

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of the [City] Standards Committee [X]

**BETWEEN**

**VJ**

Applicant

**AND**

**JT**

Respondent

**DECISION**

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

**Introduction**

[1] Mr VJ has applied for a review of a decision to take no further action on his complaint against Ms JT, made by the [City] Standards Committee [X] on 5 November 2014.

**Complaint**

[2] Mr VJ applied to the Family Court for a variation to parenting orders in respect of his two children who were in their mother's care (the proceeding). Ms JT acted for the children's mother, Ms VJ. Mr VJ called his adult step-daughter BB as a witness in the proceeding. At the time, BB was employed as a Family Court deputy registrar.

[3] Mr VJ says that in the course of cross-examining BB, Ms JT questioned her on her role as a deputy registrar in the Family Court, and queried what access, if any, she had to Mr VJ's file and documents filed in the proceeding. Mr VJ objects to the line Ms JT took in cross-examination, saying there was no good cause for it, and it was a direct attack on BB's reputation, calling into question her integrity as an officer of the Court. Mr VJ says Ms JT made unnecessary allegations against BB, who was not involved in the proceeding, did not take reasonable steps to ensure the allegations she put were

accurate, and did not protect BB's privacy. Mr VJ says Ms JT's line of questioning was not relevant to any matter to be determined in the proceeding, lacked any reasonable foundation by reference to credible information in Ms JT's possession, and that her conduct breached rules 13.8, 13.8.2 and 13.10.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the rules).

[4] Mr VJ says the Judge stopped the line of cross-examination saying it was not "pertinent", that the registrar had taken steps to ensure BB had no access to the file, and was not involved in the proceeding. Mr VJ says Ms JT's questioning reduced BB to tears and was professionally inappropriate.

[5] Mr VJ laid a complaint to the New Zealand Law Society (NZLS).

### **Standards Committee Process**

[6] The Committee advised Ms JT it was enquiring into whether the conduct alleged against her in Mr VJ's complaint may have contravened rules 13.8, 13.8.2 and 13.10.2 which say:

13.8 A lawyer engaged in litigation must not attack a person's reputation without good cause in court or in documents filed in court proceedings.

...

13.8.2 Allegations should not be made against persons not involved in the proceeding unless they are necessary to the conduct of the litigation and reasonable steps are taken to ensure the accuracy of the allegations and, where appropriate, the protection of the privacy of those persons.

...

13.10.2 A lawyer cross-examining a witness must not put any proposition to a witness that is either not supported by reasonable instructions or that lacks foundation by reference to credible information in the lawyer's possession.

[7] In her reply Ms JT referred to the history of the proceeding, and the relevant Family Court hearing. She expressed the view that "how the parties and counsel conduct themselves during a session of the Court in front of a Judge is for that Judge to manage".

[8] Ms JT denies attacking BB's reputation, making allegations against her, and says the reasonable instructions and other information she had in her possession, including "Mr VJ's own writings", provided her with sufficient foundation for the line she took in cross examining BB. Ms JT referred to BB's evidence in chief, which she says painted Mr VJ in "glowing terms", explained that her questions were aimed at exploring how BB had come into possession of information she referred to in her evidence in chief, and the extent of BB's knowledge of matters involving Mr VJ.

[9] Ms JT said her line of cross-examination was to highlight inconsistencies between BB's evidence and that of Mr VJ. Her objective was to elicit from BB whether she considered Mr VJ to be a person of integrity or, as her client appears to have believed him to be, a "liar and a cheat". Ms JT says the Judge also questioned BB, and it was during that questioning that she became confused, said she was nervous and became tearful. Ms JT denies that she made any suggestion of impropriety by BB, but refers to a comment made by counsel for Mr VJ as a possible basis for Mr VJ's recollection that impropriety had been implied, though not by her.

[10] The Committee considered the documents including an excerpt of the transcript of cross-examination, before deciding that the "transcript failed to establish the allegations put forward by Mr VJ" in relation to alleged breaches of rules 13.8, 13.8.2 or 13.10.2.

[11] The complaint was determined on the basis that further action was not necessary or appropriate pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act).

[12] Mr VJ disagrees with the decision and has applied for a review.

### **Review Application**

[13] In his review application Mr VJ seeks rulings that by attacking BB's reputation Ms JT breached various professional standards.

### **Review Hearing**

[14] Mr VJ attended a review hearing in Auckland on 3 August 2015. Ms JT was not required to attend, and the hearing proceeded in her absence.

### **Role of LCRO on Review**

[15] The role of the Legal Complaints Review Officer (LCRO) on review is to reach her own view of the evidence before her. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting her own judgment for that of the Standards Committee, without good reason.<sup>1</sup>

### **Scope of Review**

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<sup>1</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [40]-[41].

[16] The LCRO has broad powers to conduct her own investigations, including the power to exercise for that purpose all the powers of a standards committee or an investigator, and seek and receive evidence. The statutory power of review is much broader than an appeal, and gives the LCRO discretion as to the approach to be taken on any particular review and the extent of the investigations necessary to conduct that review.

### **Review Issue**

[17] Mr VJ expressed concern that the Committee gave weight, or undue weight to the fact that he, and not BB, was the complainant. Although Ms JT mentioned that in her reply to his complaint, there is no evidence to support a finding that it affected the Committee's decision making. That concern will receive no further attention in the course of this review.

[18] Mr VJ also says that in the course of the complaints process, Ms JT breached s 11B of the Family Courts Act 1980, and on review he adds that she also breached s 204 of the Criminal Procedure Act 2011. Neither of those matters formed part of Mr VJ's original complaint, and both were the subject of a separate complaint which was addressed in a separate decision by the Committee,<sup>2</sup> and has been determined by this Office on review on the basis that Mr VJ has another alternate remedy available to him.<sup>3</sup>

[19] The Committee does not appear to have been aware the complaint was being addressed separately. Although the two decisions result in the same outcome and clearly arise from the same concerns, one of them is surplus. The Committee's decision on the complaint raised by Mr VJ about Ms JT's conduct in the course of the complaint process that is the subject of this review is therefore reversed on review pursuant to s 211(1)(a) of the Act.

[20] Mr VJ objects to the Committee's suggestion that it was not Ms JT's cross-examination that upset BB but the Judge's later questioning. Cross-examination is counsel's opportunity to test the evidence given by a witness for an opposing party. It can be disconcerting. BB's reaction to Ms JT's cross-examination, and any discussion Ms JT may have had with her afterwards, are diversions from the main issue on review, which is whether Ms JT's conduct in cross-examination warrants a disciplinary response. For the reasons discussed below, the answer is no, so that aspect of the decision is therefore confirmed pursuant to s 211(1)(a) of the Act.

### **Discussion**

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<sup>2</sup> Standards Committee decision (20 May 2015).

<sup>3</sup> LCRO 134/2015.

[21] Mr VJ is critical of Ms JT's cross-examination of BB, and the Committee's decision for a lack of objectivity. I have therefore considered a copy of the excerpt of the transcript that was approved for release to this Office by the Family Court.<sup>4</sup> I have also considered a publicly available copy of the Family Court judgment to which Mr VJ refers at paragraph [8] of the supporting reasons for his review application.<sup>5</sup>

[22] Mr VJ believes the Judge stopped Ms JT's cross-examination because it was irrelevant to a matter to be determined in the proceeding, and because the judge considered it inappropriate. He refers to what he describes as the:

... judge's growing irritation with Ms JT's line of questioning and records his sharp admonishment to her that he was "not going to permit" Ms JT to continue her questioning of the witness. The admonishment recorded is not one which indicates irrelevance was worrying the judge but how indeed Ms JT was conducting the whole cross-examination.

[23] Mr VJ also said at the review hearing that the Judge completely stopped Ms JT from cross-examining BB, and did not allow her to continue with a different line. His recollection is inconsistent with the transcript which indicates Ms JT's cross-examination continued along a different line after the Judge had ruled that she could not continue along the line she had been taking. The transcript generally tends to undermine Mr VJ's complaint.

[24] It has also been helpful to consider the Family Court judgment to which Mr VJ refers, which contains the following comment by the Judge:<sup>6</sup>

The hearing before me lasted eight days. I read boxes of written material. Careful, detailed cross-examination by four skilled counsel [one of whom was Ms JT] demonstrated consistent depth of preparation. The submissions were meaty and relevant.

[25] That passage is also inconsistent with Mr VJ's view of the Judge's reasons for stopping Ms JT's cross-examination, and indicates that the Judge was entirely satisfied with Ms JT's conduct in the proceeding. The judgment provides no support for the inference that Ms JT's cross-examination included an illegitimate attempt to impugn BB's reputation or make any allegation against her. The Court documents provide no support for Mr VJ's position.

[26] The judgment makes a number of references to Ms VJ's view of Mr VJ. The accuracy of her views is irrelevant to this review, but the Court's record of her views is relevant to ascertaining what Ms JT's instructions were. That in turn is relevant to this review, because Ms JT had an obligation to Ms VJ to adduce evidence that accorded

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<sup>4</sup> Minute of Fleming DCJ (25 August 2015).

<sup>5</sup> *GEH v AJH* [2013] NZFC 889.

<sup>6</sup> At [10].

with her instructions. Ms JT's explanation of the line she took in cross examining BB is consistent with the record of Ms VJ's views set out in the judgment.

[27] Ms JT describes the purpose of the cross-examination as a test of the validity of BB's view of Mr VJ. Her questions were clearly aimed at ascertaining the independence of BB's views, and the extent to which they may have been affected by input from Mr VJ. That is consistent with the general thrust of what can be seen of Ms VJ's case from the judgment.

[28] For completeness, I also note that the Family Court judgment describes the relationship between Ms and Mr VJ in some detail,<sup>7</sup> expresses views on Mr VJ's trustworthiness,<sup>8</sup> and comments on the medical evidence of his state of mind that was before the Family Court. While I have read the whole of that judgment, I have disregarded the views expressed by the Family Court, because this review relates to Ms JT's conduct, not to Mr VJ's history, his personal qualities or his state or mind.

[29] I have carefully analysed the Family Court judgment to ascertain whether it provides any support for Mr VJ's complaint about the manner in which Ms JT conducted herself in cross examining BB. It does not. On the contrary, it describes Ms JT as well prepared and careful in her cross-examination. The Family Court Judge was not obliged to say anything about counsels' conduct. I take from the fact that he did, that he had absolutely no qualms about the conduct of any of the counsel who appeared, including that of Ms JT. While they are not conclusive, I attribute significant weight to the Judge's comments.

[30] It is also necessary to consider what weight to attach to the comments made and conclusions drawn by the Standards Committee. Committees are constituted of lawyers from a range of backgrounds, and of lay members. Committees are so constituted to enable collective views to be formed based on a range of independent and objective perspectives, before decisions are made. Before making the decision under review, the Committee considered the transcript, along with all the other information available to it which included the Family Court decision.<sup>9</sup> Collectively, the Committee exercised its discretion in concluding that Ms JT's cross-examination did not fall below the relevant professional standards set out in the rules referred to by Mr VJ.

[31] Mr VJ's complaint was very specific about the rules he considered Ms JT had contravened. Having considered all of the material available on review, I have been unable to identify any other rules the Committee should have considered in the

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<sup>7</sup> At [35].

<sup>8</sup> At [72].

<sup>9</sup> At [31].

circumstances. Given the above, I attach considerable weight to the conclusions drawn by the Committee.

[32] It is also appropriate to repeat that a LCRO must proceed with caution before interfering with a Committee's exercise of its discretion and must have good reason to do so. The answer to whether Ms JT's conduct crossed the line lies in the transcript, her client's instructions, the documents she had available to her, and her explanation of the rationale for her line of enquiry.

[33] Nothing in those materials suggests Ms JT's conduct fell below appropriate professional standards. While I have good reason to believe that BB found the experience of being cross examined by Ms JT distinctly uncomfortable, that is irrelevant to whether Ms JT's conduct fell below proper standards. Mr VJ has added nothing in the course of this review that leads me to conclude that there is any reason to interfere with the Committee's decision. The decision is therefore confirmed on review.

### **Decision**

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

**DATED** this 2<sup>nd</sup> day of September 2015

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**D 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 VJ as the Applicant  
Ms JT as the Respondent  
[City] Standards Committee [X]  
The New Zealand Law Society