

LCRO 321/2013

CONCERNING

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

AND

CONCERNING

a determination of [Area] Standards Committee [X]

BETWEEN

AA

Applicant

AND

GQ

Respondent

DECISION

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

Introduction

[1] Mr AA has applied for a review of the determination by [Area] Standards Committee [X] to take no further action in respect of his complaints about Mr GQ.

Background

[2] Mr GQ defended Mr AA in the District Court against criminal charges. Mr AA was convicted and sentenced to a period of imprisonment. Mr AA appealed.

[3] After the Standards Committee issued its determination the appeal was heard. Panckhurst J dismissed the appeal against conviction but reduced the period of imprisonment. Mr AA represented himself on appeal.

Mr AA's complaints

[4] The Standards Committee summarised Mr AA's complaints¹ as being that "Mr GQ did not run the defence of his case in accordance with [Mr AA's] instructions".²

[5] Mr AA's complaints included:

- (a) Mr GQ had not provided him with an audible version or a transcript of a 111 call made to the police by his nephew.³
- (b) Mr GQ failed to provide Mr AA with a copy of a witness statement by Ms HH.⁴
- (c) Mr GQ failed to obtain details of violent conduct on previous occasions by FF.
- (d) Mr GQ failed to obtain meteorological evidence that there was no moon on the night the assaults took place.⁵

[6] Mr AA asserted that Mr GQ had breached his fiduciary duties to him.

[7] In his response to the complaint, Mr GQ advised that Mr AA had instructed him to plead self defence to the charges. In the District Court, Judge Farish preferred the evidence of FF and HH to that of Mr AA and his brother (GG) with whom Mr AA had been jointly charged.

[8] Mr AA held the view that Mr GQ's representation of him amounted to misconduct and he should be struck off the roll of barristers and solicitors. In his complaint, Mr AA also sought that "Mr [GQ] be removed from public office pursuant to proceedings under the Judicature Amendment Act 1972 and rule 627 of the High Court Rules".

¹ It is not easy to discern Mr AA's complaints. In the complaint form, Mr AA alleges breach of trust but particular issues need to be gleaned from copies of letters from Mr AA to the Ministry of Justice Legal Aid office.

² Standards Committee determination (20 September 2013) at [9].

³ Mr AA was accused and convicted of assaulting his nephew FF.

⁴ Ms HH was FF's partner.

⁵ The relevance of this is that Ms HH had said she could see the events occurring because of the moonlight.

The Standards Committee determination

[9] The Standards Committee identified the issue to be addressed as follows: “whether or not Mr GQ carried out Mr AA’s instructions with respect to the criminal prosecution that Mr AA faced”.⁶

[10] In examining the issue the Committee noted:

- (a) Mr GQ argued self-defence for Mr AA but it was rejected by the Judge.
- (b) Mr GQ kept Mr AA fully informed as to matters in respect of sentencing and any possible appeal and those were clearly communicated to Mr AA following the hearing.⁷
- (c) There is nothing in Mr AA’s complaint that has any bearing on how Mr GQ ran the defence of the case. It was Mr AA’s decision to run a defence of self-defence, which proved unsuccessful.⁸

[11] The Committee determined to take no further action in respect of Mr AA’s complaints.

The application for review

[12] Mr AA’s application for review contains mixed allegations of failures by Mr GQ, and disputed facts. He says Mr GQ did not include with the disclosure documents details of a 111 call made by FF to the police, Ms HH’s witness statement, or the Family Violence Report Supplementary Sheet (POL1312). Mr AA asserts these documents would disprove findings of fact made by Judge Farish. Mr AA says he was unable to challenge evidence presented to the Court because he had not been provided with these documents. He asserts Mr GQ was incompetent.

Review

[13] This review has been progressed by Mr Vaughan, a delegate duly appointed by the Legal Complaints Review Officer (LCRO) pursuant to clause 6 of schedule 3 of the Lawyers and Conveyancers Act 2006 (the Act). The LCRO has delegated to Mr Vaughan all of the LCRO’s functions and powers under the Act. He has also

⁶ Above n 2, at [12].

⁷ At [15].

⁸ At [16].

delegated Mr Vaughan to report to me and the final determination of this review as set out in this decision is made following a full consideration of all matters by me.

[14] During the course of investigating this review, Mr Vaughan issued a minute on 2 May 2017 in which Mr AA was advised of the limitations of the review process and the likely outcome of the review. A copy of that minute is attached to this decision.

[15] Mr AA advised he wanted the review to continue and he required a hearing.

[16] An applicant-only hearing was scheduled to be heard by telephone. Mr AA objected and demanded a hearing in person.

[17] Section 206(5) of the Act provides that the LCRO may “regulate his or her procedure in such manner as he or she thinks fit” and, relying on that authority, Mr AA was advised the hearing would take place by telephone. Arrangements were made for Mr AA to have access to a land line at the Disputes Tribunal in Christchurch for this purpose.

[18] In the days prior to the hearing Mr AA made requests for this Office to obtain transcripts of the High Court proceedings for him. The judgments of Panckhurst J are all that is required for the purposes of this review and the general principle followed by this Office is that no new evidence would be accepted on review. This Office does not follow directions from applicants and Mr Vaughan determined that the transcripts requested by Mr AA had no relevance to the review.

[19] Mr AA requested adjournments of the hearing to enable him to obtain copies of the transcripts himself but these requests were declined and the hearing proceeded by telephone on 19 June 2017.

[20] Mr AA made the following comments during the course of the hearing:⁹

- (a) Mr GQ had not provided him with an audible copy or a hard copy of the 111 call.
- (b) Panckhurst J referred to the 111 call as the “best evidence”.
- (c) Mr GQ had a duty of care to “get it right”.

⁹ These are not intended to be an exhaustive record of all of Mr AA’s submissions but are intended to provide an indication of the nature of the matters raised on review.

- (d) Mr GQ only provided Mr AA with Ms HH's witness statement as they were on the way to Court leaving insufficient time for him to analyse the evidence.
- (e) Judge Farish made an incorrect finding of fact as to the positioning of Mr AA's brother in relation to the caravan that was damaged in the melee. Photographs showed differently.
- (f) Mr AA requested Mr GQ to obtain meteorological evidence that there was no moon on the night the events took place and Mr GQ had not done that.

[21] Overall Mr AA asserts that Mr GQ had breached his duties to Mr AA. He says these failings constituted misconduct and Mr GQ should be struck off.

[22] Mr AA does not agree with the Court's findings of fact and the consequent outcome and he remains convinced that Judge Farish's judgment is wrong. He maintains that, as a result, he was wrongly convicted and imprisoned.

[23] Mr AA exercised his right of appeal. His subsequent application for leave to appeal the High Court judgment was declined.

[24] Mr AA has been advised on many occasions that this Office does not have jurisdiction to interfere with findings and decisions of the Courts. This decision will not consider any of the matters raised on review by Mr AA which challenge the findings and decisions of the Courts. The only issue which is properly the subject of consideration on review is whether or not Mr GQ has met the standards required by the Act and the Conduct and Client Care Rules.¹⁰

[25] In general terms, the standard required of a lawyer is that set by s 12(a) of the Act, namely, a standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

[26] It must be noted here, that a breach of s 12(a) results in a finding of unsatisfactory conduct, not misconduct as sought by Mr AA. A finding of misconduct may only be made by the Lawyers and Conveyancers Disciplinary Tribunal (the Tribunal) and a lawyer may be struck from the Roll of Barristers and Solicitors only following a finding of misconduct by the Tribunal.

¹⁰ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[27] Before embarking on an assessment of Mr GQ'S competence, it is relevant to note various comments that have been made about the standard that can be expected of a lawyer conducting court proceedings:

- (a) We wish to make it clear that it is not this Tribunal's role to closely analyse and second guess every move of counsel during each piece of litigation. We consider our role is to take an overview and to look at patterns of behaviour.¹¹
- (b) Lawyers are often faced with finely balanced problems. Diametrically opposite views may and not infrequently are taken by barristers and indeed by judges, each of whom has exercised reasonable, and sometimes far more than reasonable, care and competence. The fact that one of them turns out to be wrong certainly does not mean that he has been negligent.¹²

Negligence and unsatisfactory conduct are not necessarily synonymous but this observation by the Court is relevant to the standard that is expected of a lawyer in litigation.

- (c) What a reasonably competent practitioner would do will of course change with circumstances. As with any professional service which requires the exercise of considerable discretion under demanding circumstances, all that is required is that the barrister act with the degree of care that a practitioner with a reasonable degree of skill and knowledge would take in the same circumstances. Accordingly, for example, the law will be less forgiving of a barrister's error in drafting pleadings than in examining a witness. By way of further example, given the pressures of cross-examination, only a significant error will be inexcusable as falling short of what might be expected from a reasonable practitioner exercising proper care, skill, and knowledge. It is on this basis that the Canadian Courts have found that a mere error of judgment is rarely a breach of duty of care.¹³

[28] Mr GQ advises he defended the charges on the grounds of self-defence as instructed by Mr AA but this failed because the judge formed an adverse view of Mr AA's credibility as a witness.

[29] Mr AA places considerable weight on the fact he was not able to hear or see a transcript of the 111 call. He goes so far as to say that if Mr GQ had provided him with this he would not have been convicted and imprisoned.¹⁴ In the same letter he says (in words to that effect) that the 111 call made by FF was made when FF was obviously intoxicated.

¹¹ *Auckland Standards Committee 3 v Castles* NZLCDT 53 at [177].

¹² *Saif Ali v Sydney Mitchell & Co (a firm)* [1980] AC 198, 231.

¹³ Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington).

¹⁴ Letter AA to Lawyers Complaints Service (19 July 2013).

[30] I infer from this that Mr AA considers that this somehow would disprove the evidence against him. It would seem however that the “best evidence” provided by the 111 call was the sound of what was occurring at the scene and both Judge Farish and Justice Panckhurst were able to draw their own conclusions from the evidence provided.

[31] Mr GQ explained the reason for the late disclosure of Ms HH’s witness statement. He advises he received the statement approximately one week prior to the trial. In his view the statement did nothing more than corroborate the evidence of FF and raised no new matters. Mr GQ acknowledged an oversight in not providing Ms HH’s statement to Mr AA until the day of the trial.¹⁵

[32] Mr GQ says that the meteorological evidence about the moon was a “side issue” as the evidence before the Court was that there were other light sources to enable Ms HH to see what was occurring.

[33] Mr GQ formed his own view of the relevance of the evidence and it is not for this Office to second guess him. The oversight in not providing Ms HH’s witness statement to Mr AA until the day of the trial is not sufficient to support a finding of unsatisfactory conduct.

[34] The final observation to be made about Mr AA’s complaints about Mr GQ’s competence is to note the comment made by Panckhurst J in the High Court:¹⁶

In essence, [Mr AA’s] complaint was his case should have been conducted differently by then counsel in the District Court and that as a result, he had not had a fair trial.

These aspects have only emerged belatedly and none of the requirements for challenging counsel’s competence had been met. I am in no position to entertain these arguments.

[35] His Honour was in the best position to observe or comment on counsel’s competence and he has made a point of commenting positively. That should be, and for the purposes of this review is, the end of the matter. It is neither necessary nor appropriate to take any further action on Mr AA’s complaints.

¹⁵ Letter GQ to Lawyers Complaints Service (23 May 2013).

¹⁶ AA & GG v YY [20XX] NZHC XXXX at [39]–[40].

Decision

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

DATED this 27TH day of June 2017

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 AA as the Applicant
Mr GQ as the Respondent
[City] Standards Committee [X]
New Zealand Law Society
Secretary for Justice