

CONCERNING

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

AND

CONCERNING

a determination of the Standards Committee of the New Zealand Law Society

BETWEEN

AM
Applicant

AND

SB
Respondent

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

DECISION

Introduction

[1] Mr AM has applied for a review of a decision by the Standards Committee dated 16 November 2012 in which the Committee decided to take no further action on his complaint against Ms SB pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act).

Background

[2] Ms SB filed a notice advising the Court that she was the solicitor acting for Mr TX on an application he had filed seeking to set aside a default judgment obtained against him by Mr AM. Ms SB was successful in having the default judgment set aside. The District Court Judge directed the claim be determined in the Disputes Tribunal.

[3] Mr TX acted for himself in the Tribunal, but was unsuccessful in defending Mr AM's claim against him, and did not make out his counter-claim. The Tribunal made orders requiring Mr TX to pay the amount Mr AM had claimed, plus interest.

[4] Ms SB then acted on Mr TX's appeal to the District Court from the Tribunal's decision. The appeal was unsuccessful, leaving the Tribunal's orders against Mr TX intact.

[5] Ms SB then sent a cheque to Mr AM for the amount of the Tribunal's orders, plus interest, drawn on what she describes as her practice account under the title "SB Barrister" (the cheque).

[6] When he received the cheque, Mr AM wrote to the New Zealand Law Society (NZLS) raising a number of concerns including that Ms SB appeared to be operating a trust account, although as a barrister the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the rules) prohibit her from doing so.

Complaint

[7] Mr AM's complaint outlined several aspects of Ms SB's conduct that were of concern to him. In summary, Mr AM says inconsistencies between the way in which Ms SB described her mode of practice as a solicitor, then as a barrister, gave rise to confusion and practical difficulties for him. He considers her conduct fell below appropriate professional standards, and that she has contravened a number of rules and regulations governing lawyers' conduct. He expressed the view that she lacked competence, made misrepresentations that adversely affected his interests and those of her client, is a danger to the community and her clients, and should be struck off.

Standards Committee Process

[8] The Committee forwarded Mr AM's complaint to Ms SB. In her reply, Ms SB says at all relevant times she held a practising certificate as a barrister and solicitor, and did not have a trust account. She also provided documents she had filed in Court in the course of acting for Mr TX showing her as solicitor on the record, and explained her involvement.

[9] With respect to the cheque, Ms SB says that she had acted for Mr TX on a pro bono basis, and chose to pay his debt herself. She says that the description of her as a barrister on the face of the cheque was an error by the bank, and it having been brought to her attention, she would promptly have that corrected.

[10] The Committee considered Mr AM's complaint lacked merit, and decided further action was unnecessary or inappropriate.

[11] Mr AM was dissatisfied with that outcome and applied for a review.

Review Application

[12] Mr AM objects to the Committee's decision on the basis that the Committee had not carried out what he considered to be a proper investigation, had not prosecuted Ms SB for what he described as "serious misconduct", and believes the Committee's attitude towards his complaint was malicious. He considers the Standards Committee was not even-handed in its dealings with him, when compared with how standards committees have dealt with conduct by other lawyers.

Role of LCRO on Review

[13] 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 judgement for that of the Standards Committee, without good reason.

Scope of Review

[14] 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 Hearing

[15] Mr AM attended a review hearing in [City]. Ms SB was not required to attend and the review hearing was conducted in her absence.

Review Issues

[16] Although Mr AM's complaint traversed a number of issues, many of those are not issues that are regulated under the Act. His concern that NZLS and the Standards Committee have not dealt even-handedly with him are addressed by this review, which, despite Mr AM's reservations, has been conducted independently on the basis of all of the information that is available on review.

[17] The approach taken on review has been to focus on identifying whether any professional standards issues emerge from the materials available on review, and consider whether any disciplinary consequences should result.

[18] The key issue on review is whether the lack of clarity around Ms SB's status as a barrister, solicitor or both is a matter that should be of concern in a professional disciplinary context. For the reasons discussed below, the answer to that question is no. Consequently no further action is necessary or appropriate on review.

Discussion

Barrister and Solicitor

[19] Ms SB says at the relevant time she was in practice as a barrister and solicitor, but that she did not operate a trust account. Her name appeared on her cheque as "Barrister", and on the court record as Mr TX's "solicitor". The letter she sent to the Court advising that she was acting for Mr TX in the appeal was under her letterhead in which she describes herself as a "Barrister and Solicitor".

[20] While clarity would have been assisted by her cheque describing her as a barrister and solicitor, that failure is not significant enough to warrant any kind of disciplinary sanction.

[21] There is also nothing objectionable about her describing herself as Mr TX's solicitor on documents filed in court without reference to her status as a barrister. It is generally the solicitor's job to file documents in court where separate counsel is instructed.¹ In this case the documents filed in Court record that Ms SB was acting as solicitor and counsel in the proceeding; she was shown in the memorandum on the front page as "solicitor" but has signed later on the document as "counsel". There is nothing objectionable in her having done so in circumstances where she held a practising certificate as a barrister and solicitor. It is not necessary to consider those matters further.

The cheque

[22] The cheque has caused Mr AM some consternation. He rightly says that barristers sole are prohibited from holding a trust account.² I would add that solicitors in practice on their own account are not under any professional obligation to hold a trust account, although a great many of them do. The practice of NZLS is to require any solicitor in practice without a trust account to certify that the practice has not done any of the things specified in s 112(2), which includes holding money in trust for another

¹ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 14.13.

² Rule 14.2(e).

person,³ and having a trust account.⁴ The declaration acts as an exemption from the audit requirements associated with trust accounts that otherwise arise under s 112(1).

[23] In the course of this review NZLS produced a copy of the exemption signed by Ms SB covering the relevant period. In that document Ms SB confirms she was not intending to hold money in trust, and did not hold money in trust, at the relevant time. It is not necessary in the circumstances of this review to enquire beyond that, although it remains open to NZLS to audit Ms SB's practice if it has any residual concerns.

Indemnity

[24] The risk Ms SB took by choosing to pay Mr TX's debt is that by effectively assuming his debt, she appears to have an interest beyond the purely professional in his litigation. Beyond "pro bono", there is no evidence of what the arrangements were between Ms SB and her client. The overall outcome is an apparent cost to Ms SB, in exchange for her professional growth, and a net benefit to Mr TX.

[25] There is no evidence of Mr TX having expressed concern over anything Ms SB has done for him. There is no evidence of him expressing any doubts about her conduct, and perhaps understandably, he has not objected to her having paid his debt. He is entitled to confidentiality in his dealings with his lawyer, and those cannot properly be enquired into in the course of this review based on a complaint laid by Mr AM, who is essentially a third party to whom Ms SB owes only very limited professional duties, none of which are the subject of his complaint. There are no other grounds on which to pursue any such enquiry in the course of this review.

Summary

[26] The key question on review is whether there is good reason to interfere with the Committee's decision to take no further action on Mr AM's complaint. Having considered all of the information on review, including Mr AM's submissions at the review hearing, and the exemption signed by Ms SB, further enquiry is unnecessary and inappropriate. The further information obtained on review reinforces the Committee's decision that further action on Mr AM's complaint was not necessary or appropriate. As mentioned above, if NZLS has concerns about any of the financial aspects of Ms SB's practice, it remains open to it to enquire. In the circumstances, the Committee's decision is confirmed.

³ Lawyers and Conveyancers Act 2006 s 112(2)(b)(i).

⁴ Section 112(2)(b)(iii).

Recusal application – Breach of Natural Justice - Fairness

[27] The present matter was one of three review hearings set down for 6 July 2015 involving Mr AM. Mr AM objected to me conducting a review of any matter involving him on the basis of fairness. Mr AM alleges bias because while I was in practice in [City]:

- (a) in court proceedings to which he was a party, I acted as counsel for an opposing party;
- (b) was the subject of adverse media comment in relation to matters involving Mr AM; and
- (c) was involved in Law Society matters.

[28] The type of unfairness Mr AM implies relates to:⁵

A predisposition to decide a cause or an issue in a certain way which does not leave one's mind properly open to persuasion. It results in an inability to exercise one's functions impartially in a particular case. The predisposition may stem from ... personal relationship, ideology and inclination ...

[29] In *Denbighshire v Galashiels*,⁶ noting that an LCRO is not a judge, the LCRO considered and applied the test for apparent bias set out by the Supreme Court in *Saxmere v Wool Board Disestablishment Company Limited*.⁷

...if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.... that principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal...be independent and impartial. Unless the judicial system is seen as independent and impartial the public will not have confidence in it and the judiciary who serve in it.

[30] The Supreme Court said that two steps are required:⁸

- (a) First, the identification of what it is said might lead a judge to decide a case other than on its legal and factual merits; and
- (b) Secondly, there must be “an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits”.

[31] The Court listed a range of qualities to be attributed to the “fair-minded lay observer” including intelligence, objectivity, and a balance between undue sensitivity,

⁵ GDA Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, LexisNexis, Wellington, 2014) at 521-522.

⁶ *Denbighshire v Galashiels* LCRO 218/2009 at [25]-[49].

⁷ *Saxmere v Wool Board Disestablishment Company Limited* [2009] NZSC 72, [2010] 1 NZLR 35 at [3].

⁸ At [4].

suspicion and complacency about what may influence the judge's decision. The person is presumed to be reasonably informed about the workings of the judicial system, the nature of the issues in the case and about the facts pertaining to the situation which is said to give rise to an appearance or apprehension of bias. The minimum knowledge assumed includes a basic understanding of the professional capacity in which lawyers act for their clients, and that accepting a brief to act for clients in a particular case does not mean the lawyer becomes part of or identified with the client.⁹

[32] Bearing those comments in mind, I deal with each of Mr AM's objections in turn. Mr AM's objections conflate the role of lawyer instructed by clients with the client itself, and are not a proper basis for an allegation of bias. There is no relevant link between any Law Society matter in which I have been involved and Mr AM. In particular, I did not sit on the Standards Committee that dealt with the complaint that is the subject of this review application.

[33] There has been no predetermination in respect of this review, and I do not recuse myself on that basis.

[34] I note the reference in *Denbighshire* to "what personal relationships with litigants would be a proper basis for recusal", with reference to the decision in *Locabail (UK) Limited v Bayfield Properties Limited*, where it was said:¹⁰

... a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case ...

[35] I am acquainted with Mr AM only through having been instructed as counsel in matters in which he has been involved as a party, and through his applications to this Office on review. I have no animosity towards him, and no personal acquaintance with him.

[36] I also note, adopting the LCRO's approach in *Denbighshire*, that I must be very cautious of allowing Mr AM by his own behaviour to manufacture circumstances which would found a successful application for bias and enable him to engineer which judicial officer hears his application. In particular I do not consider the focus should be on the allegations that Mr AM has made against me. If that were the focus any litigant could manufacture an effective recusal application by making unfounded allegations or bringing review applications whether or not they have merit. The fact that Mr AM may strongly and honestly believe I am biased is not a relevant consideration. The test for

⁹ At [5]-[7].

¹⁰ *Locabail (UK) Limited v Bayfield Properties Limited* [2000] QB 451 (CA) at 480.

bias is an objective one to be applied by the tribunal before which any issue of bias actual or perceived, is to be determined.

[37] The focus of the enquiry must be on what relationships I have, or conduct I can be shown to have engaged in which demonstrates that a fair-minded lay observer might reasonably apprehend that I might not bring an impartial mind to the matter. Mere allegations are not enough.

[38] I have no relationships which are relevant to this matter. My previous practice as a lawyer does not amount to bias or show bias. The key question is “whether a reasonable observer might think that in light of the behaviour and allegations of Mr AM I might be biased against him”. I also “take account of the fact that I must not be unduly timid”, and that “there is an inherent reluctance on the part of any decision maker to make a finding that he or she is (even only apparently) biased”. I have also taken into account that it is necessary to “ensure that any decision of this office is sufficiently robust to be accepted by the parties and therefore give finality to the matter”.¹¹

[39] Taking those matters into account, I consider that a reasonable and informed lay onlooker would consider that I am able to impartially consider Mr AM’s application for review. Accordingly I have considered and decided it.

Decision

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

DATED this 28th day of July 2015

D Thresher
Legal Complaints Review Officer

¹¹ Above n 6, at [49].

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr AM as the Applicant
Ms SB as the Respondent
Standards Committee
New Zealand Law Society
Secretary for Justice