

CONCERNING

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

AND

CONCERNING

a determination of the Canterbury Standards Committee 1 of the New Zealand Law Society

BETWEEN

LS SANQUHAR AND JS SANQUHAR

of Canterbury

Applicant

AND

MR ABERDEENSHIRE

of Canterbury

Respondent

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

DECISION

[1] Ms LS Sanquhar and Ms JS Sanquhar (the Sanquhars) complained to the New Zealand Law Society about the conduct of Mr Aberdeenshire. The complaint has a long history which commenced in 1996 when Mr Aberdeenshire assisted the Sanquhars in contracting for the harvesting of certain trees on their property. It appears uncontested that the forestry company which felled the trees also felled certain other trees which were excluded from the agreement. This resulted in a claim being brought by the Sanquhars against the forestry company which was ultimately arbitrated. Mr Aberdeenshire assisted in that arbitration which resulted in a modest award in favour of the Sanquhars. After the arbitration was concluded action was commenced against Mr Aberdeenshire in which negligence in respect of the drawing up of the agreement and in the conduct of the arbitration was alleged. That action was not successful.

[2] The Sanquhars complained that Mr Aberdeenshire had misled the court (or to put it more strongly perjured himself) when he gave evidence in the District Court

proceedings. Their particular allegations were that he was not telling the truth when he said:

- [a] The contract with the forestry company was signed by the Sanquhars without his knowledge;
- [b] The contract which was signed required further amendment and did not incorporate all of the matters he had advised;
- [c] He never received the signed copy of the agreement until after the trees were felled;
- [d] The Sanquhars instructed him not to put before the arbitrator valuation evidence of Mr XX.

[3] The matter was considered by the Canterbury Standards Committee 1 which concluded that no further action in respect of the complaints was necessary or appropriate. In reaching that conclusion it traversed certain findings of fact of Judge D in the District Court and noted that his honour had had the opportunity of hearing the witnesses in person. It also gave as reasons for its decision:

- [a] The allegations were of perjury and serious;
- [b] The complaints have their origin in events which occurred in 1996;
- [c] The issue of negligence of Mr Aberdeenshire was dealt with by the District Court;
- [d] All parties were represented by counsel in the District Court;
- [e] The claim in the District Court against Mr Aberdeenshire failed;
- [f] The material presented in respect of the complaint was substantially that which was before the District Court.

[4] The Sanquhars seek a review of that decision. The review was heard on 16 February 2010. Both the Sanquhars and Mr Aberdeenshire attended that hearing and were heard from.

[5] I observe at the outset that in this case the Standards Committee declined to take any action on the complaint for the reasons outlined. It did not conclude one way or the other whether the complaint was well founded. The discretion to take no action on a complaint is found in s 138 of the Lawyers and Conveyancers Act 2006. Subsection 1 provides a number of grounds upon which that discretion may be exercised including:

- [a] the length of time that has elapsed between the date when the subject matter of the complaint arose and the date when the complaint was

made is such that an investigation of the complaint is no longer practicable or desirable; and

[b] there is in all the circumstances an adequate remedy or right of appeal... that it would be reasonable for the person aggrieved to exercise.

[6] Subsection 2 provides a more general ground for the exercise of the discretion to take no further action where “it appears to the Standards Committee that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate”. It was this latter broad ground that the Standards Committee relied on.

[7] The primary task on review is therefore to determine whether the discretion to decide to take no further action was wrongly exercised. Understandably the Sanquhars in their submissions on review focussed on establishing their allegation rather than on the exercise of the discretion.

[8] If the evidence presented by the Sanquhars was such to show a compelling prima facie case that the allegations they have made are well founded it may be that it would have been inappropriate to exercise the discretion not to proceed. I have considered this, and taken into account the material provided by the parties. The fact is Mr Aberdeenshire denies the allegations and disputes the facts upon which they are based (in his letter of 4 August 2009 in particular). The Sanquhars disagree with much of what Mr Aberdeenshire says in his response to this complaint and raise numerous factual disputes (in their reply of 21 August 2009).

[9] The Sanquhars have presented evidence which they say proves their allegation. This includes a letter of 13 February 2009 from a Mr YY (stating that he dropped the agreement into the offices of Aberdeenshire ZZ and Co) and a further letter from him of 9 July 2009 (stating that he had made all requested amendments to the agreement).

[10] I note that I am able to take these letters into account as evidence by s 207 of the Lawyers and Conveyancers Act. However, I accord them very little weight. In respect of the 13 February letter it purports to give a categorical answer to an event which occurred in 1996. At the time this occurred there was no particular reason to recall the sequence of whether the contract was delivered prior to the trees being felled. In respect of the 9 July letter I observe that it is not conceivable that Mr YY would offer evidence that he was instructed (and agreed) to make amendments and he failed to do so before procuring the Sanquhars' signatures. To this extent the letter is self serving.

[11] I do not propose to address the wide ranging arguments made by the Sanquhars in support of their contention that Mr Aberdeenshire had misled the court. It is sufficient

to say that I did not consider that there was compelling evidence to support the allegations adequate of itself to show that the Standards Committee was wrong in exercising its discretion to take no further action.

[12] The Sanquhars in their review application also objected to the fact that the Standards Committee had given as a reason for declining to consider the matter the fact that “the allegations are serious in that they are allegations of perjury”. Clearly if an allegation is a serious one this would weigh in favour of conducting an inquiry and not against it. If the Standards Committee had meant that because the allegation was serious it ought not be inquired into it would have been in error. However, it appears from the decision as a whole that the Standards Committee was alluding to the fact that where allegations of such seriousness are made there must be clear evidence before finding them proved. Given the other matters referred to (such as the lapse of time) as well as the conflict of evidence the weight of evidence needed to establish such a serious allegation did not appear to exist. This was not clearly expressed by the Committee and in this regard the objection of the Sanquhars to that aspect of the reasons given is understandable.

[13] The Standards Committee also placed considerable weight on the fact that this matter had been considered by the Court and had in many respects accepted the evidence of Mr Aberdeenshire. If the decision of the Court is based on an error or it has been misled the proper forum for correction of that error is appeal. The Sanquhars in their complaint and this application for review are fundamentally arguing that the Court was wrong to reach the conclusions it did and are asking that I conclude that Judge D was wrong to make the credibility findings he did.

[14] It is entirely inappropriate for me to revisit a review of a complaint or a finding of fact or credibility of the Court. The conduct of a lawyer in court may properly be the subject of a complaint and discipline in some cases, however this is unlikely to be the case where to uphold the complaint would be to attack the conclusions reached by 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.

[15] It is also the case that the conduct which is complained against occurred in open court and was therefore subject to the scrutiny of the Court. The Sanquhars were represented by very senior counsel and had a full opportunity to test the credibility of Mr Aberdeenshire in that forum.

[16] A further reason given by the Standards Committee for not taking any further action was that “the complaints have their origin in events that occurred from

September 1996 onwards". I have already noted that s 138(1)(a) of the Act provides that the discretion to take no further action may be exercised where:

The length of time that has elapsed between the date when the subject matter of the complaint arose and the date when the complaint was made is such that an investigation of the complaint is no longer practicable or desirable.

[17] While some aspects of the complaint in this matter relate to events in 1996, the allegations themselves relate to the trial in 2005. However, it is relevant that in responding to the allegations Mr Aberdeenshire is expected to recall events of 1996 and refer to documents from that time. The fact is that some of those documents which were held by his counsel appear to have been lost. It is exactly these kinds of matters which mean that over time complaints of this nature become more difficult to investigate and to properly respond to.

[18] In all of the circumstances I conclude the Standards Committee did not err in exercising its discretion to take no further action in respect of the complaints of the Sanquhars.

Decision

The application for review is declined pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 and the decision of the Auckland Standards Committee 2 is confirmed.

DATED this 17th day of February 2010

Duncan Webb
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:

LS Sanquhar and JS Sanquhar as Applicants
Mr Aberdeenshire as Respondent
Aberdeenshire ZZ AA as a related party
The Canterbury Standards Committee 1
The New Zealand Law Society