LCRO 19/2017

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 [X]
BETWEEN	**VY** Applicant
AND	**WR** Respondent

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

DECISION

Introduction

[1] Mr VY has applied for a review of a decision by the [Area] Standards Standards Committee [X] to take no further action in respect of his complaint concerning the conduct of the respondent, Mr WR.

[2] The complaint related to Mr WR's conduct as lawyer for [insurance company], the insurer of Mr VY's [city] home (the house).

Background

[3] The house has one and a half storeys. It was built in about 1913. Since then it has undergone various renovations and has been extended.

[4] Following very heavy rain in early June 2015, the house suffered flooding. When Mr VY lodged a claim for flood damage several engineers and allied specialists inspected and/or assessed the damage at the instigation and cost of his insurer, [insurance company].

[5] The professionals principally involved and the points in time when they first reported were:

(a) AB, a structural engineer with [Engineering Co AB] — July 2015.

(b) CD, an engineering geologist with [Engineering Co CD] — March 2016.

(c) EF, an engineer with [Engineering Co EF] — May 2016.

(d) GH, a structural engineer with [Engineering Co GH], in conjunction with a licensed building practitioner — October 2016.

[6] Mr VY had expressed disquiet early in the claims process about the management of his claim in general and, in particular, the conduct of Mr WR, acting for [insurance company].

[7] He was also concerned about the opinions provided by some of the engineers.

[8] Mr VY does not appear to have at any point engaged his own engineer or specialists. Here I note that Mr VY:

(a) self-identifies as a barrister and solicitor admitted by the High Court who is employed in an accountancy practice;

(b) asserts a knowledge of engineering;

(c) reports that his father-in-law is an engineer; and

(d) says that he has several relatives who are builders.

[9] By November 2016 the parties were very much at odds over the nature and extent of remedial work required.

[10] Mr VY rejected an offer by Mr WR to involve [Engineering Co IJ], a firm specialising in geotechnical, water and civil engineering, as a possible means of breaking what was a house foundations-related impasse.

[11] To advance matters, Mr WR proposed that a meeting of the four engineers engaged be convened, and that they compile an agree/disagree memorandum to be shared with all concerned. He indicated that he would take that step with or without Mr VY's concurrence.

[12] A meeting was convened, without Mr VY's concurrence, and appears broadly to have followed the process provided for by r 9.44 of the High Court Rules 2016 when an experts' conference is convened in the course of proceedings in that court.

[13] That process is one where the experts involved are directed:

(a) to confer on specified matters in the absence of the legal advisers (if any) of the parties with the objective of trying to reach an agreement on the matters in issue; and

(b) to then prepare and sign a joint statement (without the involvement of any lawyers engaged in the case) recording what they have agreed or not agreed, with the reasons for any disagreement

[14] The 24 November 2016 instructions that Mr ST is on record as having given the engineers described the problem to be addressed in these brief words: "all four of you have variations in terms of the way you see the unevenness of [VY]'s property".

[15] This was a neutrally expressed reference to the disputed question of whether proper remediation required foundations-related works.

[16] Mr WR had released all the engineering reports to Mr VY, including two which were originally withheld on the ground of privilege relating to reasonably anticipated litigation.

[17] On 8 December 2016, the engineers met in [City] and reached agreement on the approximately 45 pertinent points they had identified as requiring consideration.

[18] Their unanimous conclusions led to their joint advice that:

> … the work scope outlined by [Building company] to repair the concrete floor, kitchen wall and kitchen units is an appropriate scope of works to address the damage caused by the flood.
>
> … there was no evidence to indicate that the existing foundations need additional support as a result of the flood event – nor that the stairs or upper-level floors were affected by the flood.

[19] Mr VY has not accepted these findings.

[20] His perspective is illustrated by these extracts from his 1 March 2017 email to the Legal Complaints Review Officer (LCRO):

> I do not for a second believe that Mr WR did not try to influence the outcome of the 'experts conference'.
>
> … the] mere presence of [Mr AB] and [Mr EF] at the 'experts conference' was a stacking of the deck as I have accused both of these two of fraud and I have active complaints against them. They were always going to try and game the process to try and save their own careers.
>
> … I was not given the opportunity to either be present myself or have someone represent me at that conference. I suggest that Mr WR and his guy [Mr VY's label for Mr [EF]] did not want any objectivity to that process.

The complaint

[21] Mr VY lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 11 November 2016, with a supplement to that complaint lodged on 13 November 2016. He sought the disbarment of Mr WR.

[22] The substance of his complaint was that in breach of r 2.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) Mr WR was either "actively participating in a crime (namely fraud) or was knowingly assisting in concealing a conspiracy to defraud".

[23] This contention was seemingly centred on his perception of the way in which Mr WR was acting with reference to his instructions from [insurance company].

[24] He submitted a letter he had sent to the BNZ on 11 November 2016 as a document relevant to this case. That letter set out his chronology of the claim history and included the assertion that [insurance company] knew exactly where to get fraudulent engineers' reports.

The Standards Committee decision

[25] The Standards Committee delivered its decision on 12 December 2016.

[26] The Committee determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) that no further action on the complaint was necessary or appropriate.

[27] In reaching that decision the Committee:

(a) noted the general principle that a lawyer's duty is owed to their client so Mr WR had no duty to protect and promote the interests of Mr VY;[1]

(b) Mr WR, on his client's behalf, was entitled to take a position that did not accord with that of Mr VY;[2]

(c) the allegation of fraudulent activity could not be sustained because neither Mr WR nor his client could be compelled through the complaints process to review matters of advice and instruction;[3] and

(d) the complaint related to a contractual dispute that belonged in the courts.[4]

Application for review

[28] Mr VY filed an application for review on 13 January 2017. Once again, the outcome sought is disbarment of Mr WR.

[29] Mr VY submits that:

(a) the decision of the Standards Committee was a "complete farce";

(b) Mr WR's release of all the engineering reports disclosed content establishing that Mr WR had acted fraudulently;

(c) the Committee's decision ignored a lawyer's obligation to uphold the law and their duty as an officer of the High Court;[5]

(d) to suggest that for r 2.4 to apply it was necessary that a duty be owed to the particular complainant was "plainly ridiculous"; and

(e) the complaint was not contractually based but one of fraudulent conduct by a practising lawyer.

[30] His criticisms of Mr WR are severe, describing Mr WR's conduct in his review submissions as "disgraceful, immoral and criminal".

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[1] Standards Committee determination, 12 December 2016 at [5].
[2] At [7].
[3] At [8].
[4] At [9].
[5] Lawyers and Conveyancers Act 2006, s 4.

Mr WR's response

[31] Mr WR was invited to comment on the review application. He did so on 14 February 2017.

[32] In his response, as I paraphrase it:

(a) Mr WR set out his chronology of the relevant events which included a brief review of the various engineering reports.

(b) He noted that when the engineers' meeting has been arranged, [insurance company] had waived privilege on the two reports originally withheld on privilege grounds.

(c) He suggested that Mr VY's tactics seemed to involve laying complaints about anyone, lawyer or engineer, whose views did not coincide with his own.

(d) He said he had set out to ensure that, for the purpose of their joint meeting, all the engineers had all the report material prepared by those amongst their number but remained uninfluenced by anything coming from outside.

[33] He then turned to Mr VY's allegations, responding (and again I paraphrase) that:

(a) He categorically rejected the assertion of fraudulent conduct.

(b) Mr VY had not usefully specified the grounds for his claim of fraud.

(c) Mr WR's role was to represent [insurance company]'s interests by endeavouring to resolve the differences with Mr VY within the scope of the insurance cover and in as inclusive a manner as was possible.

(d) It had always been open to Mr VY to engage his own engineering advice.

(e) His failure to do so had frustrated the opportunity for rational dialogue.

(f) There had been no criminal element in the privilege claim, which Mr VY had alleged at one point. The authors of the reports in question had

expressed opposing views, indeed there had been elements of conflict between and amongst all the engineers.

(g) These differences had related to what he called the "buoyant uplift" issue, which is tied to the question of whether foundation work was required as an element of remediation.

[34] He posed the rhetorical question:

> How can an allegation of concealment resulting in Mr VY being defrauded be sustained given that privilege has been waived in the reports and a copy of the joint experts' report made available to him?

[35] He then continued:

> Meantime (Mr VY) retains all his rights to litigate his claim or refer it to IFSO[6] knowing the totality of the engineering evidence to date.

Mr VY's rejoinder

[36] Mr VY responded on 1 and 2 March 2017. His response made clear that the dissension arose from his conviction that foundation work was a remediation necessity.

[37] His response renewed his wide-ranging claims of fraud. His reaction to the jointly expressed view of the engineers that foundation work was not in fact required was expressed in terms such as:

> I am adamant that Mr WR knew the outcome of the conference before it occurred and that he worked with [Mr EF] to ensure the outcome could be controlled.

[38] But, having said that, he remarked that his real complaint was that even before the conference took place, Mr WR had dictated the outcome. This allegation is seemingly linked to Mr VY's concerns that reports that subsequently came into his possession, had initially been withheld by Mr WR.

Review on the papers

[39] The parties have agreed to the review being dealt with on the papers. This review has been undertaken on the papers pursuant to s 206(2) of the Act which allows a LCRO to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

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[6] The Insurance and Financial Services Ombudsman.

[40] I have been assisted in the preparation of this decision by the involvement of an LCRO delegate, Mr Roderick Joyce QC. Mr Joyce has reviewed all of the material on the file.

[41] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party. On the basis of the information available I have concluded that the review can be adequately determined in the absence of the parties.

Nature and scope of review

[42] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[7]

> … 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.

[43] More recently, the High Court has described a review by this Office in the following way:[8]

> 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.

[7] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].
[8] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[44] 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.

Analysis

Preliminary Comments.

[45] Mr VY has filed comprehensive submissions on review.

[46] His submissions, detailed and articulate, comprehensively traverse the history of the dispute surrounding his insurance claim.

[47] Fundamentally, as has been noted, Mr VY believes that the Insurer has endeavoured to avoid responsibility for covering the cost of attending to remedial work on the foundations to his property, by arguing that foundation work is not required.

[48] In his submissions, Mr VY provided meticulous account of the to-ing and fro-ing that had occurred in the course of the dispute and, in doing so, traversed a number of issues.

[49] In pursuing this approach, he frequently draws conclusions about the conduct of the insurer's lawyer, and invites this Office to accept those conclusions as having been established. He invites this Office to examine communications between parties engaged in the dispute, to draw inferences as to these individuals' motivations, and to accept his view as to what those motivations were. Importantly, he invites this Office to form a view on technical issues by referencing aspects of the technical evidence in the reports obtained, and measure that evidence against his views. I give but one example. In page two of the submissions received by the LCRO on 1 March 2017, Mr VY:

(a) argues that technical reports received were not objective;

(b) suggest that there were inconsistencies in the reports;

(c) invites the LCRO to interpret survey levels; and

(d) asks the LCRO to compare original survey levels with a version provided by Mr VY.

[50] What Mr VY is saying is that his view of the extent of the remedial work required is correct, that Mr WR has manipulated the process, particularly the evidence of various experts, with fraudulent purpose, and his account of events (but small part of which is described above), establishes the fraud.

[51] With every respect to Mr VY, his degree of attentive attention to detail on occasions diverts focus from the relatively narrowly confined scope of this review.

[52] It is not the role of this Office to speculate on the motivations of third parties engaged in the dispute, or to attempt to unpick every evidential issue engaged in the dispute.

[53] It does not fall within the jurisdiction, or expertise, of the LCRO to cast itself in the role of the arbiter of evidence in a civil dispute.

[54] This review is necessarily focused on addressing the evidence which it considers material to Mr VY's allegation that Mr WR has, in advancing his client's case, engaged in fraudulent conduct.

[55] Another thread running through Mr VY's complaints, is argument that Mr WR has been instrumental in denying him opportunity of fair process.

[56] He is critical of the fact that he was not provided with opportunity to attend, or have a representative attend, the experts conference though he advances that argument from his stance that Mr WR had committed a fraud before he had decided to organise the conference.

[57] Mr VY is critical of the Committee's discussion concerning the extent of the duties owed by Mr WR, noting that it had never been his position that he had denied that Mr WR's first obligations were to his client. Rather, he argues that the Committee failed to sufficiently consider Mr WR's obligations to uphold the rule of law. In advancing this proposition, he returns to the argument that Mr WR had engaged in fraudulent and criminal conduct, thereby breaching specific conduct rules

[58] Mr VY submits that the starting point for the Committee's inquiry should have been an examination as to whether Mr WR had transgressed in his fundamental obligation to uphold the rule of law.

[59] I also note that the outcome sought by Mr VY, is for Mr WR to be struck off the solicitors roll.

[60] That is not a remedy available to this Office, but rather a power that rests with the New Zealand Lawyers and Conveyancers Disciplinary Tribunal. If this Office were to conclude that Mr WR's conduct raised spectre of a misconduct finding, the option available would be to have the matter referred to the Tribunal.

[61] Mr VY contends that Mr WR has committed an offence under the Crimes Act 1961. If that is his view, his option is to take the matter to the Police. This Office does not determine issues of criminal liability. If a practitioner is found guilty of an offence under the Crimes Act 1961, that finding once established, would likely provide the foundation for a conduct complaint.

The Rules and the evidence

[62] Rule 2 of the Rules direct that a lawyer is obliged to uphold the rule of law and to facilitate the administration of justice.

[63] Rule 2.4 says:

> A lawyer must not advise a client to engage in conduct that the lawyer knows to be fraudulent or criminal, nor assist any person in an activity that the lawyer knows is fraudulent or criminal. A lawyer must not knowingly assist in the concealment of fraud or crime.

[64] The rule is not directly on point, as it is not suggested by Mr VY that [insurance company] were engaging in conduct that was fraudulent or criminal, but rather that Mr WR was behaving dishonestly in advancing his client's case. But the rule points to what could be described as the obvious imperative that a lawyer must never become contaminated by engaging in conduct that has any hint of criminality or fraud.

[65] Having scoured the materials filed, I have not found any evidence even remotely tending to support the possibility of some kind of fraud by Mr WR.

[66] Any breach of this rule by a lawyer would most certainly constitute a very serious matter. Consonant with that state of affairs, and as lawyers know, to allege fraud at all is a serious matter.

[67] A clear reflection of that is found in the Rules themselves:

> 13.8 A lawyer engaged in litigation must not attack a person's reputation without good cause in court or in documents filed in court proceedings.
>
> 13.8.1 A lawyer must not be a party to the filing of any document in court alleging fraud, dishonesty, undue influence, duress, or other reprehensible conduct, unless the lawyer has taken appropriate steps to ensure that reasonable grounds for making the allegation exist.

[68] In the very recent decision *Zhao v The Legal Complaints Review Officer*, the High Court, in considering the obligations of counsel to ensure that allegations of fraud or dishonest conduct were advanced with a degree of caution made the following observation:[9]

> the law is tolerably clear. It is the duty of counsel not to allege fraud, or dishonesty, unless he or she has clear and sufficient evidence to support that allegation. The decision to advance a plea of fraud imposes on counsel a heavy ethical responsibility. Counsel must have before him or her material which establishes a prima facie case.

[69] These observations are made of course in the context of a consideration of a lawyers professional obligations when filing proceedings with the Court, but the principle engaged has relevance to the present case, in that any discussion regarding the importance of advancing accusations of fraudulent conduct with care, reinforces the point that when challenge is being made to personal reputation, it is necessary to bolster allegations that can have serious consequences for the recipient with credible evidence.

[70] In this case, Mr VY's serious allegations of fraudulent conduct, engage an attack not just on Mr WR's reputation, but also on the reputations of other professionals. He suggests that one of the engineers provided advice which was not the product of a proper professional inquiry, but rather tailored to suit Mr WR's position. Other engineers it is suggested, were complicit in acquiescing to advancement of opinions which were fundamentally unsound, because they were unable to resist pressure that had been asserted on them.

[71] Allegations that an engineer provided advice which was not just wrong, but improper, are not matters which are to be determined in this jurisdiction. I understand

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[9] *Zhao v The Legal Complaints Review Officer* [2017] NZHC 1561 at [64].

that Mr VY may have filed complaints against some of the engineers with their professional body, but it could be expected that allegation of unethical conduct on their part would, at minimum, need to be established by an inquiry which:

(a) established in conclusive fashion that the advice given was fundamentally flawed;

(b) established that the flaws in that advice were so manifest, egregious and seemingly at odds with accepted and recognised engineering practice, that no proper conclusion could be drawn other than that the advice was given in deliberate bad faith, and with ulterior purpose; and

(c) mere difference of opinion would not suffice. Professionals often disagree.

[72] Mr VY's accusation that Mr WR has engaged in fraudulent conduct, demands at first step acquiescence to his argument that other professionals have aided and abetted the alleged fraudulent conduct.

[73] Mr VY contends that Mr WR had inappropriately claimed privilege over two reports. He suggests that Mr WR exhibited a lamentable lack of understanding of the principles which underpinned the privilege doctrine. He considers that the withholding of the reports was indicative of a deliberate intention on Mr WR's part to conceal and mislead, and an attempt by him to dictate the expert evidence which would determine the outcome of his claim.

[74] It is not uncommon for lawyers to disagree as to the extent to which privilege attaches to a particular document or report. On occasions, those disputes are litigated in the course of proceedings that are before the court.

[75] In my view, it manifestly overstates the implications and consequences of Mr WR's decision to withhold the reports, to suggest that asserting a claim of privilege (even if incorrectly) is reflective of fraudulent conduct.

[76] It is difficult to see how the withholding of a report in these circumstances, sensibly translates to accusation of fraudulent conduct, or how such serious accusation can be credibly sustained in the face of Mr WR's subsequent decision to release the reports.

[77] Mr VY argues that the reports that were withheld contained advice that assisted him in his case, and that Mr WR had not, when managing his clients' claim, been transparent about the information contained in the reports. This lack of transparency was designed says Mr VY, to conceal that his view as to the extent of the remediation work required, was supported by expert evidence. It is suggestion that Mr WR set out with deliberate intention to mislead. This, says Mr VY, quite properly engages inquiry as to whether Mr WR had breached such fundamental obligations as his obligation to uphold the rule of law.

[78] I am not persuaded on the evidence advanced by Mr VY, that it is established that Mr WR engaged in misleading or deceptive conduct.

[79] Mr VY's allegations of fraudulent conduct, peppered throughout his submissions, are incapable of identification as anything other than an expression of the apparent beliefs and perceptions of Mr VY. Beliefs and perceptions are no substitute for evidence.

[80] I find that:

(a) there is no direct evidence of any wrongful or criminal deception (actual or attempted) carried out with the intention of inducing Mr VY to surrender any legal rights — which, in this case, is what he effectively alleges;

(b) there is no inferential evidence of any such deception or attempt at that. A legitimate inference requires a sufficient, in the circumstances, foundation of otherwise established facts and in that respect, must manifest the attributes of fairness, reasonableness, and logic;

(c) Mr VY's allegations do not match those requirements; indeed they do not come anywhere near them; and

(d) in short, Mr VY does not bring to light any evidence-based case, direct and/or circumstantial, to support his very serious allegations.

[81] To the contrary:

(a) Taken as a whole, the materials lodged point simply to it being the case that Mr WR has endeavoured to fulfil his fundamental obligations to

protect and promote his client's interests in his endeavours to settle the claim with Mr VY.

(b) Those efforts included a laying on the table of all of the engineering evidence gathered by [insurance company], with privilege claims put aside.

(c) At no point has Mr WR breached the obligations he owes as an officer of the Court, to uphold the law.

Result

[82] I see no grounds which could persuade me to depart from the Committee's decision to take no further action on the complaint. My conclusion, albeit arrived at by a somewhat different route, is that the Committee was right so to decide.

Decision

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

DATED this 9th day of November 2017

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R Maidment
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 VY as the Applicant
Mr WR as the Respondent
Mr QT as a related person
[Area] Standards Committee [X]
New Zealand Law Society