

LCRO 245/2013

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of the Standards Committee

**BETWEEN**

**MR AND MRS BZ**

Applicants

**AND**

**FI**

Respondent

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

**DECISION**

**Introduction**

[1] Mr and Mrs BZ have applied for a review of a decision of the Standards Committee in which the Committee determined to take no further action on a complaint Mr and Mrs BZ had proceeded against Mr FI.

**Background**

[2] The BZs were, at the time their complaint was filed, neighbours of clients of Mr FI's.

[3] Mr and Mrs BZ were the holders of an easement which gave them the right to pass over land owned by Mr FI's clients. The neighbours were in bitter dispute over issues relating to access.

[4] Argument over access issues appear to have expanded into broader areas of conflict. Mr and Mrs BZ initiated proceedings including:

- An application for an injunction to restrain the neighbours from erecting structures on the right-of-way.
- Proceedings seeking an amendment of the terms of the right-of-way.
- Harassment Act proceedings.

[5] Doubtful that pursuit of legal remedy could ever provide satisfactory outcome to the neighbourly dispute, Mr and Mrs BZ decided to place their home on the market.

[6] On 16 May 2013 Mr FI wrote to the BZs' solicitor advising that it had had come to his clients' attention that the BZs had put their home on the market. Mr FI made request that details of the dispute between the parties be brought to the attention of the real estate agent instructed to handle the sale. Mr and Mrs BZ's counsel, Mr DV, responded promptly, and affirmed the right of his clients to continue to enjoy the benefit of the existing easement.

[7] On 29 May 2013, Mr FI wrote to the BZs' real estate agent. It is that correspondence which is at the heart of the complaint. In his correspondence, Mr FI made request of the agent to bring to any prospective purchaser's attention, a number of matters including:

- The existence of proceedings before the Court to resolve matters relating to the driveway.
- Proceedings before the Court to determine a claim to reduce maintenance costs incurred under the easement.
- A dispute over fencing issues.

[8] Mr and Mrs BZ's lawyer wrote to Mr FI complaining about the correspondence. It was alleged for the BZs that Mr FI's correspondence contained a number of errors including:

- Advising that there were proceedings on foot in respect of the easement when that claim was no longer being pursued.
- Advising that there were proceedings on foot in respect of a dispute over a driveway when that claim was no longer being pursued.
- Advising that there were proceedings on foot in respect of an application to reduce the obligation to meet maintenance costs when that claim was no longer being pursued.

[9] Mr FI's response was to advise that he considered that his correspondence accurately reflected the position. Further, he invited Mr and Mrs BZ to advise their agent if they disagreed with the position he had advanced.

### **The Complaint and the Standards Committee Decision**

[10] Mr and Mrs BZ filed a complaint with the Complaints Service on 10 June 2013. They complained that Mr FI had misrepresented the position in his correspondence to their real estate agent of 29 May 2013.

[11] In its decision delivered on 28 June 2013, the Committee determined to take no further action on the complaint. The Committee considered that Mr FI's correspondence had been carefully drafted and written in such a way as to ensure that it was readily apparent that he was presenting his clients' view of the situation.

### **Application for Review**

[12] Mr and Mrs BZ filed an application to review the Standards Committee decision on 9 August 2013. They submit that:

- The Standards Committee failed to address their main complaint.
- Mr FI was aware that the dispute over the easement had been settled at the time he wrote to the real estate agent.

- The legal position in respect to the easement was clear and any suggestion to the contrary was misleading and deceiving.

[13] Invited to provide response, Mr FI advised that he placed reliance on the submissions provided to the Standards Committee.

### **Role of the LCRO on review**

[14] The role of the Legal Complaints Review Officer (LCRO) on review is to reach his own view of the evidence before him. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting his own judgment for that of the Standards Committee, without good reason.

[15] In *Deliu v Hong Winkelmann J* provided helpful guidance on the nature and scope of a LCRO review. She described the review framework in the Act as creating “a very particular statutory process”.<sup>1</sup>

[16] Her Honour noted that:<sup>2</sup>

...the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence ... Nevertheless ... where the review is the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

### **The Hearing**

[17] The hearing proceeded by way of a teleconference on 10 March 2016.

[18] After hearing from the parties, and before the hearing concluded, I invited both parties to make final submissions, and gave the parties opportunity to raise any matters they may have overlooked when advancing their submissions. Neither party indicated that they wished to add anything further, or to file any additional submissions.

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<sup>1</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39].

<sup>2</sup> At [41].

[19] Immediately after the hearing was concluded, Mr BZ contacted the LCRO. He advised that:

- He wished to file a copy of a court transcript.
- He had wanted to advise at hearing that he sought leave to file further information, but was unable to do so as the hearing had concluded before he had a chance to do so.
- He was able to forward the information through to the LCRO immediately.

[20] In making request to provide further information, Mr BZ advised that he had only received the notice of the review hearing on 9 March 2016. Mr BZ was advised by email on 24 February 2016 that the hearing would proceed on 10 March, and that a formal notice of hearing would follow. It appears that through oversight, that formal notice of hearing was not forwarded to Mr BZ until the day before the hearing.

[21] Mr BZ advised that he had received no guidelines for the review process as advised in the notice of hearing, however a perusal of the file confirms that a copy of the guidelines was sent to Mr and Mrs BZ when the application for review was first received, and a further copy of the guidelines was provided with an earlier notice of hearing that had been forwarded to Mr and Mrs BZ.

[22] Those guidelines advise that all evidence should be made available to the LCRO prior to the hearing. Hearings proceed generally in an inquisitorial fashion with parties being provided opportunity to present their submissions, and the Review Officer asking questions of the parties if it is considered necessary to do so.

[23] Mr BZ had earlier advised the LCRO that he wished to call evidence from the District Court Judge or his lawyer. Mr DV also advised that his clients had wanted to have evidence on the crucial points called before the LCRO and the Committee.

[24] There is a sense from those submissions that Mr and Mrs BZ had expectation that the review process would allow them opportunity to call and cross-examine witnesses.

[25] The review process is not comparable to a court hearing. No cross examination of witnesses is permitted in a review hearing.

[26] Whilst I was reluctant to allow opportunity for Mr BZ to file further information after the hearing had been concluded, it being his responsibility to have all his evidence put before the LCRO prior to the hearing, I agreed to allow him an opportunity to file the additional information as it was my understanding that it was information that Mr BZ had on hand, and was able to provide to the Office immediately.

[27] A case manager from the LCRO followed up with Mr BZ on 11 March, to enquire as to when the information would be received.

[28] Mr BZ forwarded further information to the LCRO at 5.42 pm on 16 March 2016. That information comprised:

- A copy of correspondence from Mr and Mrs BZ's solicitor dated 15 March 2016.
- Photographs.
- Search copy of a title.
- A memorandum of transfer.
- Minute of Doherty J dated 11 December 2012.
- A memorandum confirming adjournment of injunction proceedings.
- Diagrams.
- Correspondence between the parties' solicitors.

[29] In large part, the material provided little assistance in determining the issue that was before me by way of review.

[30] Relevant to the review, although not advancing a position of which I was unaware, was the correspondence from Mr and Mrs BZ's lawyer (Mr DV) dated 15

March 2016. In that correspondence, Mr DV asserts that he attended a settlement conference with Mr FI presided over by the Judge. Mr DV states that he advised the Court that his client's application to modify the right of way was abandoned, and that there were no issues in dispute in respect to the easement. Mr DV says that there was a second conference before the same Judge, at which he reiterated his clients' position in respect to the easement application.

[31] In deciding to allow Mr and Mrs BZ opportunity to provide further submissions, it was on the basis that I understood the position to be that they had a transcript of court proceedings available that they wished to provide to the LCRO. It was not within my contemplation that the opportunity to provide further information after the hearing would extend to allowing opportunity for Mr and Mrs BZ to secure further evidence from their lawyer, post hearing.

[32] It is the responsibility of a party seeking to review a Committee's decision, to file the evidence in support of their application at the time they file their review.

[33] Parties who are pursuing complaint against a lawyer have an opportunity, and a corresponding obligation which travels with that opportunity, to put all the relevant information pertaining to their complaint before the Complaints Service. If the Complaints Service identifies a need for a complainant to provide further information, request may be made of the complainant to do so. If there is uncertainty as to the nature of the complaint or complaints being pursued, again the Complaints Service will frequently provide advice and assistance to the complainant to clarify the precise nature of the complaint. Consistent with the consumer protection objectives of the Lawyers and Conveyancers Act 2006 (the Act), and the requirement to ensure that complaints are managed in an expeditious manner, effort is made by the Complaints Service to ensure that complaints put before a Committee are clear, and relevant information to support the complaint is filed. Further, it is not uncommon for a Committee, when considering a complaint, to seek further information or clarification from a party if the Committee considers it necessary to do so.

[34] When a party elects to exercise their right to challenge a Committee's decision by way of review to the LCRO, it can reasonably be expected that the applicant's evidence has been put before the Committee, and that the focus of the review will be on the applicant identifying those areas where it considers that the Committee has erred. Any additional evidence that is filed on review, could be expected to focus on

providing support to the applicants' arguments in those areas where challenge is taken to the Committee's decision.

[35] A consequence of parties filing additional submissions is that the scope of the review can be considerably expanded, and the information filed becomes less relevant to the issues which fall for determination.

[36] This is not to suggest that Mr and Mrs BZ have embarked on a process of filing a raft of additional submissions, but rather to note that some of the submissions filed on review are of relevance to the dispute they were embroiled in with their neighbours and provide context to that dispute, but are only of peripheral assistance in determining the conduct issue before the LCRO.

[37] As noted, the document filed post hearing, which has relevance to the review, is Mr DV's correspondence of 15 March 2016. Mr DV records in that correspondence that he had advised the Court, prior to Mr FI forwarding correspondence to the real estate agent, that his clients were not pursuing the easement issues. Mr DV contends that Mr FI could not have made the assertions he did, with a bona fide belief that the assertions were correct.

[38] Mr DV's evidence could have been put before the LCRO at the time the review application was filed. His evidence, in as much as it is central to the complaint, should have been provided to the Standards Committee.

[39] Whilst I was reluctant to accept evidence that was provided post hearing, I determined to accept the evidence. The evidence does not raise new issues, and simply confirms what Mr and Mrs BZ had advised in their earlier submissions, that it was their lawyer's understanding that the Court had been advised that the proceedings in respect to the easement would be withdrawn.

[40] I did not require a response from Mr FI in respect to the further submissions filed.

[41] For completeness, I record that I was satisfied that the comprehensive information filed by Mr and Mrs BZ, together with the submissions advanced by them at hearing, provided a thorough account of the grounds on which they laid challenge to the Committee's decision.



## Analysis

[42] The complaint is narrowly focused on allegation that Mr FI was misleading and deceptive when he put the BZs' agent on notice that there were active proceedings before the Court, and various issues in dispute between the BZs and Mr FI's clients.

[43] Mr and Mrs BZ's dispute with Mr FI's clients had been traumatising for them. They considered that Mr FI's clients had bullied and intimidated them to the point where they had no option but to sell their home. They make accusation that their neighbours behaved throughout in an abjectly unethical fashion and, to a degree, they consider Mr FI to have been complicit in this behaviour.

[44] Mr BZ argues that Mr FI should not be able to shield himself from responsibility for his actions by couching his correspondence in the guise of his clients' instructions. It is suggested that Mr FI should have conveyed those instructions in terms which reflected his own views, rather than the views of his clients.

[45] With respect to Mr and Mrs BZ, that position presents a distorted view of Mr FI's obligations. It was Mr FI's role to represent his clients and to advance his clients' position in accordance with their instructions. It was not his role to intercede personally in the dispute, and to present his clients' position as reflective of his personal views. If he had done so, he would have significantly compromised his position.

[46] Response to complaint that Mr FI breached his professional obligations requires a correct understanding of Mr FI's role. His correspondence of 29 May 2013 makes it abundantly clear that the information conveyed in that correspondence reflected his clients' instructions.

[47] Mr and Mrs BZ endeavour to sheet home argument that Mr FI must be held responsible for a professional breach, on the strength of submission that Mr FI must have known that the information conveyed in his correspondence of 29 May 2013 was erroneous. Particular emphasis is placed on argument that Mr FI advised that there were proceedings before the Court to resolve a dispute over the easement. Mr and Mrs BZ submit the easement dispute had been resolved, and an agreement reached. They place reliance on Mr DV's statement produced after the hearing.

[48] I am being asked to determine what representations were made at a confidential settlement conference, in the absence of evidence to confirm what was said, other than the recollections of counsel. The Court minute, produced as part of the additional evidence supplied after the conclusion of the hearing, does not confirm that any proceedings before the Court had been withdrawn, rather that minute advises that proceedings, at the time the minute was drafted, had been adjourned. Whilst the minute records that the parties had reached a compromise, and details of agreements reached are recorded, it is clear from the Court minute that other issues remained outstanding, and that the injunction proceedings were adjourned, rather than dismissed. The Court minute of 4 December 2012, provides leave for either party to bring any issues relating to access or fencing back to the Court on 48 hours' notice. I do not conclude from that minute that it could be said with certainty that issues relating to the easement had been confirmed as resolved. If that was the case, the injunction proceedings could have been withdrawn.

[49] Mr and Mrs BZ contend that a final agreement had been reached, but can point to no specific evidence (for example, a memorandum or Judge's direction) which records any concluded settlement.

[50] It is customary for settlement conference proceedings to remain confidential to the parties. Whilst Mr and Mrs BZ had formed a view that a final settlement had been concluded, it could reasonably be expected that if an agreement had been reached on the significant and material issue which was before the Court, that agreement would have been recorded by counsel and confirmed by the Court.

[51] That being said, it is entirely possible that a degree of misunderstanding may have arisen as to the scope of a submission made at a settlement conference, but it is unreasonable to impute improper motive to Mr FI in reporting his clients' understanding of the position, simply on the basis of argument that Mr DV and his clients had a different view to that of Mr FI and his clients. Mr DV's correspondence of 15 March 2016, records that all the parties were present at the settlement conference at which he recalls advising the presiding Judge that the easement dispute was settled, but it was clearly not Mr FI's clients' understanding that a firm agreement had been reached.

[52] There were a number of applications before the Court. There was a degree of overlap in the applications. Mr DV acknowledges that the Harassment Act proceedings may have needed to continue if there were issues with interference with access. Those

arguments, if they arose, could presumably engage further examination as to the extent of the rights available under the easement. As the costs decision makes clear, whilst there had been a number of hearings and various undertakings provided in support of various agreements, no orders were made by the Court and no concluded resolution reached.

[53] On receipt of advice that his understanding as to the state of the proceedings was being challenged, Mr FI wrote to the Court registrar seeking advice as to whether the Court had received notice that the application in respect to the easement was not proceeding. In correspondence to Mr FI dated 24 June 2013, the Court advises Mr FI that there was no advice on the Court file to confirm that the “proceeding to extinguish a right of way easement is no longer proceeding”.<sup>3</sup>

[54] Mr and Mrs BZ were the plaintiffs in the proceedings. If it was their position following the settlement conference that they wished to withdraw their proceedings, their lawyer could have been instructed to file a notice of discontinuance with the Court. That was not done.

[55] Nor is it the case that settlement had been reached on other matters. When lodging their complaint with the Complaints Service, Mr and Mrs BZ noted that whilst they considered that their application to abandon the easement had been confirmed at the settlement conference,

... the balance of matters were referred to Judge Moran to see whether resolution could be reached. We thought that resolution had been reached but it transpires that is not the case.

[56] At hearing, Mr BZ advanced the view that it was the responsibility of the Court to advance the proceedings. He is mistaken in that view. As the plaintiffs, he and Mrs BZ had an obligation to advise the Court if they wished to discontinue the proceedings.

[57] Surprisingly, no steps were taken to discontinue the proceedings for a considerable time. On 19 January 2016, the District Court delivered a costs decision in respect to the various proceedings engaging Mr and Mrs BZ and Mr FI’s clients. Both parties were represented at the costs hearing. In that decision, the Judge noted that:<sup>4</sup>

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<sup>3</sup> Email LL to FI (24 June 2013).

<sup>4</sup> [Case name].

- A number of hearings had been adjourned for resolution by the parties, or for the conduct of settlement conferences.
- Various undertakings had been filed by both parties.
- Ultimately there was no concluded resolution.
- No orders had been made by the Court in the course of the proceedings.
- The plaintiffs had not sought leave to discontinue their proceedings, as required by the District Court Rules.

[58] Whilst Mr and Mrs BZ contend that agreement had been reached on the easement issue, neither the information Mr FI obtained from the Court, nor the subsequent costs decision issued by the Court, records that to be the case. That is not to dismiss Mr DV's submission that he had advised the Court of his clients' intention to proceed no further with the easement application, but rather to acknowledge, in the absence of any information which could clarify the matter with any degree of certainty, the possibility for genuine misunderstanding as to whether the easement proceedings remained on foot.

[59] Allegation that a lawyer has been deliberately complicit in misrepresenting the state of court proceedings, if established, could result in serious disciplinary consequences for the practitioner. Allegations of that degree of seriousness must be supported by more than conflicting opinion of counsel and their clients as to what had transpired at a confidential settlement conference. There is no evidence to support conclusion that Mr FI, in conveying his client's instructions, deliberately and intentionally set out to mislead the agent.

[60] Nor do I consider that any disciplinary issues would necessarily have arisen if conclusion had been reached that Mr FI had, in reporting his clients' instructions, relayed a position which was incorrect. An error made by a practitioner does not automatically attract a disciplinary response.

[61] If Mr and Mrs BZ's position was that challenges to the easement were not being pursued, and that there were no other issues in contest between the neighbours which could materially impact on any prospective purchaser, they simply had to advise

the agent accordingly, and they were invited to do so. Their agent would be able, and required, to place reliance on their instructions.

[62] Accusation is made that Mr FI was complicit in misleading the agent, but if any uncertainty arose as a consequence of Mr FI's representation that there were live proceedings before the Court, that could have been immediately rectified by Mr and Mrs BZ confirming their position with the Court in a formal manner.

[63] Mr FI did not respond to allegation that his clients had misrepresented the position by advancing with obdurate insistence argument that his clients' position was correct.

[64] In face of accusation that he was misrepresenting the BZs' position, Mr FI sought clarification from the Court as to whether there was any indication on the Court file that the proceedings to extinguish the easement were no longer proceeding and received confirmation that there was no advice on the Court file to record that being the case.

[65] The difference of opinion was traversed between Mr FI and the BZs' counsel, however, a difference of opinion between the respective solicitors seems to have advanced no further than each providing their view of what they considered to be accurate account. Mr FI advised the BZs' lawyer that he believed that his correspondence accurately reflected the situation. There is no evidence that this response was met with any attempts by the BZs to clarify their understanding of the position in respect to the Court proceedings. There is no indication that any information was sought from the Court to confirm the position that was said to have been advanced at the settlement conference.

[66] Nor was it the case that Mr FI adopted an intransigent position on receipt of the complaint. The Committee's decision records that Mr FI was prepared to meet with the BZs and their lawyer to consider the correspondence that had caused offence, with a view to discussing the basis upon which he asserted the contents of his letter to be correct.

[67] I see no basis to depart from the view arrived at by the Committee to take no further action on the complaint.

**Decision**

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

**DATED** this 5<sup>th</sup> day of April 2016

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**R Maidment**  
**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 BZ as the Applicants  
FI as the Respondent  
HJ as a related person as per section 213  
The Standards Committee  
The New Zealand Law Society  
Secretary for Justice