

CONCERNING

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

AND

CONCERNING

a requirement of the [City] Standards Committee of the New Zealand Law Society

BETWEEN

KL
Applicant

AND

[CITY] STANDARDS COMMITTEE
Respondent

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

DECISION

- [1] Mr KL has applied to withdraw his application for review of a Standards Committee's requirement that he produce his files for the Committee to inspect, pursuant to s 147(2) of the Lawyers and Conveyancers Act 2006 (the Act). Counsel for Mr Mr KL applied for costs against the Standards Committee on the basis that Mr KL had good grounds for bringing the review, and had incurred costs in so doing.
- [2] The application to withdraw is granted, and the application for costs is declined, for the reasons discussed below.

Withdrawal

- [3] No issues of public interest arise with respect to the review application. There is no other good reason to continue conduct of this review. Mr KL's application to withdraw his application for review is therefore granted, so the Committee's requirement is unaffected by this decision.

Costs

[4] The discretion to award costs is conferred by s 210 of the Act which 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.

[5] The LCRO Costs Orders Guidelines are also relevant to the consideration of costs orders. The Guidelines say that an applicant for review who is a lawyer, who is unsuccessful in his or her review application, could expect to contribute to the costs of the review. The levels of contribution are also included, with the rider that costs may be increased where a party has acted vexatiously, frivolously, or unreasonably in bringing, continuing, or defending the review, in which case that party may be exposed to an increased order for costs.

[6] In exercising the discretion over costs, I have considered:

- (a) Whether the New Zealand Law Society (NZLS) should be ordered to pay Mr KL's costs; and
- (b) Whether Mr KL should be ordered to pay costs to NZLS.

Costs Against NZLS

[7] Although Mr KL had not produced his files, the Committee continued its complaints process, with counsel for Mr KL advising this Office that Mr KL's application for review "would responsibly not be pursued".¹ In support of his costs application, counsel for Mr KL argued that the Committee's requirement had "been de facto quashed and as such the review... has become moot".²

[8] The Legal Complaints Review Officer (LCRO) considered an application for costs against the Standards Committee in *AP v Standards Committee* commenting:³

There is no restriction on that discretion, and costs awards may be made against, or in favour of, a lawyer vis a vis the New Zealand Law Society for payment in favour of the lawyer (or in this case of a conveyancer, or against the New Zealand Society of Conveyancers). 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.

and that the:⁴

...focus of review by this Office is on the decision itself, not the decision maker ... whose conduct in the exercise of regulatory functions cannot be the subject of a disciplinary finding by this Office.

¹ Email BC to LCRO (11 April 2014).

² Email BC to LCRO (7 July 2014).

³ *AP v Standards Committee*, LCRO 317/2012 at [5].

⁴ Above n 3 at [17].

- [9] The Standards Committee is a statutory committee established pursuant to s 126 of the Act. Although the Committee is not a court, similar principles apply to the consideration of costs because the Committee makes binding determinations under statutory authority. The Court of Appeal in *Coroners Court v Newton* considered an application for costs against a Coroner acting in statutory authority, and said:⁵

In this subject area it is important to keep first principle squarely in mind. Costs will only be awarded (even in judicial review proceedings) against judicial officers such as Justices or Coroners in the rarest of circumstances when such a judicial officer has done something which calls for strong disapproval. It is certainly not the practice to grant costs against Justices or a Coroner merely because that person has made a mistake in law. It must be shown that the judicial officer concerned has acted perversely, oppressively or in bad faith.

And that:⁶

...errors of law will not by themselves support an award for costs; errors of process will normally not support an award of costs; and judicial misconduct in the way the hearing is conducted will normally have to be of a particularly egregious kind for costs to be awarded. The question is not whether the applicant is in some sense “deserving” of costs – in a large sense, such a person often will be. The critical point is that the order for costs is an expression of disapproval of the conduct of the judicial officer in character. There must be a clear basis for such an order.

- [10] The Coroner’s case was progressed, without necessarily conceding, that even if the coroner’s errors were as the applicant contended, they fell far short of conduct which could have justified an award of costs. The Court considered that the *bona fides* of any such alleged error was relevant, and that what the Coroner had done was “at worst a pure mistake”, and “certainly not a flagrant instance justifying a costs award.”
- [11] Mr KL’s review application was brought on the basis that the Committee had erred in ordering him to produce his file for inspection such that the direction was unlawful. As the review application was withdrawn that question has not been determined. Counsel’s submission that “the direction has been de facto quashed” is therefore not correct.
- [12] There is no evidence of the Committee having conducted its business in bad faith, and no other reason that would support a costs order being made in favour of Mr KL.
- [13] Mr KL’s application for costs is therefore dismissed.

⁵ *Coroner’s Court v Newton* [2006] NZAR 312 at [44].

⁶ Above n 5 at [46].

Costs Against Mr KL

- [14] The exercise of discretion as to costs also calls for consideration of whether Mr KL should be ordered to pay costs to NZLS. The purpose of a costs award on review is to defray the costs of administering the complaints and disciplinary processes under the Act, which otherwise fall on all lawyers.
- [15] In an unpublished decision, LCRO 302/2013 costs were ordered against a lawyer who had applied for review of a procedural direction given by a Standards Committee, then applied to withdraw his application the day before the review hearing was scheduled to proceed.
- [16] In that case, although the review had not been completed, the application had been processed, scheduled and the LCRO had considered and analysed all of the information in detail in preparation for the hearing. Conduct of that review was therefore at an advanced stage, and it was appropriate for the practitioner to contribute to the costs of conducting the review.
- [17] That decision is distinguishable from the present situation because in this case Mr KL has applied to withdraw his review application at a much earlier stage. In this instance, although the Committee had confirmed its consent to a hearing on the papers,⁷ Mr KL had given no such indication before counsel advised that Mr KL may not wish to proceed with his review application.
- [18] Any applicant who considers their application is no longer necessary, or should no longer responsibly be pursued for whatever reason, should be encouraged to make that decision as early as possible. The risk that costs may be imposed on a late withdrawal is a clear incentive to applicants to consider the propriety of their review applications throughout the review process.
- [19] Given Mr KL's relatively early application for withdrawal, although the review application had been received and was being processed, the substance of the review application has not been considered.
- [20] In the circumstances no order for costs will be made against Mr KL.

Decision

- [21] Mr KL's application to withdraw his review application is granted.
- [22] No costs orders are made.

⁷ Letter Standards Committee to LCRO (20 March 2014).

DATED this 6th day of August 2014

Dorothy Thresher
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 KL as the Applicant
Mr BC as the representative for the Applicant
The City Standards Committee as Respondent
The New Zealand Law Society