer who had been present at the July meeting. In its written decision the Standards Committee acknowledged that considerable evidence was given in relation to underlying dispute between the parties in order for the Committee to fully understand the background and to assist in resolving any credibility issues. The Committee concluded that those issues had no relevance to the complaint. The Committee observed, however, that the applicant was unable to withstand the forceful cross examination by the practitioner, and the Committee Chairman had been required to intervene and take over the questioning. The Committee also noted that a subsequent letter sent by the practitioner to the applicant was 'couched in strong language.'

- [6] The Committee accepted that the applicant felt vulnerable and referred to his subjective view of the meeting. The Committee noted that the onus was on the applicant applicant to prove his complaint to the required standard. It concluded that the applicant had failed to demonstrate that the conduct complained of reached the threshold required under the Law Practitioners Act 1982, this standard being applicable to complaints about conduct that occurred prior to the commencement of the Lawyers and Conveyancers Act 2006.
- [7] The review hearing took place on 17 December 2009 and was attended by the applicant and his support person, and the practitioner and the other lawyer. The applicant agreed that the Standards Committee had correctly summarised the complaints. He also agreed that the practitioner's conduct at the Standards Committee hearing was not altogether dissimilar to that which had occurred at the July meeting, but added that the practitioner had raised his voice more at the July hearing and had made threats.
- [8] The applicant's concern was that the Standards Committee had not taken proper or sufficient account of the impact on him of the practitioner's conduct, and that it had been influenced by the legal issues underlying the complaint. He submitted that at the Committee hearing the practitioner had introduced the legal issues in order to discredit him, and that these issues confused or overrode his main complaints so that the Committee had failed to properly consider the seriousness of the practitioner's conduct. The applicant added that he had not expected that the legal issues involved in the dispute would arise at the Standards Committee hearing, and had felt himself at a disadvantage, being unprepared for the practitioner's cross examination of him. He said that he had been told he would not be cross examined at the Committee hearing, and that he had not expected to have to address the substantive issues. He said he had felt "shell-shocked" after the July meeting. His support person was witness to the applicant's credibility and he was able to confirm the impact that that meeting had had on the applicant.
- [9] The practitioner's view was that his conduct was more forceful at the Standards Committee hearing than it had been at the original July meeting. He said that at the latter meeting he was also defending his reputation in the light of accusations by the applicant which he considered were unfounded. He questioned the applicant's motive in making the complaint which he considered

was calculated to avoid or delay action being taken against the applicant in respect of his legal obligations to the practitioner's client. The practitioner said he had been instructed by his client to attend the meeting with the applicant to discuss the outstanding issues and try and resolve what he saw as a straight forward issue. He said he conveyed his client's position, and denied being intimidating, accusative or threatening. He described how all parties had sat around in arm chairs or on couches, and said there was no indication that the applicant was distressed. He denied having directly accused the applicant of fraud but acknowledged that fraud had been raised as a way of viewing the transaction. This evidence was generally confirmed by the lawyer who had accompanied the practitioner to the Standards Committee hearing, and who had been present at the July meeting.

[10] At the review hearing it was put to the applicant that the Standards Committee had had the opportunity of seeing the practitioner in action, insofar as the Committee members had observed for themselves the practitioner engaging in the same or similar conduct as that which was the subject of the complaint. The applicant did not dispute that this was so.

[11] In considering the complaint it seemed very likely that the applicant would have neither sought nor attended the meeting had he known that he would be meeting with the practitioner instead of the other party to the dispute. There had been no prepared agenda or any other written communication in advance of the meeting. It was apparent that each had come to the meeting with a different objective. However, the complaints are to be considered regardless of this background or any misunderstandings about the meeting.

[12] In considering the allegations it was clear that the Standards Committee had the benefit of observing the practitioner's conduct first hand when he attended the oral hearing arranged by the Committee. The Committee referred to the practitioner's forceful style. The Committee was nevertheless of the view that the conduct complained of fell short of the threshold that applied under the Law Practitioners Act 1982. The conduct complained of had occurred prior to the coming into force of the Lawyers and Conveyancers Act which came into force on 1 August 2008.

[13] The pre 1 August 2008 standards are found in ss 106 and 112 of the Law Practitioners Act 1982. The threshold for disciplinary intervention under that Act was relatively high and could include findings of misconduct or conduct unbecoming. Misconduct was generally considered to be conduct: of sufficient gravity to be termed 'reprehensible' (or 'inexcusable', 'disgraceful' or 'deplorable' or 'dishonourable'). The test for conduct unbecoming was whether the conduct was acceptable according to the standards of "competent, ethical, and responsible practitioners".

[14] The Standards Committee did not dispute the applicant's feelings, and acknowledged the impact that the meeting had had on him. However, the Committee assessed the practitioner's conduct objectively; its judgement could not rest on the feelings of the applicant. In my view this is the correct approach.

[15] Having considered the evidence relating to the allegations and the processes of the Committee, I can find no basis for the view that the Committee was influenced by improper or irrelevant considerations such as the merits of the legal arguments. The Committee accepted that the practitioner had acted forcefully, but it was required to consider whether the conduct reached a threshold for disciplinary intervention under the former Act. The Committee had the advantage of observing for itself the practitioner's conduct which was confirmed as equivalent, or almost equivalent, to that arising in his complaint. I can find no reason to diverge from the Committee's assessment. The application is dismissed.

Decision

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

DATED this 23rd day of December 2009

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 Yaxley as Applicant
Mr Falkirk as Respondent
The Otago Standards Committee
The New Zealand Law Society