

CONCERNING

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

AND

CONCERNING

a determination of the Canterbury-Westland Standards Committee 1

BETWEEN

Mr and Mrs OG
Applicant

AND

Mr PV
Respondent

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

DECISION

Background

[1] The background concerned the sale of the Applicants' property, and what price adjustment should be made after a wool shed burned down between the time that the sale and purchase contract was signed and the date of settlement. The parties agreed to have the matter resolved by arbitration and to be bound by the decision of an arbitrator. Mr PV (the Practitioner) acted as arbitrator.

[2] The procedures agreed to by the parties was that the Practitioner would decide the matter solely on the information provided by the parties. The information provided included the reports of the two valuers who had provided opinions for the vendors (the Applicants) and the purchasers respectively, each taking different approaches to the valuation.

[3] The outcome of the arbitration did not support the approach advanced by the Applicants. They perceived that the wrong principles had been applied.

First complaint

[4] The Applicants sent a complaint about the Practitioner to the New Zealand Law Society in December 2009 which the Standards Committee declined to uphold under section 138(1)(f). The Standards Committee's decision, dated 12 April 2010, referred to the limited right of appeal available to the parties, and stated that an allegation of error did not of itself amount to unsatisfactory conduct.

[5] The Applicants sought a review of that decision, which was unsuccessful as the Legal Complaints Review Officer, Mr Vaughan, confirmed the Standards Committee decision as correct (LCRO 72/2010).

Second complaint

[6] On 21 January 2011 the Applicants sent a further complaint against the Practitioner to the New Zealand Law Society. Attached to the complaint was 17-pages of background to the matter, and they sent further correspondence on 1 May and 25 May.

[7] On 19 August 2011, the Standards Committee issued a decision declining to uphold their complaint, for the reason that the complaint, as detailed, was effectively the same as one earlier considered by the Standards Committee. That complaint had not been upheld, and the decision was confirmed on review by this office.

Review application

[8] The Applicants disagree that the second complaint is the same as the first complaint. They seek a review of the Committee's decision.

[9] They explained that the first complaint was centred on the Practitioner not having presented a definition of 'diminution of value'. They say that their second complaint is that the Practitioner, acting as Arbitrator, decided to ignore a diminution value assessment forwarded on their behalf, and ignored their submissions which 'clearly explained' the difference between diminution value and replacement value, and instead accepted the replacement value assessment forwarded on behalf of the purchasers.

[10] Much of their review application comprised an explanation of what ought to have been taken into account, and why the Practitioner "*got it completely wrong.*" They also

noted that the Practitioner has, since issuing his award, stated he would have been greatly assisted had the two valuers got together to resolve their different valuations.

Considerations

[11] This is a review of a Standards Committee decision that declined to uphold a second complaint made by the Applicants for the reason the complaint was perceived by the Committee to be substantially the same as the earlier complaint that had been dismissed.

[12] The Committee's decision was made pursuant to section 138(2) of the Lawyers and Conveyancers Act 2006. This confers on Standards Committees a discretionary power to take no action or no further action on a complaint if it appears to the Committee, after having regard to all of the circumstances of the case, that any further action is unnecessary or inappropriate. If the Committee's assessment of the second complaint is correct then its decision to take no further action under this section would be a proper exercise of a discretionary power.

[13] The review issue in this case is whether their second complaint is materially different from the original complaint. If it is, then the Standards Committee was obliged to investigate, and could not decline to do so. If not, that is the end of the matter.

[14] This review has involved considering the issues arising in both the first and second complaints. The Applicants have explained what they see as the distinctions between the two complaints.

[15] I have read the Applicant's first complaint and cannot agree that it is "*centred on the Practitioner not having presented a definition of 'diminution of value'*". While it is correct that their complaint form stated, "*[n]o authority has been cited in the award supporting the view that replacement costs are a factor in determining a diminution of value*", their complaints against the Practitioner included his failure to have requested certain information pertaining to the valuations, but in particular questioned the Practitioner's qualification to make valuation assessment. In seeking a review of the Committee's (first) decision they wrote, "*[w]hat has been alleged is that [the Practitioner] adopted an incorrect decision.*" The LCRO interpreted this as an allegation of negligence against the Practitioner.

[16] On the basis of information they provided in relation to their first complaint, in my view the essential grievance is that the Practitioner was not better informed about the issues on which he was called to adjudicate and therefore erred in his assessment.

[17] The second complaint alleged negligence (the Practitioner ignored appropriate procedures), and incompetence (the Practitioner ought to have been better informed about the distinctions between the two valuation approaches). Different words may have been used to describe the complaints, and there are some differences in the issues that have come under particular focus at different times as more background details have been added along the way.

[18] However, I am unable to see any material differences in the essence of the first and second complaints. Both arise from the same set of facts and concern the same grievance. Both describe, albeit in different terms and degree of detail, how they consider the Practitioner failed to do his task properly and thus came to the wrong decision. There are no discernible differences such that one might reasonably conclude that different issues arise in each.

[19] The Applicants may perceive that providing further clarification about the differences of the valuation approaches to demonstrate their view that the Practitioner arrived at the wrong decision will make the first complaint substantially different from the second. If that is the case, then it may be helpful to explain that the question for the Standards Committee is not whether the Practitioner reached the right decision (that being a matter for appeal), but whether any part of the Practitioner's actions raised disciplinary concerns.

[20] My reading of the two complaints is that both alleged that the Practitioner (as arbitrator) failed to interpret or understand the differences between the two valuation approaches (namely diminution value and replacement value), that he failed to take into account relevant factors, and failed to follow proper processes in his task, all of which led to his making a wrong decision.

[21] Having read all of the information, and also the previous LCRO decision, I find that the nature of the grievance as set out in the second complaint is in essence the same as that arising in the earlier complaint.

[22] I note that the approach taken by the Standards Committee to the (first) complaint did not directly address the complaints about the Practitioner because the Committee took the view that section 138(f) applied (the availability of a right of appeal)

and because an allegation of error did not in itself amount to unsatisfactory conduct. LCRO Mr Vaughan confirmed that decision on review.

[23] The Standards Committee's decision on the second complaint was that it was in essence the same as the first complaint which had already been determined.

[24] My confirmation of this decision will effectively mean that the Applicants' grievance has not been addressed on its terms. I anticipate that this will be disappointing to them. However, the role of the Standards Committees, and this office on review, is confined to considering disciplinary matters only.

Decision

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

DATED this 27th day of July 2012

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 and Mrs OG as the Applicants
Mr PV as the Respondent
The Canterbury-Westland Standards Committee 1
The New Zealand Law Society