

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 of the New Zealand Law Society

BETWEEN

Mr Denbighshire
of Auckland
Applicant

AND

Mr Galashiels
of Auckland
Respondent

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

DECISION

[1] Mr Denbighshire complained to the New Zealand Law Society in respect of the conduct of Mr Galashiels. In particular, Mr Denbighshire complained about the conduct of Mr Galashiels at an incident which occurred at the offices of the Auckland District Law Society on 14 October 2008. On that date Mr Denbighshire accompanied another practitioner (Mr XX) to those offices with a view to making submissions to a Complaints Committee of the Auckland District Law Society. They appear to have been of the view that they had the right to be heard in the matter under consideration. The Committee was of the view that this was not the case.

[2] An exchange occurred between Mr Denbighshire and Mr XX and members of the Complaints Committee and staff of the Law Society. Mr Galashiels was the convenor of the Committee. Mr Denbighshire alleges that Mr Galashiels "assaulted" him and also that he made a false declaration to the police. The allegation of assault is in fact an allegation that Mr Galashiels acted in a threatening way towards Mr Denbighshire and Mr Denbighshire says he feared for his safety. There is no suggestion of any physical contact or assault in the everyday sense that the word is used. The allegation that Mr Galashiels made a false declaration to the police is based on the assertion that Mr

Denbighshire and Mr XX were invitees rather than trespassers and therefore the police ought not have been called. Mr Denbighshire says that Mr Galashiels had in fact invited him for a cup of tea.

[3] This matter was considered by the National Standards Committee of the New Zealand Law Society which determined that it would take no further action on the complaint on the basis that it was not necessary or appropriate to do so. The reasons the Committee gave were that the conduct of Mr Galashiels did not warrant further attention. It considered that there was nothing objectionable in Mr Galashiels calling the police in the circumstances. It considered that there were no consumer protection or public interest concerns that warranted investigating the complaint further.

[4] Mr Denbighshire sought a review of that decision.

Relevance of wider matters

[5] Mr Denbighshire submits that this matter should be considered in light of the fact that the Auckland Standards Committee (1) has resolved to prosecute him before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal. I observe that in reaching its decision in this matter the National Standards Committee took notice of the existence of other complaints by Mr Denbighshire and also stated that it was familiar with the subject matter of the complaint from its other enquiries. In light of this it seems appropriate to take notice of the fact that Mr Denbighshire is to be prosecuted before the Tribunal for his part in the altercation.

Nature of hearing

[6] The review hearing was conducted on 18 February 2010. The hearing had been scheduled as a case to answer hearing in order to determine whether there was sufficient basis to the review to require Mr Galashiels to answer to it. However, Mr Galashiels elected to attend the hearing and with the consent of Mr Galashiels and Mr Denbighshire at the hearing, the matter proceeded as a substantive hearing at which the application would be finally disposed of.

Private hearing

[7] Section 206(1) of the Lawyers and Conveyancers Act 2006 provides that every review conducted by the Legal Complaints Review Officer under the Act must be conducted in private. Mr Denbighshire brought with him a Mr YY, ostensibly as a support person. Paragraph 33 of the Guidelines for Parties to Review of this office provides that parties are entitled to be accompanied by a representative and/or support person. I sought to clarify the role of the non parties present at which point Mr

Denbighshire disclosed that Mr YY was a journalist. I indicated that provided Mr YY's was present as a support person and not as a journalist (and therefore would not report on the matter) his presence was unobjectionable. It transpired that Mr YY was not present as a support person at all.. Rather he appears to have been invited to the hearing so that he might report on the proceedings. It appears that Mr Denbighshire did not act in good faith in bringing Mr YY to the hearing as a support person and only disclosed that he was a journalist at the commencement of the hearing. This disclosure was made only when the exact function of the non-parties attending was clarified. It was ruled that Mr YY was not permitted to be at the hearing and he accordingly left.

Merits

[8] I turn now to the substance of the application by Mr Denbighshire. Mr Denbighshire's complaint is that the Standards Committee was wrong to resolve to take no further action in respect of his complaint against Mr Galashiels. His fundamental argument was that it was irrational or unreasonable that one Standards Committee had resolved to prosecute him for his part in the incident of 14 October 2008 and another Committee resolved that no further action was necessary in respect of Mr Galashiels's involvement. He suggested that there must be some rational similarity between prosecutorial decision-making and that different Standards Committees should take a similar approach.

[9] Mr Denbighshire developed this submission by suggesting that in the absence of some good reason for the different decisions there must be some nefarious or corrupt reason and stated that the bona fides of the Committee must be looked at. He suggested that the Committee favoured Mr Galashiels because of his high standing within the legal profession. He also suggested that the fact that Mr Denbighshire was not born in New Zealand meant that he was regarded differently by the Committee.

[10] In making this argument Mr Denbighshire referred to the earlier review of this office (*Re Denbighshire* LCRO 166/09) and the material he raised there. It was agreed that it was appropriate that I have reference to the material he presented in that application.

[11] Mr Denbighshire traversed statements of a number of people at the meeting which, he suggested, showed that Mr Galashiels had acted in a way which warranted further steps being taken. His basic argument was that his conduct was no worse than that of Mr Galashiels and therefore it was irrational for one Committee to decide to

prosecute one case and another Committee to take no action in a more serious case relating to the same set of events.

[12] Putting aside Mr Denbighshire's arguments relating to motive, which I consider unsubstantiated and unhelpful, I accept Mr Denbighshire's proposition that there must be some rational similarity between prosecutorial decision-making of Standards Committees and that different Standards Committees should take a similar approach. To put it another way, in considering how a matter should be determined a Committee may not act capriciously, in bad faith or with malice. That was the position I adopted in *Re Denbighshire* LCRO 166/09 where I cited *Kumar v. Immigration Department* [1978] NZLR 553, 558 (CA); *Polynesian Spa Ltd v Osborne* [2005] NZAR 408 and *Down v Van der Wetering* [1999] 2 NZLR 631; [1999] NZAR 307, and *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA) in support of the proposition that the exercise of a prosecutorial discretion (and in that I include a decision not to prosecute or investigate) might be revisited where the decision was:

- [a] significantly influenced by irrelevant considerations,
- [b] exercised for collateral purposes unrelated to the objectives of the statute in question (and therefore an abuse of process),
- [c] exercised in a discriminatory manner,
- [d] exercised capriciously, in bad faith or with malice.

[13] On the basis of those principles the argument of Mr Denbighshire has a large factual component. Namely whether on the facts before the two Committees it was rational to make the two different decisions in respect of the conduct of Mr Denbighshire and Mr Galashiels respectively. Mr Denbighshire naturally emphasised those parts of the statements which had been made in respect of the incident which put Mr Galashiels in the worst light and sought to emphasise this. I record that I also had the benefit of hearing from Mr Denbighshire and Mr Galashiels personally and assessing the material in light of that.

[14] Mr Denbighshire provided voluminous information in respect of the earlier review. I observe that I have had particular regard to the following materials:

- [a] minutes of the ADLS Complaints Committee 2 of 14 October 2008;
- [b] the emailed responses of Mr Denbighshire to the investigator in the matter of 20 April 2009, 8 May 2009 and 29 May 2009;
- [c] submissions of Mr Denbighshire to the Standards Committee (by email) dated 14 August 2009;

- [d] Letter of Mr XX to the Society of 14 October 2008;
- [e] the statement of Mr Galashiels of 18 May 2009;
- [f] the statements of A, P, J, T, G, L, H and M. Although not all of the statements are dated they appear to have been prepared on the same day or the day after the incident in question.

[15] I do not propose to traverse the evidence contained in those documents. The statements of the members of the Committee are largely (though not entirely) consistent. I observe that they record the behaviour of some of the members of the Committee which was inopportune including Mr Galashiels insulting Mr XX and having an apparently heated exchange with Mr Denbighshire (which Mr Denbighshire characterises as a common law assault).

[16] Those accounts are also largely consistent in stating that Mr XX and Mr Denbighshire were not permitted to attend the meeting, they entered anyway and began insisting they be permitted to make submissions, they refused to leave even when asked to do so a number of times and they acted in a threatening and aggressive manner.

[17] In general the statements suggest that Mr XX and Mr Denbighshire disrupted the Complaints Committee meeting and interfered with it discharging its functions and that they did so in a manner which was outrageous. In response to this conduct some of the members of the Committee including Mr Galashiels behaved intemperately.

[18] The accounts of Mr XX and Mr Denbighshire maintain that they acted entirely appropriately and were reasonable and calm throughout. On their accounts the unfortunate conduct of the members of the Committee was entirely unprovoked. I also observe that the responses of Mr Denbighshire made wide ranging and quite outrageous allegations in respect of members of the Law Society and other intemperate remarks. For example in his email of 8 May 2009 he stated "certain criminal conspirators at the Society are engaging in a criminal cover up" and (to the investigator) "do you and your respected firm want to remain on the side of these gangsters".

[19] I conclude that the Standards Committees considering these matters gave credence to the views recorded in the statements of the members of the Complaints Committee and officers of the Law Society and did not accept the accounts of Mr XX and Mr Denbighshire. I consider that they were quite reasonable to do so. The accounts of Mr XX and Mr Denbighshire are not credible, particularly when viewed in light of the manner in which they sought to respond to the inquiry into the matter. Their

subsequent behaviour has been typified by the making of immoderate and unfounded allegations. That is entirely consistent with the views found in the statements.

[20] In light of this the conduct of Mr Denbighshire and the conduct of Mr Galashiels are quite dissimilar. Mr Denbighshire is accused of disrupting the Complaints Committee meeting and interfering with it discharging its functions and in a manner which was outrageous and in breach of his professional obligations. That question is of course yet to be determined by the Disciplinary Tribunal. On the material I have considered it appears that Mr Galashiels might be accused of responding inappropriately in the face of the outrageous behaviour (and arguably goading) of Mr Denbighshire and Mr XX.

[21] I record that the complaint against Mr Galashiels was made on 10 August 2009. This was some ten months after the incident itself. It was however some two months after the completion of the investigators report into the matter. It was also some few days prior to the Standards Committee convening to hear its own motion complaint into the conduct of Mr XX and Denbighshire into the incident of 14 October 2008.

[22] I observe that Mr Denbighshire made specific submissions relating to the fact that at one point Mr Galashiels asked him to "have a cup of tea" and then later called the police. The suggestion was that it was inappropriate to call the police in light of an invitation to stay. In making that submission Mr Denbighshire chose to focus on a small part of the overall matrix of facts. I do not consider that the fact that Mr Galashiels called the police to assist after telling Mr Denbighshire to have a cup of tea has any especial bearing on the questions I have to decide.

[23] The other main thread of Mr Denbighshire's submissions was that Mr Galashiels had acted in a threatening manner towards him. It is clear that an exchange which was unfortunate and heated occurred between Mr Galashiels and Mr Denbighshire, however the preponderance of evidence would suggest that Mr Denbighshire was as much at fault as Mr Galashiels. The Standards Committee concluded that there was no public, professional, or consumer interest in pursuing that matter. That was an entirely reasonable conclusion to reach.

Conclusion

[24] In reaching the decisions they have the Standards Committees have taken a particular approach to the evidence. Inherent in that approach is the fact that the accounts of Mr XX and Denbighshire as regards the events of 14 October 2008 are not accepted. I have examined the material before the Committee and concluded that that approach to the evidence was not irrational or unreasonable. It follows from this that it

was rational for the Standards Committees to prosecute Mr XX and Mr Denbighshire for their part in the incident and to resolve to take no further action against Mr Galashiels.

Recusal application

[25] I record that Mr Denbighshire objected to my hearing this application. He put forward numerous grounds in support of his application.

[26] The first ground was that I had predetermined the matter by directing that a case to answer hearing be scheduled. He argued that this showed that I had decided the matter already and was therefore not impartial. He also argued that there was no statutory basis for a case to answer hearing and I was therefore acting ultra vires.

[27] Section 206(5) of the Lawyers and Conveyancers Act provides that subject to the Act and to any rules made under the Act, the Legal Complaints Review Officer may regulate his or her procedure in such manner as he or she thinks fit. Section 200 of the Act provides that the Legal Complaints Review Officer must conduct any review with as little formality and technicality, and as much expedition, as is permitted by the requirements of the Act; and a proper consideration of the review; and the rules of natural justice.

[28] A set of Case to Answer Hearing Guidelines of this office sets out and explains the purpose of the procedure in para 4 as follows:

Where the LCRO concludes on the material before him or her that it appears that there is no case to answer, the LCRO may convene a Hearing to determine whether there is a case to answer. The purpose of such a Case to Answer Hearing is to give the applicant for review an opportunity to be heard on the question of whether there is a case for the respondent to answer.

If on conducting such a hearing it appears there is a case to answer further steps will be taken.

[29] Mr Denbighshire particularly objected to the fact that the case to answer procedure was initiated by the Legal Complaints Review Officer and not by the respondent. I observe that the review function of this office is not intended to be an adversarial hearing. The powers conferred on the Legal Complaints Review Officer are wide including investigatory powers. It is therefore appropriate for the Legal Complaints Review Officers to be active in managing the course of a complaint.

[30] The question in respect of predetermination is as stated by Gallen J in *Loveridge v Eltham County Council* (1985) 5 NZAR 257 at 264:

whether or not it appears from all the evidence that all or any of the bodies or individuals involved had so conducted themselves that an informed objective observer would consider that they had closed their minds and were no longer giving genuine consideration to the live issues before them.”

[31] While a view has been expressed that there are obstacles to Mr Denbighshire succeeding in his application for review there is nothing objectionable in this. Indeed even where judicial officers have expressed a view as to the ultimate outcome of a case a number of decisions have found that this did not amount to bias: *Turner and Others v Allison and Others* [1971] NZLR 833; *R v Alcock* 37 LT 829 pp 831 & 831; *R v London County Council* 71 LT 638, p 639) Per Salmond J in *English v Bay of Islands Licensing Committee* [1921] NZLR 127, 135.

[32] The fact that a preliminary view that there is no case to answer is reached does not indicate predetermination of the final question. Indeed the holding of a preliminary view is a natural consequence of having read the material submitted by the parties and is unobjectionable: *Riverside Casino Ltd v Moxon* [2001] 2 NZLR 78. Expressing a preliminary view ensures that the complainant is aware of the obstacles to a successful review and is given the opportunity to address them. The adoption of a case to answer procedure is clearly within the powers of the Legal Complaints Review Officer in determining his or her own procedure and is not ultra vires.

[33] There has been no predetermination of this matter and I do not recuse myself on that basis.

[34] Mr Denbighshire also referred to proceedings in the High Court in which he is reviewing a decision of mine as Legal Complaints Review Officer in which he was the unsuccessful applicant. In particular he is seeking judicial review of an order of costs made against him. In that application he has made a number of applications including an order for costs against the judicial officer, and an inquiry into fitness for office. Mr Denbighshire argued that he is an opposing litigant of me personally in the High Court.

[35] I do not understand this to be the case. Mr Denbighshire’s proceedings quite correctly name the Legal Complaints Review Officer as the respondent to his judicial review application. He is in effect appealing the costs aspect of the earlier decision. In this sense being the subject of judicial review is a usual incident of issuing decisions which are otherwise unappealable. I also observe that the judicial review application argues that I have made errors, but does not suggest that I have been guilty of bad faith.

[36] After the hearing Mr Denbighshire contacted this office by email of 18 February 2010 and further argued that because I am to conclude this role shortly it was inappropriate for me to consider the matter. He followed this up with a further letter of 22 February 2010 in which he suggested that the conclusion of my role may have been linked to the proceedings for judicial review filed in the High Court. The date for my conclusion of this role was agreed prior to the service of any proceedings and there is no causal connection between the two matters. No further reasons were given in support of this argument and I cannot see that it has any merit.

[37] Mr Denbighshire cited *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, [2000] 2 WLR 870, [2000] 1 All ER 65. In that case the English Court of Appeal was considering what personal relationships with litigants would be a proper basis for recusal. The Court noted “By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case”.

[38] I am acquainted with Mr Denbighshire only through the applications he has made to this office. I have no animosity towards him, and no personal acquaintance with him at all.

[39] I also observe that caution must be exercised to ensure that a litigant who has not been successful before one judicial officer should, by objecting in sufficiently intemperate terms, ensure that they are heard by a different judicial officer in another matter. It is obviously the role of any judicial officer to put to one side irrelevant considerations and decide the matter on its merits and there must be a strong presumption that judicial officers are capable of doing so. Mr Denbighshire’s application proceeds on the basis that because he is reviewing a decision which I made a reasonable person would consider that I would be unable to determine the present matter impartially. I do not consider this to be the case.

[40] In *Clenae Pty Ltd v Australia and New Zealand Banking Group Ltd* [1999] VSCA 35, Vic SC. Callaway JA observed (para 89(e)):

As a general rule, it is the duty of a judicial officer to hear and determine the cases allocated to him or her by his or her head of jurisdiction. Subject to certain limited exceptions, a judge or magistrate should not accede to an unfounded disqualification application.

[41] Mr Denbighshire also argued that because (in his view) I had made errors in deciding his earlier application for review I would not be able to properly consider this

application. I do not understand that there is any legal basis for this to found a recusal application. Indeed in *Locabail* the Court found that no sustainable objection could arise merely because, in the same case or a previous case, the judge has commented adversely on a party or witness, or found their evidence to be unreliable.

[42] I must consider this against the legal test for when a judicial officer should recuse him or her self. I observe that the Legal Complaints Review Officer is not a judge, but it does appear that in general the same principles of those developed by the Courts will be applicable. I note that there is authority for the proposition that the test for bias ought to be adjusted for bodies other than courts: *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252 (CA) at 277. The test for recusal for bias had been articulated by the Supreme Court in *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2010] 1 NZLR 35 which indicated that there were two steps to the analysis.

- [a] first, the identification of what it is said might lead a judge to decide a case other than on its legal and factual merits; and
- [b] secondly, there must be “an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits”.

[43] In that case Anderson J also adopted the test in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at para [6] of whether “a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide”.

[44] Mr Denbighshire has argued that I am unable to decide the matter on the legal and factual merits because:

- [a] In convening a case to answer hearing I predetermined the matter;
- [b] He is reviewing an earlier decision of mine and seeking orders of costs against me as a judicial officer as well as an inquiry into my fitness to hold office;
- [c] I am shortly to conclude filling the role of Legal Complaints Review Officer;
- [d] I have previously decided a matter against him.

[45] I also take notice of the fact that it appears that Mr Denbighshire has spoken with members of the media and since this matter was heard, reports of some of the issues that Mr Denbighshire has referred to have been published.

[46] I recognise that I must be very cautious of allowing Mr Denbighshire by his own behaviour to manufacture circumstances which would found a successful application for bias and enable him to engineer which judicial officer hears his application. In particular I do not consider the focus should be on the allegations that Mr Denbighshire has made against me. If that were the focus any litigant could manufacture an effective recusal application by making unfounded allegations or bringing review applications whether or not they have merit. The fact that Mr Denbighshire may strongly and honestly believe I am biased is not a relevant consideration. It was observed by the Court of Appeal in *Collier v Attorney-General* [2002] NZAR 257 it was not for a litigant to decide whether the tribunal he appeared before was the fair and impartial tribunal to which all were entitled. Such an approach was described as “wrong and unworkable”. The test for bias is an objective one to be applied by the tribunal before which any issue of bias actual or perceived, was to be determined.

[47] The focus of the inquiry must be on what relationships I have, or conduct I have can be shown to have engaged in which demonstrate that a fair-minded lay observer might reasonably apprehend that I might not bring an impartial mind to the matter. Mere allegations are not enough.

[48] I have no relationships which are relevant to this matter. The only conduct complained about is the substance of the decision of the earlier application for review by Mr Denbighshire. Even if I erred in that previous decision in a substantial way, an error does not amount to bias or show bias. I have already recorded my view that there has been no predetermination of this matter and that my ceasing acting as Legal Complaints Review Officer has no connection with him and is irrelevant.

[49] It is also important to consider this matter globally and without an overly technical analysis. The core question is whether a reasonable observer might think that in light of the behaviour and allegations of Mr Denbighshire I might be biased against him. I take account of the fact that I must not be unduly timid in approaching that question, however, I also take account of the fact that there is an inherent reluctance on the part of any decision maker to make a finding that he or she is (even only apparently) biased. I also take into account the need to ensure that any decision of this office is sufficiently robust to be accepted by the parties and therefore give finality to the matter.

[50] Taking all of these matters into account I consider that a reasonable and informed lay onlooker would consider that I am able to impartially consider Mr Denbighshire’s application for review. Accordingly I have considered and decided it.

Costs

[51] Section 210 of the Lawyers and Conveyancers Act confers a discretion on the Legal Complaints Review Officer to award costs. Section 210(1) provides

The Legal Complaints Review Officer may, after conducting a review under this Act, make such order as to the payment of costs and expenses as the Legal Complaints Review Officer thinks fit.

[52] In general costs orders are not made against complainants in favour of the Law Society (because they are usually lay complainants). It is also arguable that s 210 (and in particular s 210(3)) contemplates that orders be made only against the lawyer who is the subject of the complaint or investigation. In light of this no costs order will be made in this case.

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 National Standards Committee is confirmed.

DATED this 26th 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:

Mr Denbighshire as Applicant

Mr Galashiels as Respondent

The National Standards Committee

The New Zealand Law Society