

LCRO 268/2011
LCRO 269/2011
LCRO 105/2012

CONCERNING

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

AND

CONCERNING

a determination of the [North Island] Standards Committee

BETWEEN

MR VK (LCRO 269/2011
105/2012)

MR VI (268/2011)

Applicants

BETWEEN

MR AC

Respondent

DECISION

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

Introduction

[1] Mr VK lodged a complaint with the New Zealand Law Society Complaints Service on 14 September 2011 concerning the conduct of Mr AC. Mr AC and his partner, Mr AD, provided a response to those complaints by letter dated 19 September 2011. That letter was sent to Mr VK.

[2] On 26 September, Mr VK copied to the Complaints Service an email that he had sent to Mr VI, with which he had sent the response from Messrs AC and AD. He sent that letter to Mr VI as he considered that Mr VI and his wife should be given the opportunity to review the content of the letter.

[3] Mr VI then communicated directly with the Complaints Service by letter dated 2 October 2011, in which he commented on the response from Messrs AC and AD and requested the Complaints Service to treat his email as his own complaint against Mr AC. The Complaints Service then opened a new file for the complaint by Mr VI and sent Mr VI's email to Mr AC for response.

[4] The Complaints Service progressed the complaints from Mr VK and Mr VI together as they related to the same issues and both complaints were considered by the Standards Committee on 6 October 2011.

[5] Subsequently, Messrs AC and AD responded to Mr VI's complaint by letter dated 12 October.

[6] The Standards Committee issued its determination in respect of both complaints on 1 November 2011 and determined pursuant to s 138(1)(c) of the Lawyers and Conveyancers Act 2006 (the Act) to take no further action in respect of the complaints. Section 138(1)(c) of the Act provides that a Standards Committee may determine to take no further action in respect of a complaint if it determines that the complaint is frivolous, vexatious, or not made in good faith.

[7] Both Mr VK and Mr VI lodged applications for review of the Standards Committee's determination. Prior to completion of the reviews of that determination, the Standards Committee issued its determination¹ in respect of a further complaint lodged by Mr VK against Mr AC in which it again determined to take no further action in respect of Mr VK's complaints on the same grounds. Mr VK has applied for a review of that determination also.

[8] This review is therefore a review of both Standard Committee determinations.

[9] An applicant only review hearing took place in Hastings on 13 March 2013 attended in person by Mr VK, and by Mr VI by telephone. Mr AD also attended in person.

Background

[10] Mr AC acts for the [A School] Board (the Board).

[11] Mr VI's wife was a teacher at the school.

[12] Mr VK's son was a pupil at the school.

[13] Mrs VI became involved in a dispute with the Board and was ultimately dismissed. Mr AC provided advice to the Board in connection with this.

[14] Mr VK sought information from the Board concerning the issues relating to Mrs VI.

¹ Standards Committee Determination, 17 April 2012.

[15] The Chairman of the Board responded by advising that the issues relating to Mrs VI were contested and for that reason were *sub judice* and could not be discussed outside of the Board.

[16] Mr VK took issue with that response and was referred by the Chairman directly to Mr AC. Mr VK sent an email to Mr AC on 19 March 2010 in which he sought confirmation from Mr AC that the issues relating to Mrs VI were *sub judice*, and that the Board was unable to discuss the matter with him for this reason.

[17] He sent another email to Mr AC on 24 March, again requesting confirmation that the matter was *sub judice*.

[18] Mr AC responded on that date by advising that the person who was referred to as "TA" in Mr VK's emails had not been identified and that as a result Mr AC could not answer Mr VK's questions.

[19] Further correspondence passed between Mr VK and Mr AC, the common thread in such correspondence being Mr VK's request for confirmation that the matter was *sub judice*. Mr VK had a particular view of what that term meant and did not consider that Mr AC's advice to the Board was correct. As a result, he considered that the Board was using that incorrect advice as a means of not providing the information he sought.

[20] This resulted in Mr VK's first complaint to the Complaints Service, namely that "[Mr] AC has made a deliberate false statement...via [the Board], regarding *sub judice*."²

[21] Messrs AC and AD responded to that complaint by letter dated 19 September 2011 in which they provided some detail of the events involving Mrs VI and the Board, and also responded specifically to Mr VK's complaint.

[22] As noted in the introduction to this decision, that resulted in the complaint from Mr VI. I shall deal first with Mr VK's complaints.

Mr VK's first complaint

[23] There is little that can or needs to be said about Mr VK's first complaint. It was simply that Mr AC had made a deliberately false statement to Mr VK, via the Board, that matters relating to Mrs VI were *sub judice*.

² Email from Mr VK to NZLS, 14 September 2011.

[24] Mr AC acted for the Board. He provided advice to the Board. He had no duty to Mr VK. The Board was at liberty to accept Mr AC's advice, or not. The Board declined to provide the information that Mr VK sought on the basis of Mr AC's advice.

[25] It escapes me how Mr VK can allege that Mr AC's advice was 'deliberately false'. There is no evidence to support that, and no reason that he should do so. Nor has the Board, Mr AC's client, complained about the advice received. Mr VK's view is that the matter was not *sub judice* – that is his view, but it does not mean that Mr AC's advice was incorrect, and can not in any sense be described as "a deliberate false statement".

[26] The Standards Committee determined to take no further action in respect of this complaint on the basis that the complaint was frivolous and vexatious. That phrase has been examined in various cases relating to applications by the Attorney General pursuant to s 88B of the Judicature Act 1908 to have a person declared a vexatious litigant.

[27] In *Brogden v Attorney General* the Court stated:³

The requirement that the institution of proceedings be persistent does not depend simply on the number of proceedings instituted. Just as important is the character of the proceedings, whether they have a **reasonable basis** (emphasis added) and how they may have been conducted. Accordingly, although the number of proceedings instituted may be small, it may be sufficient if the proceedings constitute an attempt to re-litigate issues already determined, contain scandalous and **unjustifiable allegations** (emphasis added) and/or draw in as defendant's persons whose only involvement has been to act in a professional capacity in earlier litigation.

[28] For the present purposes, the reference to such proceedings having a reasonable basis is relevant to Mr VK's complaint. In addition, Mr VK's allegation that Mr AC's advice was 'deliberately false' is an unjustifiable allegation. Mr AC acted in a professional capacity for the Board. Mr VK has no reasonable basis on which to allege that Mr AC's advice was 'deliberately false' and in any event Mr AC's advice was to his client only. Mr VK's remedy lay in challenging the Board's response.

[29] In the circumstances, I have no hesitation in confirming the determination of the Standards Committee to take no further action in respect of this complaint.

³ *Brogden v Attorney General* [2001] NZAR 809 (CA) at [21].

Mr VK's second complaint

[30] Mr VK's second complaint is equally lacking in merit. He complained that Mr AC "consistently and repeatedly refused to respond to [his] request for a copy of his authority to act [for the Board]."⁴

[31] At the review hearing, it seemed that his complaint was that Mr AC had not responded to him at all, rather than that he had not provided his authority to act.

[32] Again I note that Mr AC did not act for Mr VK. Messrs AC and AD responded to Mr VK's complaint by correctly noting that Mr VK "has no entitlement to demand provision of such documentation, and Mr AC has no right to provide it except with his client's instructions".⁵

[33] I might add, that I do not consider that Mr AC had any obligation to seek his client's instructions as to whether he should provide the authority or not. That was a contractual document between Mr AC (and/or his firm) and the Board. Consequently, it was as much the right of Mr AC or his firm to decline to provide the authority as it was the Board's right.

[34] Mr AC had written to Mr VK and stated that he acted for the Board. If Mr VK chose to disbelieve that, then that was his prerogative, but Mr AC had no duty to Mr VK to provide authority. Mr AC could have replied directly and advised that he did not intend to provide the authority. Whether he did or did not was immaterial - he did not respond to that demand. He did however respond on behalf of the Board to the other issues Mr VK was raising.

[35] In the circumstances, it is correct to describe Mr VK's complaint as frivolous and vexatious and again, I have no difficulty in concurring with the determination of the Committee to take no further action.

Mr VI's review application

[36] Mr VI notes at paragraph 5 of his letter dated 25 November 2011 which accompanied his application for review, that the Committee made its decision prior to receipt of the letter dated 12 October 2011 from Messrs AC and AD in response to his complaints. There is little, however, in the response from them.

⁴ Letter from Mr VK to NZLS, 13 March 2012.

⁵ Letter from Messrs AD and AC to NZLS, 22 March 2011.

[37] In the review process, Mr VI has forwarded further material in support of complaints to other bodies, and sought to introduce new complaints. He also forwarded numerous questions which he wished to be directed to Mr AC for response.

[38] In the course of this review no new complaints can be addressed and this was made clear to Mr VI.

[39] Mr VI requested to be heard in support of his review application rather than the matter being dealt with on the papers.

[40] Despite a number of requests from this Office he declined to provide a succinct summary of his complaints to assist in identifying the precise nature of these. A hearing date was set for an applicant only hearing to be held in Hastings on 13 March 2013. Immediately prior to that date⁶ Mr VI requested the hearing to be adjourned and sought to introduce further material. Mr VI was again reminded that no new complaints would be considered in the review process and was requested to be prepared at the review hearing to provide the summary that had been sought on several occasions.

[41] Mr VI attended the review hearing by telephone.

The Standards Committee procedure

[42] Section 137(1) of the Lawyers and Conveyancers Act 2006 provides:

- (1) A Standards Committee on receiving a complaint: may -
 - a) inquire into the complaint; or
 - b) give a direction under section 143; or
 - c) decide, in accordance with section 138, to take no action on the complaint.

[43] At [2.7] of its determination, the Standards Committee noted that the complaints had been referred to it for a threshold decision pursuant to s 137 of the Act. The Committee reached its decision on the material before it and declined to take any further action on the grounds that the complaints were frivolous and vexatious, as provided for in s 138(1)(c) of the Act.

[44] The procedure followed by the Committee was therefore correct and even though the response from Mr AC and Mr AD arrived prior to the issue of the determination, that response was presumably not considered by the Committee. In

any event, the response was limited and provided little further relevance to the Committee in reaching its determination.

Mr VI's complaints

[45] Mr VI's complaints were contained in his letter of 2 October 2011, which was sent after Mr VK had forwarded to Mr VI the response from Messrs AC and AD to his [Mr VK's] complaint. Mr VI's letter however was largely a vehicle in which he raised a number of questions which he wanted Mr AC to answer which primarily related to the dispute between Mrs VI and the Board. Clearly these issues have limited, if any, relevance to a complaint about Mr AC under the Act.

[46] As noted, despite several requests from this Office, Mr VI did not provide a succinct summary of his complaints. I have therefore been obliged to attempt to distil these from his letter of 2 October 2011:

- a) Mr VI supported Mr VK's complaint that the Board had declined to respond to Mr VK's questions on the grounds that the issues surrounding Mrs VI were *sub judice* when they were not.
- b) Mr VI alleged that Mr AC had breached Rule 2.4 of the Conduct and Client Care Rules⁷ (assisting in a fraud or crime) after Mr AC had been made aware that statements by the Headmaster of the school to the Police were incorrect and had "knowingly allowed his client [the Board] to give false information to the Police".⁸
- c) He alleged that a conflict of interest arose when one of Mr AC's clients (the Board) provided, allegedly, incorrect information about the advice received by it to another of Mr AC's clients ([another school board]).
- d) Mr VI accused Mr AC of failing to act with "any degree of integrity, respect or courtesy."⁹ He cited as an example a statement by Mr AC in a letter dated 31 March 2010 to the New Zealand Teachers Council that "[i]n the opinion of the Board, there is ongoing communications with Mrs VI which may

⁶ Email from Mr VI, 13 March 2013.

⁷ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

⁸ Letter from Mr VI to NZLS, 2 October 2011 at 5.

⁹ As at n 6.

or may not have a bearing on her competency as a teacher.”¹⁰ Mr VI then says that Mr AC failed to provide evidence in support of this statement.

e) He alleged that Mr AC had failed to complete full discovery in correspondence with the New Zealand Teacher’s Council.

Sub Judice

[47] Mr VI made further submissions as to why he considered Mr AC’s advice to the Board (that the issue concerning Mrs VI was *sub judice*) was incorrect. I refer to my comments above in respect of Mr VK’s complaint in this regard and Mr VI’s comments do not alter those findings.

Rule 2.4 Conduct and Client Care Rules

[48] The basis on which Mr VI asserts that Mr AC “knowingly allowed” his client to give false information to the Police is that Mr VI says Mr AC did not take note of advice by Mr VI that the statements to the Police by the Headmaster were incorrect. In essence his position is that Mr AC should take as correct the statements made by him in preference to the statements made by his own client.

[49] Mr AC was not the arbiter of the truth of the information supplied - the complaints were made to the Police and it was the function of the Police to assess that information. The truth of the statements made by each party may have been considered by the Police to be immaterial but that is of limited relevance to this complaint.

[50] I have some doubt as to whether Rule 2.4 is applicable to these circumstances. No crime or fraud was involved. However, in an overall assessment of this issue, it involves a minor factual matter of limited relevance and in respect of which Mr AC is entitled to support his client. The complaint is trivial.

Conflict of interest

[51] As with all of Mr VI’s complaints, the basis of this complaint is imprecise. There is no conflict of interest in the sense referred to in the Conduct and Client Care Rules. The matter related to the two clients of Mr AC, and Mr VI was not either of the parties involved. It was for Mr AC to correct any misinformation supplied to his clients, if indeed the information was incorrect. There is nothing in the materials supplied by Mr VI that would support an allegation that Mr AC had a conflict of interest.

¹⁰ Letter from Mr AC to New Zealand Teachers Council, 31 March 2010 at [4].

Lack of integrity and courtesy

[52] In the letter dated 31 March 2010 supplied in support of this allegation by Mr VI, Mr AC stated that “[i]n the opinion of the Board”.¹¹ It was not his opinion. The Board did have concerns as to Mrs VI’s competency. For Mr AC to make such a statement cannot in any sense be regarded as lacking in integrity or courtesy.

Discovery

[53] Any issues of the correctness of discovery of documentation must be pursued before the relevant authority. The Complaints Service is not the appropriate body to rule on this matter.

Summary

[54] Overall, when looking at the totality of Mr VI’s complaints, I have no hesitation confirming the determination of the Standards Committee that they were frivolous and vexatious.

Bias

[55] Mr VI makes unfounded allegations as to the integrity of the Standards Committee. He asserts, without any evidence other than his own views, that the Committee took its lead from Mr AD. Mr AD was a member of the Standards Committee but recused himself from consideration of the complaints by Mr VK and Mr VI. Mr VI alleges that the Committee merely followed Mr AD’s submissions that no further action should be taken in respect of the complaints.

[56] In *Muir v Commissioner of Inland Revenue* Hammond J said:¹²

In our view, the correct enquiry is a two stage one. First, it is necessary to establish the actual circumstances which have a direct bearing on a suggestion that the Judge was or may be seen as biased. This factual enquiry should be rigorous, in the sense that complainants cannot lightly throw the “bias” ball in the air. The second enquiry is to then ask whether those circumstances as established might lead a fair minded lay observer to reasonably apprehend that the Judge might not bring an impartial mind to the resolution of the instant case. This standard emphasised to the challenged Judge that a belief in her own purity will not do; she must consider how others would view her conduct.

¹¹ As at n 8.

¹² *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 (CA) at [62].

[57] I consider that Mr VI has done nothing more than to “throw the bias ball in the air” and in the course of which he has made allegations as to the integrity of members of the Standards Committee. That is unacceptable. Two members of the Committee (one of whom was Mr AD) recognised a conflict of interest and recused themselves. The remaining members (which included a lay person) proceeded to consider the complaint. To suggest that the members of the Committee who remained did anything other than to consider the complaint objectively is preposterous and without foundation.

[58] I have considered all of the same material as was considered by the Committee and have come to the same view as the Committee, and in the circumstances Mr VI may care to consider making an apology to the Committee (the lawyer members of which are volunteers) for the unfounded allegations of bias made by him.

Decision

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

Comment

[59] Mr AC acted for the Board. He did not act for either Mr VI or Mr VK. He had limited fiduciary duties to them. The complaints against him by Mr VI and Mr VK have been correctly described by the Standards Committee as frivolous and vexatious and appear to be part of a campaign by the complainants against the Board in numerous fora.

[60] The complainants take issue with the actions of the Board. That has nothing to do with these complaints against Mr AC. His duty was to his client and it is to the Board to which he was accountable.

[61] Mr AC has been obliged to respond to these complaints to the Standards Committee and the review by this Office. Mr AD also appeared at the LCRO hearing. Unfortunately, this Office frequently receives review applications which have little merit. If Mr AC had sought costs against Mr VK and Mr VI on receipt of this review application I would have been minded to put them on notice that by pursuing the review they stood exposed to a costs Order, albeit that such Orders are not made lightly.

[62] In the present circumstances, it was not an option to award costs against Mr VK and / or Mr VI as they had not been put on notice that such a step was a possibility. However, s 210(1) of the Act provides that the Legal Complaints Review Officer may make such Orders as to costs as they think fit. Although it is noted in para [11] of the

Legal Complaints Review Officer Costs Orders Guidelines that the discretion to Order costs against a lay applicant will be used sparingly, that does not mean that it will not be used at all, and where a party has been given adequate notice of the possibility of an award against them being made where the review application is unmeritorious, then the Legal Complaints Review Officer will exercise his or her discretion to make such an award.

Dated this 13th day of May 2013

O W J 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:

Mr VK as the Applicant
MR VI as the Applicant
Mr AC as the Respondent
Mr AD as a related person or entity under s 213 of the Act
The [North Island] Standards Committee
The New Zealand Law Society