LCRO 224/2010
LCRO 262/2011

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
BETWEEN	**Mr OX** of Christchurch Applicant
AND	**Mr PE** of Christchurch Respondent

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

DECISION

[1] The review applicant is Mr OX (the Applicant) who sought a review of two Standards Committee decisions declining to uphold complaints against Mr PE (the Practitioner).

[2] The first Standards Committee decision is dated 15 October 2010, and dealt with complaints made by the Applicant in June of that year. The second decision is dated 12 October 2011 in relation to complaints made on 6 October 2011, the Standards Committee concluding that the complaint was vexatious. The Committee noted it had considered four previous complaints, none of which was upheld.

[3] The Committee observed that the Applicant sought an inquiry into material that was before the Court and under the Court's control, and until he received that material he had no evidential foundation for his complaints. The Committee noted that the

complaints related to allegations of misconduct in the Court, and that it was well within the jurisdiction of a court to deal with such issues. In that light the Committee considered that the Applicant had an adequate remedy that he could exercise pursuant to section 138(1)(f) of the Lawyers and Conveyancers Act (the Act).

Background

[4] The Practitioner acted (or acts) for the wife of the Applicant in matrimonial proceedings which involved particularly contentious issues around the Applicant's contact with his three children. The Applicant's wife sought contact to be supervised; this was opposed by the Applicant. At some point there had been a temporary protection order obtained by the Practitioner's client which subsequently lapsed and no further order was made. After separation of the Applicant and his wife, the Applicant had supervised visits with his children. His objections to ongoing supervision led to further disputes between them. The Applicant was legally represented at some stage but not at the later stage of proceedings.

[5] In the course of all of these contentious matters, the Applicant came to perceive that the Practitioner himself was 'involved' in the proceedings by aligning himself with his client's (the wife's) agenda. The Applicant came to hold the view that the Practitioner was party to the obstruction of his rights of access to the children. This led the Applicant to focus his attention on the actions of the Practitioner.

[6] The Applicant brought several complaints to the New Zealand Law Society. Underlying the complaints was his belief that the Practitioner had a "personal stake" in the proceeding.

June 2010 complaints

[7] The complaints made by the Applicant in June 2010 may be summarised by the following allegations:

- that the Practitioner was involved in soliciting false testimony against the Applicant;
- that the Practitioner was involved in the fabrication of a statement made by BJ (a witness);
- that the Practitioner intentionally filed affidavits that contained false testimony;

- that the Practitioner intentionally lied to the Court on 7 August 2009 when he informed the Court that six supervised visits had been ordered, knowing that there had only been four, and thereby misled the Court;
- that the Practitioner intentionally misled the Court in the memorandum dated 3 March 2010 and 19 March 2010 with regard to affidavits;
- that the Practitioner intentionally lied in court on 19 March 2010 and intentionally withheld information from the critique writer;
- that the Practitioner filed a number of affidavits that he knew contained false information;

[8] The Committee received responses from the Practitioner and invited comments on those responses from the Applicant. This assisted the Committee to identify the main aspects of the complaints and the background from which they arose.

[9] The Standards Committee determined to take no further action pursuant to Section 138(1)(f) and Section 138(2) of the Act for the reason that the Applicant had an adequate remedy available to him in respect of those aspects of the complaint concerning the way the litigation was conducted. This was a reference to the fact that courts govern their own procedures and any conduct concerns in the course of litigation are properly to be brought before the presiding Judge.

[10] As for the remainder of the issues, the Standards Committee considered that, having regard to all the circumstances, further action was unnecessary or inappropriate. This dealt with those aspects of the complaint alleging soliciting false evidence, being party to fabrication of evidence, lying in court and allegations of the Practitioner knowing that affidavits he had filed in court were false.

October 2010 complaints

[11] The complaints made by Applicant in October 2010 related to a direction that the Applicant claimed had been made by the Court, but had not appeared in a Minute issued by the Judge. The Applicant alleged further instances of the Practitioner misleading the Court. He also insisted that the Practitioner should answer a number of questions which he included in the complaint. These included the identity of an agent who had appeared for the Practitioner.

[12] The Committee notified the complaint to the Practitioner but informed him that no response was required. The Practitioner nevertheless did provide a response to the

allegations, but declined to answer the Applicant's specific questions. The Committee resolved to take no further action, perceiving the complaints to be vexatious.

Review application

[13] The Applicant's review application, and further information provided for the review, primarily focused on what he perceived as lies told by the Practitioner in court on 2 July 2009 and 7 August 2009. The other matters he sought to have reviewed related to the complaints he had put before the Standards Committee.

[14] The Applicant contended that the Standards Committee had given no weight to any of the documents from the Court staff, his counsel, or lawyer for the child. His accompanying letters clearly set out the various issues of concern to him.

[15] A review hearing was held on 2 February 2012, attended by the Applicant and the Practitioner.

Considerations

[16] I have considered all of the information on the file which includes the Standards Committee files and the information provided for the review. I have also taken into account the review hearing.

[17] I observe that a number of matters raised by the Applicant in correspondence prior to the review hearing concerned the Court proceedings and matters of evidence. These are not matters that can be considered in this forum, as the sole focus of this office (and the Standards Committee previously) is on disciplinary matters involving lawyers. It is these matters that are addressed in this decision.

[18] I also record that after the hearing the Applicant sent in a further letter expressing his dissatisfaction with the review hearing. He also asked for a reply to the various areas of criticism he raised. I did not consider it necessary to send it on to the Practitioner. Nor is it appropriate that I correspond with any party to a review. The views of the Legal Complaints Review Officer are set out in the reasons for their decisions.

The Practitioner as an Officer of the Court

[19] The main focus of the Applicant's grievance concerns allegations that the Practitioner misled the Court. As an Officer of the Court, a lawyer's first duty is to the Court, a duty that is higher than the duty to his or her client. This duty is enshrined in

Rule 13 of the Lawyers Conduct and Client Care Rules. Rule 13.1 states that a lawyer has an absolute duty of honesty to the Court and must not mislead or deceive the Court. The Applicant's complaints essentially allege a breach of this rule.

[20] In order to make a disciplinary finding under this Rule, there needs to be more than an honest error or oversight. A finding that a lawyer has 'misled' or 'deceived' the Court requires an element of knowledge or intention on the part of the lawyer to mislead or deceive the Court, or some evidence of a reckless disregard as to the accuracy of information conveyed to the Court. This may come in the form of a wilful blindness to matters that challenge the accuracy of the information, but materially there needs to be an element of moral lapse in the lawyer's actions.

Allegation that Practitioner lied to the Court about supervised visits

[21] This allegation rests on a Minute issued by the Judge on 3 July 2009, and the Practitioner's subsequent submission to the Court. In one paragraph of his Minute, the Judge had stated, *"I see no reason why it* [the Applicant's contact with his children] *should be supervised from now on. It is a matter for the parties, with* [counsel for the children's] *assistance, to attempt to arrange an appropriate regime, presumably over the weekend's when* [the Applicant] *can have contact."*

[22] At a subsequent court hearing the Practitioner submitted to the Court that the six supervised visits had not yet expired and that there were two remaining.

[23] The Applicant described the Judge's Minute as a decision and direction for unsupervised visits. On this basis he accuses the Practitioner of lying to the Court when later submitting to the Court that there were supervised visits still outstanding.

[24] The Practitioner disputed that the 3 July Minute of the Court was a 'decision' of the Court, submitting that the Judge's statement (above) was the Judge expressing his view, and was neither a decision nor direction. The Practitioner further explained that the addendum of that Minute referred to ancillary orders that had originally been made with the protection order, the Judge noting that the ancillary orders were by implication discharged, although the current status remained by agreement. The Practitioner said that the ancillary orders concerned supervised visits and he had understood that the agreement concerning supervision was to remain.

[25] It appears that the Practitioner made a submission to this effect at a hearing on 7 August. The Applicant was present at that hearing on 7 August and had informed the Judge at that time that the Practitioner was wrong in his submissions about there being

two remaining supervised visits. The Minute issued by the Judge, following the hearing, recorded that the "contentious issue" was that the Applicant required unsupervised contact with his children, and that his wife required supervised contact.

[26] In my view the Minute issued by the Judge on 3 July 2009 was neither a decision nor a direction. I do not read the Judge's Minute as a decision by the Court that there should be unsupervised visits. The Judge expressed his view about the necessity of supervision, but it is clear from the remainder of the Minute that the Judge expected access to be sorted out between the parties with the assistance of counsel for the children. Assuming that the ancillary orders (included in the Minute) referred at least in part to supervised visits, the Practitioner's understanding was supported by that Minute. I do not agree that the Practitioner misled the Court in this matter.

Allegation that Practitioner lied to the Court - Number of supervised visits/funding

[27] The Applicant complained that the Practitioner misled the Court on the number of supervised visit, and regarding funding of supervision.

[28] I record that the Practitioner acknowledged that he was mistaken as to the number of supervised visits, explaining that he had understood that state-funded supervision came in blocks of six visits, and his assumption that the supervised visits were taking place under that regime. I also record that the Practitioner was mistaken about the funding issue since the Applicant said he was in fact funding the supervision himself.

[29] The evidence shows that at the subsequent hearing the Applicant himself challenged the information provided by the Practitioner. In the circumstances that the Judge had heard from both the Applicant and the Practitioner on behalf of his client, it could not be said that the Court was misled if indeed the Judge was presented with the views of both parties.

[30] The fact that the Judge was not misled (having received the evidence of the Applicant himself to refute the Practitioner's statement) does not absolve a lawyer who knowingly provides misleading information to a court, intending that the Court rely on it even if an opposing party is there to correct any misinformation. However, there needs to be evidence that the Practitioner intended to mislead the Court, or was culpably negligent in respect of information given to the Court.

[31] There is evidence that the Practitioner was mistaken but I can find no evidence that the Practitioner intended to mislead the Court. The Practitioner has explained his

misunderstanding. It may be argued that the Practitioner ought to have been more attentive to the detail, and been better prepared, but I can see no basis for a view that he intended that the Court should be misled by any of the matters before the Court.

[32] Moreover, the information that the Practitioner put before the Court was corrected by the Applicant at that time, and it must be concluded that had the Court been concerned about information given by the Practitioner, it was open to the Judge to have dealt with that matter directly at that time. There is nothing to indicate that the Judge was concerned about the Practitioner's submissions. I can find no basis for a disciplinary finding against the Practitioner in respect of this allegation.

[33] That said, the Practitioner was well aware of the contentiousness of the supervision issue. There was some discussion at the review hearing about the obligations of those practising family law to conduct their professional practice in a manner that is conciliatory. Practitioners would not be expected to aggravate a situation known to be inflammatory, and to be diligent about ensuring accuracy of contentious information to be put before the Court.

[34] In this case the evidence was that the Practitioner's client held decisive views about supervised access. It was not the role of the Practitioner to decide whether or not there should be supervision. This was a matter before the Court, and the Practitioner was obliged to place before the Court the views of his client.

Allegations concerning the evidence of BJ

[35] At some point when the Applicant was arranging supervised contact with his children, he contacted his brother-in-law, BJ, who agreed to be the supervisor. A short time later BJ changed his mind, apparently after discussions with other members of the family. It appears that BJ had written a letter in relation to this matter. Subsequently, the Applicant's wife gave evidence in the Court that referred to BJ having written this letter.

[36] The Applicant claimed that the wife's evidence was that she (the wife) had given the letter to the Practitioner. The Practitioner disagreed that the wife had said that she had given the letter to the Practitioner, although the Practitioner agreed that the wife had referred to BJ's letter in her evidence. The Practitioner had no recollection of ever having received the letter, and said he has examined his many files and was unable to locate such a letter.

[37] The significance of the letter was that the Applicant believed that BJ was coerced into signing a letter withdrawing his agreement to act in a supervisory role. The Applicant has sought to obtain a copy of the letter BJ had written, but thus far the letter has not been located. He believes that the Practitioner has deliberately withheld or destroyed it.

[38] It is not clear how this matter can be resolved. If the Practitioner had such a letter in his possession, it is difficult to imagine any reason why he would have withheld it. Also material is that BJ later prepared an affidavit denying that he had been coerced into signing a letter saying that he would not play a supervisory role. BJ had stated, "*I can categorically say I was never coerced into signing such a letter. The actions I took were of my own volition and were based on my own experiences in my relationship with* [the Applicant]".

[39] The Applicant nevertheless considered that BJ was not truthful, and further alleged that BJ had discussed with the local pastor that he had been coerced into signing a letter. This has also been denied by the pastor.

[40] It is difficult to see how this is significant to the disciplinary matters under review, or that any disciplinary issues arise for the Practitioner in not being able to produce a letter he denies every having received, being a letter which has already been explained by its author as not supporting the Applicant's beliefs.

[41] The evidence shows that BJ originally agreed, and then changed his mind, about supervising the Applicant's visits with his children. The evidence of BJ himself is that it was his own decision to not be the supervisor. The Applicant had the opportunity to cross examine BJ on this matter.

[42] No part of this issue supports any disciplinary concerns involving the Practitioner.

Allegation that Practitioner filed false affidavits

[43] The Applicant alleged that the Practitioner filed affidavits knowing that they contained false testimony. I have understood that he was referring to affidavits filed by the Practitioner's client (the wife) and also BJ. The Applicant considered the allegations made by the wife and BJ were a fabrication, and his complaint is that the Practitioner did not provide any evidence to support the allegations made by the deponents as to the Applicant's mental health and issues of violence.

[44] I do not accept that this discloses any wrongdoing on the part of the Practitioner. The sworn testimony of witnesses to a proceeding contains the knowledge or beliefs of the deponents. There is no obligation on the Practitioner to provide extrinsic evidence to support the beliefs of his clients. In my view there can be no criticism of the Practitioner for not providing supporting evidence for beliefs held by others, there being no evidence that the deponents did not honestly hold the beliefs stated in their affidavits, and no basis for the Practitioner to have doubted or questioned the testimony of his client as set down in affidavits. Rather, the evidence on the file shows the considerable concerns raised by the Practitioner's client in relation to the Applicant's behaviour.

[45] That the Applicant was sceptical of the views held by the deponents is another matter. Whether their concerns proved to be well-founded were matters to be addressed through the Court. Cross-examining deponents on their statements is the proper way to challenge affidavit evidence.

Complaint that the Practitioner had incorrectly informed a witness, MK, that he was not required for cross-examination.

[46] The background is that MK had been asked to be available for cross-examination. The request had been made by or on behalf of the Applicant. Subsequently, MK was informed he was not required for cross-examination, and at the time of the hearing it appears that MK was out of the country.

[47] The Applicant referred to his letter sent to the Practitioner wherein he wrote: "*This is to confirm that I will require both BJ and MK for cross-examination at the forthcoming hearing."* Some four days later, an email from MK stated: "*As you will know, I was contacted by* (the Practitioner's client) *and I was not required for cross-examination at the recent hearing."*

[48] The Practitioner explained that after receiving the Applicant's request that MK be available for cross-examination, he had encountered MK in the street and referred to the hearing, adding that he would be in contact with him when a date was finalised. The Practitioner said that he subsequently got a letter from the Applicant's counsel to say that MK would not be required after all, and on that basis he, the Practitioner, advised MK accordingly.

[49] At the review hearing the Applicant insisted that the Practitioner should advise him of the exact date on which the Practitioner had informed MK he would not be required. The Practitioner was unable to recall the exact date he had encountered MK.

The Applicant doubted that the Practitioner was telling the truth on the basis that MK was already out of the country on the date of the hearing.

[50] Given the Practitioner's advice that it was the Applicant's lawyer who had advised that MK was no longer needed, I put it to the Applicant that he could probably clear this up with his own lawyer who could presumably advise him about the communication he sent to the Practitioner. The Applicant said he was not interested in contacting his own lawyer. He demanded that the Practitioner tell him the date of his contact with MK.

[51] No disciplinary issues arise for the Practitioner in his inability to recall the exact date of a casual encounter with an individual on the street. If the Applicant is concerned about whether MK had, or had not, been given certain information in relation to his attendance at court, and clarification can be obtained through his own counsel, it is my view that the Applicant should contact his own lawyer. The reason for his reluctance to do so is by no means clear. Instead, he persists with his demands that the Practitioner answer the questions that he poses.

Practitioner's refusal to name his agent

[52] The final review issue arises from the second Standards Committee decision, dated 12 October 2011. The Applicant alleged that the Practitioner had misled the Court by claiming that the Judge had not directed the wife to pay for the financial assessment of W Limited. The Applicant submitted that what the Practitioner said was not true as he (the Practitioner) was not in court on the day in question.

[53] On that day the Practitioner did not attend the Court but had appointed an agent to appear on his behalf. One of the issues discussed at that hearing concerned the valuation of a company which was part of the relationship property.

[54] The Judge's Minute resulting from that hearing did not in fact include any direction as to payment of costs of the valuation. The Applicant nevertheless maintains that, despite no record being included in the Minute, the Judge had given such a direction at the hearing.

[55] The Practitioner had not attended the hearing, and could not comment on the Applicant's assertion about what was said in the Court. He noted that no reference was made to this in the Minute. His subsequent submissions in the Court relied on the Judge's Minute.

[56] The Applicant sought to challenge the accuracy of the Court's Minute and has demanded that the Practitioner identify who the agent was who appeared for him on that day. He cannot discover this from the Court record which evidently erroneously recorded the identity of the agent.

[57] The Practitioner is reluctant to provide this information to the Applicant. He is concerned that the Applicant will hound the agent. The Practitioner said that he needs to protect his agents and if he allows them to be subjected to questioning by the Applicant, he may soon find himself without any agent to appear for him. In this regard, the Practitioner refers to the large volumes of emails that he receives from the Applicant (several hundred) and I have understood that he does not wish the same fate to befall his agents.

[58] The Practitioner has refused to identify the agent who appeared for him in court. The Practitioner owes no duty to the Applicant to disclose this information, and it is therefore difficult to see how disciplinary issues arise for the Practitioner in relation to this matter.

[59] Moreover, if the Practitioner made submissions to the Court on the basis of the Minute previously issued by the Court, it is difficult to see any objection to a submission he made that was consistent with that Minute. There is no evidence either that the Minute was wrong or incomplete, or that the Practitioner believed it to be so.

[60] It would be unfortunate that the Court record is wrong but that is not the fault of the Practitioner. There is no evidence of steps taken by the Applicant himself to see whether the Court's record can provide further information about the Judge's direction. None of this impacts on what appears to be the fact that the Court's Minute does not make any direction as to who should bear the cost of a valuation. There is no basis for criticism of the Practitioner when he makes a submission that is consistent with that Minute.

[61] The Standards Committee concluded that the complaint was vexatious, referring to previous complaints against the same lawyer that had been dismissed. That alone is not a sufficient reason for concluding that further complaints are vexatious. There is no reason to doubt that the Applicant genuinely holds the beliefs on which his complaints are founded.

[62] However, having considered all of the information on the file, it is very difficult to avoid the conclusion that the Applicant seeks to blame the Practitioner for much of

what has happened to him, and the way that the Family Court matters have progressed.

[63] My observation is that the Practitioner himself appeared to have become the focus of the Applicant's dissatisfaction with his situation. I see no foundation for holding the Practitioner responsible for the concerns held by the Applicant's wife. Nor have I found that any disciplinary issues arise for the Practitioner in the way he has represented the interest of his client.

[64] There is no basis for taking a different view than was taken by the Standards Committee. The review applications are declined.

Decision

Pursuant to Section 211(1)(a) of the Lawyers and Conveyancers Act, both of the Standards Committee decisions are confirmed.

DATED this 22nd day of August 2012

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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 OX as the Applicant
Mr PE as the Respondent
The Canterbury Westland Standards Committee
The New Zealand Law Society