

CONCERNING

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

AND

CONCERNING

a determination of the National Standards Committee

BETWEEN

MR BC

of Auckland

Applicant

AND

MR YT

of Auckland

Respondent

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

DECISION

Background

[1] This is an application for the review of a decision made by the National Standards Committee concerning a complaint made by the Applicant about certain aspects of a complaint lodged by the Respondent about the Applicant.

[2] The genesis of the complaint by the Respondent was contained in correspondence from him to the Complaints Service of the New Zealand Law Society dated 16 September and 2 October 2009. With these letters, the Respondent had provided a list of cases in which he alleged that the Applicant had been criticised by the Courts.

[3] He also complained about the contents of affidavits sworn by BD (BD) (the Applicant's secretary) which he described as contemptuous, disdainful, and condescending. It is to be assumed that he means contemptuous, disdainful and condescending towards the Court. That complaint was directed against BD and the Applicant who he suspected of providing the input into the affidavit language and content.

[4] The Applicant then lodged a complaint against the Respondent in respect of matters arising out of those complaints. The issues were summarised in the letter dated 3 December 2009 from the Complaints Service to the Respondent, and were as follows:-

- Gross incompetence and failing to adhere to a minimum standard of diligence in accusing the Applicant.
- Making a complaint without merit against BD.
- Making a complaint which is frivolous or vexatious or not made in good faith.
- The gross abuse of process using the Complaints process to attack the Applicant.
- Failing to provide the Society with a relevant subsequent judgment.
- Abusing the Complaints Service by attempting to make a complaint against BD which was impossible in law.

[5] The basis for the Applicant's complaint as it related to the list of cases provided by the Respondent, is that the Respondent had been careless, reckless or had lied when alleging that the Court had been critical of the Applicant in all of those cases, as he had not appeared as counsel in four of them.

[6] He considers that this is a serious matter in that if a similar approach were to be adopted by the Respondent in his dealings with the Court, then the integrity of the justice system would be severely compromised. He was also critical of the Respondent for not providing a favourable Court of Appeal decision in respect of one of the cases referred to. The Applicant alleged that the Respondent was selective in what he supplied to the Law Society.

[7] The Applicant is also offended by the accusations made by the Respondent, and considers that the Respondent is using the Complaints procedure to conduct a vendetta against him in particular, while at the same time paying no heed to the shortcomings of other practitioners.

The Standards Committee decision

[8] The National Standards Committee considered the complaint at its meeting on 16 September 2010. It resolved that no further action was required pursuant to Section 138(1)(b) of the Lawyers and Conveyancers Act 2006 as the subject matter of the complaint was trivial. Having regard to all the circumstances of the case and pursuant to Section 138(2) of the Lawyers and Conveyancers Act, the Committee was also of

the view that there was no merit in the complaint and that any further action was unnecessary or inappropriate.

The Application for Review

[9] The Applicant applied for a review of the Standards Committee's decision.

[10] He intimated that his concern was primarily focused around the fact that the Respondent attempted to commit a fraud in his complaint against him or, de minimis was grossly reckless in accusing the Applicant without cause of having acted wrongfully in four cases where he did not appear as counsel.

[11] He accused the Respondent of scurrilous behaviour of the highest order in that he had used his client to look for "dirt" on the Applicant.

[12] He also submits that the Respondent acted in bad faith in lodging the complaint in that it constituted a personal attack on the Applicant and one of his staff members.

[13] It is useful to record here that the Applicant advised that by "fraud" he means "a material misrepresentation to a regulatory body that is known to be false". Similarly, although it is not directly relevant at this point, he advised that by "corruption", he means circumstances in which a regulatory body does not function in the way it should, and likened it to the "corruption" of a computer file.

Procedure

[14] In his letter of 26 October 2010 which accompanied the application for review, the Applicant advised that he wished to be heard in person in support of his application. He also advised that he would be making submissions before the hearing.

[15] It was considered that it was not necessary to hear from the Respondent as the Standards Committee file received by this Office contained correspondence and submissions from the parties in connection with the matter sufficient for the purposes of this review. Consequently, it was proposed to hold an Applicant-only hearing, the nature of which is set out in the LCRO Guidelines.

[16] The Applicant objected to this, and by email dated 19 January 2011, reiterated earlier requests for "reasons why this particular file had been put on the 'case to answer' track". He "demand[ed] to know why [he] was being denied his statutory right of review".

[17] The Applicant was advised that the LCRO wished to hear only from him at that stage and that direction was made pursuant to the authority provided by s206(5) of the

Lawyers and Conveyancers Act to regulate procedure in such manner as the LCRO deems fit, subject to the provisions of the Act.

[18] The Applicant was then advised by letter dated 24 January, that the hearing had been scheduled for Wednesday, 9 March 2011, and in that letter it was noted -

You have exercised your right to be heard in person. This will assist the LCRO in ensuring that he has a full understanding of the matters raised in your review application. Following that hearing, the LCRO will determine how the matter is to proceed.

The Applicant only hearing constitutes part only of the review. Further directions will be issued by the LCRO following that hearing.”

It was also noted that –

The hearing will be held in private and is estimated to be one hour long.

If you intend to bring a support person or representative to the hearing, please advise our office of this immediately.

[19] The Applicant had previously been supplied with a copy of the LCRO Guidelines, and had indicated in his email of 19 January that he was “well versed in the LCRO process”. Paragraphs 39-44 of the Guidelines explain the nature of an Applicant-only hearing and it is pertinent to record those here in full.

39. An Applicant-only hearing most often arises in the context of an Applicant having declined to the review being conducted on the papers (see above) and has asked to be heard personally. In that situation the LCRO will have already assessed, from all of the information that has been made available, that the Respondent has fully addressed and responded to all of the issues and that there appears to be no further information to be obtained that requires the Respondent’s attendance.
40. However, an Applicant only hearing does not prevent further enquiry being undertaken if the LCRO is of the view that information arising at the Applicant-only hearing discloses further matters that need to be addressed by the Respondent. Any subsequent enquiry may be done by way of a further hearing with both parties, but more often will involve the Respondent being required to provide information sought by the LCRO. All further information provided will be circulated to the parties.
41. Less commonly an Applicant only hearing may be arranged where the information provided by the Applicant does not set out sufficiently the basis of the review application. This hearing allows the Applicant an opportunity to clarify the information and explain why the review is sought.
42. In every case that an Applicant only hearing is arranged, the Respondent will be invited, but not required, to attend.
43. The fact that the LCRO may arrange an Applicant only hearing is not indicative of any outcome of the review application.
44. The same procedural rules apply to these hearings as apply to hearing involving both parties.

[20] The Respondent was advised of the hearing and declined to attend.

Hearing

[21] At the commencement of the hearing the Applicant sought permission to record proceedings. At that stage he was the only person present at the hearing apart from the LCRO clerk. Permission was provided but the Applicant was reminded of the provisions of s206(1) of the Lawyers and Conveyancers Act which provides that:

Every review conducted by the Legal Complaints Review Officer under this Act must be conducted in private.

This is a mandatory provision, and there is no discretion for the LCRO to allow otherwise, or for it to be waived by the parties. The requirement for privacy must extend to prevent the dissemination of any recording or information relating to that hearing and the Applicant's attention was directed to that.

[22] Shortly after the commencement of the hearing, a person introduced by the Applicant as his support person, Mr BE (Mr BE) arrived. No prior notification of his attendance had been provided by the Applicant as required by the letter from this Office of 24 January.

[23] At that stage, the LCRO Clerk placed a handwritten note before me. Unfortunately, the writing on the note was illegible. The Applicant objected to the passing of the note, and demanded to know its content. The matter went no further but Mr BE was also advised of the provisions of s206(1) of the Act.

[24] The Applicant then professed a lack of understanding or knowledge as to what the hearing was about, and indicated a reluctance to participate. He repeated what he perceived as his right to have the Respondent attend the hearing, and seemed to have an expectation that the LCRO review included a right for the Applicant to question the Respondent.

[25] It was again explained to the Applicant, that the hearing was part only of the review, and following the hearing the LCRO would be making further directions as to how the matter was to proceed. As set out in the Guidelines, that may or may not require further information to be provided by the Respondent, either in a further hearing or by providing answers to specific questions.

[26] The Applicant had provided no submissions prior to the hearing and was unprepared. He was invited to review the matters which he considered formed the basis of his complaint and any aspects which he wished to highlight.

[27] He proceeded to do so.

[28] Following the conclusion of the hearing, I indicated that I would consider the material provided to date, and issue further directions as to how the matter was to proceed.

[29] On 11 March 2011, I advised the Respondent that no new information had been provided at the hearing and sought his consent to proceed to complete the review on the basis of the information, records, reports or documents available to me. This was provided on 28 March 2011.

[30] The Applicant was similarly advised on 11 March 2011 as to the process that was to be followed .

Review

[31] In the introductory comments to the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules 2008) it is stated that all practitioners have a responsibility to preserve the integrity and reputation of the profession. That is, in the main, a personal responsibility, but the Rules provide that all practitioners have a mandatory obligation to report misconduct of other practitioners, and a discretionary duty to report unsatisfactory conduct.

[32] Rule 2.8 provides as follows:-

Subject to the obligations on a lawyer to protect privileged communications, a lawyer who has reasonable grounds to suspect that another lawyer has been guilty of misconduct must make a confidential report to the Law Society at the earliest opportunity.

Rule 2.9 provides:

Subject to an obligation on a lawyer to protect privileged communications, a lawyer who has reasonable grounds to suspect that another lawyer had been guilty of unsatisfactory conduct may make a confidential report to the Law Society, in which case Rule 2.8.1 will likewise apply.

Rule 2.8.1 provides that Rules 2.8 and 2.9 apply despite the lawyer's duty to protect confidential non-privileged information.

[33] These rules enforce and facilitate the obligations of all practitioners to ensure that the integrity and reputation of the profession is upheld.

[34] If a practitioner makes use of the process for the purpose of waging a personal vendetta, or for vexatious reasons, then the provisions of Rule 2.10 will apply and a practitioner will expose himself to the consequences of breaching of that Rule.

[35] It is to be noted that Rules 2.8 and 2.9 provide that the report to be made to the Law Society is confidential. Given that the report is confidential, it follows therefore that it cannot be used by the Law Society as the basis for a complaint. On receipt of such a report, the Complaints Service will consider whether further inquiries should be made in respect of the matters raised, and if so, investigate pursuant to s136 of the Lawyers and Conveyancers Act, referred to as an “own motion” investigation.

[36] A proper categorisation of the correspondence from the Respondent to the Law Society, is that it contained direct complaints by the Respondent, and a report under Rules 2.8 and 2.9.

[37] However, the Society resolved on 14 June 2010 to investigate all matters raised by the Respondent on its own motion.

[38] It is the provision of the list of cases to which the Applicant takes most exception. He contends that the Respondent has committed a fraud (as that word is used by him) or at least was grossly reckless in accusing the Applicant without cause of having acted wrongfully in four cases when in fact he was not the counsel appearing. He contends that the Applicant should not have relied upon the information in a list provided by another, and that he was obliged to personally review the cases to ensure the information provided was correct. He also contends that the Respondent should be questioned as to what steps he had taken to personally verify the information provided to him before putting it forward to the Society.

[39] In my view that is not necessary. The Respondent would have been aware of the qualifications and the ability of the person providing the list. If he had sufficient confidence in that person, then he was entitled to rely on that information to be put before the Society.

[40] In making a report pursuant to Rules 2.8 and 2.9, all that is required of the practitioner, is that he or she has “reasonable grounds to suspect” that another lawyer has been guilty of misconduct or unsatisfactory conduct. Once those reasonable grounds exist, the practitioner must (or may in respect of unsatisfactory conduct) report accordingly to the Society.

[41] It follows therefore that the practitioner is not required to adduce all the evidence necessary to support the matters raised in the report. That is the role of the Law Society. Indeed, in all complaints, whether own motion or otherwise, the Complaints Service performs an investigatory role to a greater or lesser extent. In many cases it is beyond the ability of the complainant to obtain the necessary information and the Complaints Service has a range of powers which are not available to a complainant to

facilitate an investigation. But in respect of an own motion investigation, the Law Society becomes the complainant, and assumes full responsibility to investigate matters to which it has been alerted by the report.

[42] All that is required when making a report pursuant to Rules 2.8 or 2.9 is that a practitioner has “reasonable grounds to suspect” misconduct or unsatisfactory conduct. It is for the practitioner to decide if those “reasonable grounds” exist.

[43] Rule 2.10 guards against the improper use of the complaints or disciplinary process. It provides that “a lawyer must not use, or threaten to use, the complaints or disciplinary process for an improper use.” In the present instance, the Law Society resolved to investigate further and the Standards Committee has resolved to lay charges against the Applicant before the Lawyers and Conveyancers Disciplinary Tribunal in respect of his conduct in a number of the cases identified by the Respondent. This surely validates the “suspicion” formed by the Respondent when making his report to the Law Society and as this is all that is required, the Applicant’s complaint against him can go no further.

[44] It is understandable that the Applicant should react unfavourably to the comments made by the Respondent. However, when considered objectively, they amount to little more than “name calling”. That is how the Committee has viewed them also by declining to take any further action in categorising them as “trivial remarks”. I have noted the comments made by the National Standards Committee in its Notice of Determination in respect of its own motion investigation [number], which involved the Applicant. In that determination, the Committee noted that “while having determined that no further action was required on the above matters the Committee requests that [the Applicant] reflect on Rule 10 and 10.1 of the RCCC in regard to his speech and manner when dealing with other practitioners.” Both the Applicant and the Respondent would do well to have reference to these Rules in their future correspondence with, or about, the other.

[45] In the course of the hearing the Applicant also drew attention to the fact that the list provided by the Respondent had been added to by the Complaints Service by the addition of two further cases and a newspaper article. He drew his own conclusions as to the role that the Law Society had played. That list forms part of the complaint made by the Respondent against the Applicant (complaint number [number]) and is not the subject matter of this review. However, in the light of my comments above as to the role of the Law Society it seems to me that it is entirely proper for the Law Society to take whatever steps it considers appropriate to correct or add to the information supplied to the Standards Committee.

[46] The essence of the complaint with regard to the matters raised by the Respondent about BD is that the Respondent had been careless in not identifying that she was not an employee of his, and could not therefore be the subject of a complaint. In the first instance, the Respondent's complaint with regard to the affidavits was also made against the Applicant, as he suspected that the Applicant had played a hand in drafting the affidavits. Secondly, the assertion that the Respondent should have ascertained the employment status of BD before making this complaint, is somewhat disingenuous. To an outside observer, BD is an employee of the Applicant. Indeed, the Applicant referred to her as "his secretary" in the course of the hearing, and in the letter accompanying the review application as "one of my staff members." An outside party would be justified in forming the view that she was an employee, and has no means of ascertaining otherwise. I agree with the view of the Committee that this aspect of the complaint has no merit, and no further action is required.

[47] Having completed this review, I am in agreement with the decision of the Standards Committee, that no further action is required to be taken in respect of the Applicant's complaint for both of the reasons provided, namely that the subject matter of the complaint is trivial (Section 138(1)(b) of the Lawyers and Conveyancers Act 2006), and that further action is unnecessary or inappropriate pursuant to Section 138(2) of the Act.

Decision

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

DATED this 1st day of April 2011

Owen 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:

Mr BC as the Applicant
Mr YT as the Respondent
The National Standards Committee
The New Zealand Law Society