

CONCERNING

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of the Auckland Standards Committee 3

BETWEEN

ED
of Auckland

Applicant

AND

VV
of Auckland

Respondent

DECISION AS TO COSTS

[1] On 15 June 2011 I issued a decision in respect of the substantive matters in this review. The decision of the Standards Committee to take no further action in respect of the complaint by the Applicant was upheld.

[2] Prior to the hearing the Respondent signalled an intention to make an application for costs against the Applicant, and repeated that application at the hearing.

[3] In the decision on the substantive matters I invited both parties to make submissions as to costs and sought a response by 29 June 2011.

Applicant's submissions

[4] The Applicant provided further correspondence that repeats her complaint against both the Applicant and Ms VT. She requested that this decision as to costs be delayed until a complaint which she has lodged against Ms VT is completed. She also refers to further issues that she has involving Mr VU. None of the matters raised by her relates to the issue as to costs on which submissions were requested by me.

[5] There is no reason to defer this decision. Neither the outcome of the complaint against Ms VT or the issues that the Applicant has with Mr VU affect this decision as to costs.

The Respondent's submissions

[6] The Respondent notes that despite having been provided with irrefutable evidence, the Applicant has continued to pursue her allegations that the Respondent had lied to her, the New Zealand Law Society, and myself. Indeed, she continues to make the same assertions in her correspondence in response to my request for submissions on costs.

[7] The Respondent submits that a costs order on an indemnity basis should be made. In this regard, the Respondent refers to Rule 14.6 of the High Court Rules which sets out the basis on which the Court may make an order for increased or indemnity costs.

[8] Rule 14.6 (4)(a) provides that *"The Court may order a party to pay indemnity costs if the party has acted vexatiously, frivolously, improperly or unnecessarily in commencing, continuing or defending a proceeding or a step in a proceeding"*.

[9] Examples of that type of behaviour were summarised by Sheppard J in *Colgate Palmolive Company v Cussons Pty Ltd* (1993) 118 ALR 248, which was adopted by Goddard J in *Hedley v Kiwi Co-operative Dairies Limited* (2002) 16 PRNZ 694 and endorsed by the Court of Appeal in *Bradbury v Westpac Banking Corp* [2009] 3 NZLR 400. The summary provided by Sheppard J is as follows:-

1. The making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud;
2. Particular misconduct causing loss of time to the Court and to other parties.
3. Commencing or continuing proceedings for some ulterior motive.
4. Doing so in wilful disregard of known facts or clearly established law.

[10] The Respondent submits that the conduct of the Applicant falls within each of these categories.

[11] The Respondent has provided a summary of costs which he considers have been incurred in fulfilling his obligations to respond to the complaint and the application

for review. This is predominantly made up of revenue lost through time allocated to dealing with this matter by himself and Ms VT.

Considerations

[12] The discretion to award costs is provided by section 210 of the Lawyers and Conveyancers Act 2006. This provides that *“the Legal Complaints Review Officer may, after conducting a review under this Act, make such orders as to the payment of costs and expenses as the Legal Complaints Review Officer thinks fit.”*

[13] There is no restriction on that discretion. Subsection (2) however, enables an award of costs to be made against the New Zealand Law Society for payment to a lawyer, or, in the case of a conveyancer, against the New Zealand Society of Conveyancers to a conveyancer. I consider that this provision is included for the purpose of making it clear that there is authority to make Orders against those bodies, notwithstanding that they may not otherwise be considered to be a party to the proceedings. This does not preclude a costs order against a lay person.

[14] In considering whether an award of costs should be made against a lay person, it must be remembered that the scheme of the complaints procedure, is to enhance the rights of consumers to complain about the conduct of lawyers. The inclusion of the concept of unsatisfactory conduct has introduced a consumer protection element into the disciplinary process that did not previously exist.

[15] Those rights are extended to the right to seek a review of decisions by the Standards Committees. In this regard, it is important to recognise that this course of action is a “right”, and as such it must not be diminished in any way. Consequently, it is not appropriate that awards of costs are made in the usual way in which awards are made in Court proceedings in favour of a successful litigant.

[16] It also follows, that awards against lay Applicants in review proceedings will be exercised sparingly. This is reflected in paragraph [11] of the Costs Orders Guidelines established by this Office.

[17] Paragraph [13] of the guidelines indicates that the circumstances in which an award will be made, is where a party has acted vexatiously, frivolously, improperly, or unreasonably in bringing, continuing, or defending the review. As a refinement to this, it would be an extremely rare occurrence for costs to be awarded against a lay applicant merely for lodging the application for review. That is a right provided by the Act. However, where the conduct of a party falls into one or more of the categories of

conduct described above during the course of the review, then the exposure of that party to an award of costs increases.

[18] In the present circumstances, the Applicant was put on notice on two occasions prior to the hearing that the Respondent intended to make an application for costs against the Applicant. It was therefore incumbent on her to ensure that the application for review was being made reasonably and for proper purposes.

[19] On 25 February 2011, when forwarding the letter from the Respondent in which he indicated he would be seeking costs, this Office provided the Applicant with a copy of the LCRO Costs Guidelines and drew the attention of the Applicant in particular to paragraphs [11] to [14]. Paragraph [13] of those Guidelines includes the statement:- *“A costs order may be made against a party to a review (whether a practitioner or a lay person) in favour of the other party where there has been some improper conduct in the course of the review. Such conduct may exist where a party has acted vexatiously, frivolously, improperly, or unreasonably in bringing, continuing, or defending the review.”*

[20] Again, on 15 March, this Office referred to the issue of Costs in the following manner:-

The LCRO also wishes to make sure that you understand that Mr [VV] has indicated that he will be applying for an award of costs against you as he considers this complaint is frivolous and vexatious (refer his letter of February). The LCRO holds no view in that regard but you are again referred to the LCRO Costs Orders Guidelines previously provided to you.

[21] The Applicant continued with her allegations against the Respondent, and attempted to direct the LCRO as to the course the review should take by suggesting that Ms VT should be summoned as a witness and seeking copies of her diaries. The Applicant did not otherwise acknowledge the comments made with regard to costs and continued to pursue her application vigorously.

[22] At the hearing, the Applicant maintained her allegations, notwithstanding the fact that the Respondent produced the originals of the documents which had previously been provided to the Standards Committee as certified copies. The Applicant continued to assert that the originals were fraudulent and manufactured by the Respondent to support the statements made by his partner, Mr VU.

The self represented lawyer

[23] In *The Queen v Michael Brian Meyrick* [2008] NZCA 45 it was noted at para [10] that *“the usual rule with regard to costs is that a successful self-represented litigant is entitled to recover disbursements, but not costs. There is an exception to this rule in the case of a practising lawyer. Such a litigant can be awarded both costs and disbursements.”*

[24] There is nothing in the Lawyers and Conveyancers Act which negatives this principle, which was established as long ago as 1884 in *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 (CA), a decision which was referred to in *Meyrick*. In that case, the Court reasoned that *“it would be absurd to permit a solicitor to charge for the same work when it is done by another solicitor, and not to permit him to charge for it when it is done by his own clerk”* (877). Such costs *“ought to be allowed because there is an expenditure of professional skill and labour.”*

[25] The Respondent has calculated costs based on an estimate of time expended by him and Ms VT, being 6 hours for himself, and 2 ½ hours for Ms VT. Based on their respective hourly rates of \$350 and \$250 plus GST, this produces a cost of \$3,133.75 which, together with out of pocket expenses of mileage and parking costs, produces a total cost of \$3,203.75.

[26] Some care must be taken in considering an application for costs on this basis. As referred to in *Chorley* *“professional skill and labour are recognised and can be measured by the law; private expenditure of labour and trouble by a layman cannot be measured. It depends on the zeal, the assiduity, or the nervousness of the individual.”* (877). In a case such as this, it is to be expected that a self-represented lawyer would approach his or her defence with considerable zeal, assiduity and nervousness as his or her professional standing is at risk. I do not therefore consider that it would be appropriate to award costs on an indemnity basis.

Concluding comments

[27] As observed by me in the substantive decision, the justification for the complaint is tenuous. It could be considered that the complaint was improper or made for an ulterior motive, in that the purpose of the complaint is primarily to support the Applicant's complaint against Mr VU. In doing so, the Applicant has had complete disregard to the seriousness of the allegations made, and the distress they have caused. She has single mindedly pursued her allegations and refused to objectively acknowledge the evidence provided. Evidence produced, both in the form of certified copies, and originals, has been dismissed by her as fraudulent. This is unreasonable

and vexatious and I consider that the present case is an instance where it is appropriate for costs to be awarded against the Applicant.

The award

[28] One of the principles applied by the High Court when awarding costs, is that awards should as far as possible be predictable and expeditious. The LCRO has established Costs Orders Guidelines in which the principles to be applied by the LCRO when awarding costs are set out. A schedule of costs has also been established for use where an adverse finding is made or upheld against a practitioner. No such schedule has been established where an award of costs is to be made against a lay applicant, given the limited occasions on which such awards will be made.

[29] In considering what costs should be payable by the Applicant in the present instance, I have had regard to the principles and the rates set out in the High Court Rules. The rate for Category 1 proceedings is \$1250 per day. Other provisions provide for costs payable for preparation time.

[30] LCRO hearings are generally of limited duration and seldom would extend to a full day. Rather than differentiate between hearing time and preparation, it is proposed to adopt the daily rate as the base from which costs will be assessed.

[31] Some adjustment to this must however be made in recognition of the rights provided to consumers of legal services by the Act as discussed in paragraphs [14] and [15]. I consider that the appropriate adjustment would be to divide the rate in half, giving equal weight to the right of the Applicant to apply for a review, and the right of the Respondent not to be exposed to proceedings of this nature. This would provide for an award of \$625.

[32] The means by which I have arrived at this figure is acknowledged to be somewhat arbitrary, but in applying the general discretion provided to the LCRO by section 210 of the Act, I consider that an award of \$625 is an amount which takes into account all of the factors which need to be considered when assessing the award to be made in these circumstances.

Order

1. Pursuant to section 210(1) of the Lawyers and Conveyancers Act 2006 the Applicant is ordered to pay to the Respondent the sum of \$625 within 30 days of the date of this decision. To facilitate payment of this amount, the Respondent is to advise this Office of the method of payment that is acceptable to him.

2. Pursuant to section 215(2) of the Act this Order is enforceable in the District Court at Manukau.

DATED this 12th day of July 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:

Ms ED as the Applicant
Mr VV as the Respondent
The Auckland Standards Committee 3
The New Zealand Law Society