

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of Canterbury Westland Standards Committee

**BETWEEN**

**Mr VP**  
Applicant

**AND**

**CANTERBURY WESTLAND  
STANDARDS COMMITTEE**  
Respondent

**DECISION**

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

**Introduction**

[1] In its determination dated 6 November 2012 the Standards Committee determined pursuant to s 152(2)(a) of the Lawyers and Conveyancers Act 2006 to lay two charges of misconduct against Mr VP, together with an alternative charge of unsatisfactory conduct.

[2] Mr VP has applied for a review of that determination, but limited in the ways as discussed in this decision.

**Background**

[3] The full background facts leading to the commencement of an own motion inquiry into Mr VP's conduct, is comprehensively set out in the Standards Committee determination and I will therefore only include in this decision background material which is necessary for this review.

[4] Mr VP was first appointed to act for Ms AK as a Youth Advocate on 19 April 2008. At that time Ms AK was aged 17.

[5] Mr VP acted further for Ms AK in April 2009 when he was assigned to appear for her in relation to a minor drug related charge. He continued to act for Ms AK on a number of criminal offences between that date and November 2009.

[6] The next contact Mr VP had with Ms AK was in June 2010 when she instructed him in relation to drink/driving charges she was facing in the [name] Court. Mr VP arranged for the charges to be transferred to the [North Island name] Court. She was sentenced at the end of July 2010.

[7] On 8 August 2010 Ms AK was arrested by the [North Island name] Police. On 9 August the Police rang and advised Mr VP that Ms AK was in custody.

[8] Further charges were laid against Ms AK, and on 12 August Mr VP arranged for a member of his firm to appear for her on the first appearance. As a result of an altercation in Court Mr VP subsequently withdrew as counsel and arranged for the Legal Aid assignment to be transferred to another lawyer who continued to act for Ms AK from that point on.

### **The own motion investigation**

[9] In late October 2011 the President of the [name] branch of the New Zealand Law Society received a telephone call from the Police Area Commander for the [name] region to inform him of allegations that Mr VP had a sexual relationship with, and had fathered a child with, a young person to whom he had previously be assigned as a Youth Advocate and for whom he had acted under a Legal Aid assignment. That person was Ms AK.

[10] The President contacted Mr VP and it was arranged that Mr VP would provide a written statement concerning the issues raised.

[11] Having considered this response along with the material available, the Committee determined to conduct an own motion inquiry. As part of that inquiry the Committee appointed Mr XY as an investigator to interview various persons and to provide a report to the Committee.

[12] Following completion of this report the Standards Committee considered all of the material before it and issued its determination.

### **The Standards Committee determination**

[13] The determination of the Standards Committee is comprehensive. At the heart of

the Committee's deliberations were the provisions of Rule 5.7 of the Conduct and Client Care Rules:<sup>1</sup>

A lawyer must not enter into an intimate personal relationship with a client where to do so would or could be inconsistent with the trust and confidence reposed by the client.

[14] Rule 5.7.1 does not apply as Mr VP has not acted for Ms AK in any domestic relations matter.

[15] The Committee posed the following questions:<sup>2</sup>

- A. When did the intimate personal relationship commence?
- B. Whether at the commencement of, or at any time during the course of, the intimate personal relationship was Ms [AK] a client, or did she become a client, of Mr VP and/or his firm...?
- C. What is the meaning of 'client' under Conduct Rule 5.7? Does the term encapsulate former and prospective clients? Is a person who commonly retains the lawyer or the firm, but has no current files or operative instructions at the relevant point of time, a 'client'?
- D. If Ms [AK] was in fact a client at time the personal intimate relationship formed, or during the relationship she became a client, what does that say about the conduct of Mr VP having regard to:
  - Conduct Rule 5.7 and 5.7.1; and
  - His professional obligations under the Lawyers and Conveyancers Act 2006 and otherwise; and
  - His fiduciary duties and duties of care owed to his client.
- E. What are the implications of Mr VP's initial denials of any intimate relationship with Ms [AK] in his statements dated 31 October 2011 and 7 December 2010, the latter specifically addressed to the Standards Committee?<sup>3</sup>
- F. Subject to the findings in relation to the preceding issues, does Mr VP's conduct constitute misconduct under s 7, or unsatisfactory conduct under s 12 of the Lawyers and Conveyancers Act 2006? If either is established, what determination should the Committee make under s 152(2) of the Act?

[16] In respect of each of these it determined as follows.

#### **A. When did the relationship commence?**

<sup>1</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

<sup>2</sup> Canterbury Westland Standards Committee 3 determination, 6 November 2012 at [14].

<sup>3</sup> In his letter to the President of the Waikato Branch dated 31 October 2011 and his response to the Complaints Service dated 7 December 2011, Mr VP denied any relationship with Ms AK.

[17] The Committee made no definitive finding as to when the relationship commenced. It noted that it had not seen or questioned the witnesses. It also noted that “[t]here is clearly a lot of additional information not before the Committee.”<sup>4</sup> It concluded that “the identified date of 22 June 2010 presents as the most likely commencement date.”<sup>5</sup>

[18] Mr VP has admitted that an intimate personal relationship between him and Ms AK commenced in mid November 2010.

### **B. Was Ms AK a client of Mr VP?**

[19] On this issue the Committee observed that “[o]n the basis that a relationship formed prior to Ms [AK] contacting Mr VP on 22 June 2010, or a short time after that contact was made, it follows that Ms [AK] was a client of Mr VP and his firm during their intimate relationship.”<sup>6</sup> The Committee then considered what the position would be if the relationship did not form until mid November 2010 as admitted by Mr VP. That led the Committee to a consideration of the definition of the word ‘client’ in Rule 5.7.

### **C. What is the meaning of ‘client’ in Rule 5.7?**

[20] The Standards Committee noted that the word ‘client’ is not defined in the Lawyers and Conveyancers Act 2006 or the Conduct and Client Care Rules (the Rules). The Committee then turned to the definition of the term in the Shorter Oxford English Dictionary and after some debate it concluded that “reading Rule 5.7 purposively, the word ‘client’ should be construed to include both former and prospective clients.”<sup>7</sup>

[21] The Committee made further comments, some of which I have recorded here as I consider that they are important to the overall determination of the Standards Committee. It is however necessary to read the totality of the comments to ensure a full understanding of the Committee’s position:<sup>8</sup>

40. ...The starting point must be that it is at least undesirable for lawyers to engage in intimate relationships with any clients. That is particularly so where a person’s vulnerabilities through their personality, their circumstances, or their economic, psychological or drug/alcohol dependencies, heightens the risk of emotional involvement with the lawyer...

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<sup>4</sup> Above n 2 at [30].

<sup>5</sup> Above n 2 at [31].

<sup>6</sup> Above n 2 at [32].

<sup>7</sup> Above n 2 at [40].

<sup>8</sup> Aboven 2 at [40] – [42].

41. In the Committee's view the central issue is not the status of the client or their retainer, nor whether a current file exists or not; rather it is whether the entry into the intimate relationship is inconsistent with the trust and confidence reposed by the subject person. The same test should apply be the person an existing client, a former client, or a prospective client...
42. From the other perspective, a client, specifically one who is emotionally or financially vulnerable, might seek to initiate an intimate relationship with her or his lawyer for the purpose of gaining the lawyer's favour and to try to persuade the lawyer to take an appeal against conviction and/or sentence against earlier advice not to...

#### **D. Mr VP's conduct**

[22] In considering this issue, the Committee made several comments relevant to its position:<sup>9</sup>

46. At all material times, Ms [AK] presented as an unfortunate young woman who because of her age, difficult financial circumstances, and her alcohol and drug dependencies, was extremely vulnerable and susceptible to influence. Mr VP first appeared as her Youth Advocate appointed pursuant to s 323 of the Children, Young Persons, and Their Families Act 1989. Mr VP's status, specialised authority and knowledge meant that he would have assumed a superior and dominant role in the professional relationship and potentially able to exert legal, financial and or emotional influence over his client. The risk was that such a vulnerable client was not in a position to freely consent to a sexual encounter, or once an intimate relationship had begun, to maturely and independently participate or exit if desired.
47. The Committee's strongly held view is that Mr VP should not have entered into an intimate personal relationship with Ms [AK] whether that was June 2010, or subsequently, including November 2010, as admitted by Mr VP. Ms [AK's] vulnerability was such that Mr VP's position as her lawyer, particularly as her former Youth Advocate from two years prior, commanded a heightened level of propriety. The Committee has no knowledge of whether it was Mr VP or Ms [AK] or both of them equally, who initiated sexual relations. Whatever trust was placed in Mr VP, when she instructed him over the various criminal matters on 22 June 2010 and 8 August 2010, and the confidence she reposed in having him assist her to deal with her drug and alcohol dependencies, her financial difficulties, and finding her a place to live during her pregnancy with [X], meant that Mr VP should not have initiated, nor responded, to any attempt by Ms [AK] to initiate, a sexual relationship.

#### **E. Mr VP's denials**

[23] This issue is not relevant to this review for the reasons noted later in his decision.

#### **F. Misconduct**

[24] The Committee, correctly, did not make any finding as to misconduct, as a finding in this regard can only be made by the Tribunal. It records that Mr VP's conduct *prima facie* constitutes misconduct, and at paragraph 58 of its decision records that if

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<sup>9</sup> Above n 2 at [46] – [47].

misconduct is proven, then there is a real prospect that Mr VP might be suspended from practice or struck off the Roll of Barristers and Solicitors.

[25] Although the Committee did not specifically refer to the decision of *Orlov v NZLS*<sup>10</sup> it seems to be me that these comments have been made to satisfy the threshold test enunciated by Heath J in that judgment.

[26] The Committee's determination was expressed in the following way:<sup>11</sup>

After considering all the information received, including Mr VP's personal statements and the witness statements obtained through its appointed investigator, the Standards Committee determines, pursuant to s 152(2)(a) of the Lawyers and Conveyancers Act 2006, that:

- a. The complaint in respect of the formation of an intimate personal relationship between Mr VP and his client Ms [AK], on or about June 2010, or subsequently, be considered by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal as misconduct under s 241(a); and
- b. The complaint in respect of Mr VP misleading the Standards Committee by his denial of any intimate relationship with Ms [AK] in his written and signed statement addressed to the Committee dated 7 December 2011 be considered by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal as misconduct under s 241(a) or alternatively unsatisfactory conduct under s 241(b).

### **The application for review**

[27] In his application, Mr VP limited the grounds of review to the determination to lay a charge of misconduct in relation to the intimate personal relationship between Mr VP and Ms AK. He takes no issue with the determination to lay a charge of misleading the Standards Committee.

[28] Although an application for review is not necessarily limited to the matters raised by the review applicant, in this instance,<sup>12</sup> I do not consider that there are issues for consideration in this review other than those put forward by Mr VQ on behalf of Mr VP.

[29] In addition, in the course of the review hearing, it appeared that Mr VQ's submissions were directed towards redefining the matters to be put before the Tribunal,

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<sup>10</sup> *Orlov v NZLS* [2012] NZHC 2154.

<sup>11</sup> Above n 2 at [57].

<sup>12</sup> See for example, comment by Winkelmann J as to the nature of a review in *Deliu v Hong* [2012] NZHC 158 at [41].

rather than a reversal of the decision by the Committee to lay charges.

## **Review**

[30] A review hearing took place in Auckland on 9 May 2013. Mr VP's attendance was excused as he was engaged in a trial and the issues raised on review were purely legal in nature. Mr VP was represented by Mr VQ. Mr AJ represented the Standards Committee.

[31] Mention should be made at the outset of this decision of the approach which this Office has taken previously to applications for review of a decision by a Standards Committee to lay charges before the Tribunal. This approach has been enunciated on a number of occasions<sup>13</sup> from which the general principle emerges that the LCRO will not lightly interfere with the discretion of the Committee to lay charges before the Tribunal.

[32] Mr AJ also made brief mention of earlier LCRO decisions where the question of whether a determination of a Standards Committee was subject to review at all,<sup>14</sup> but did not pursue that issue any further.

## **Should charges be laid pending completion of a review by the LCRO?**

[33] Notwithstanding that Mr VP had applied for the determination of the Standards Committee to be reviewed, the Committee has framed and served the charges to be heard before the Tribunal. Mr VQ submitted as a preliminary issue, that he did not consider the Standards Committee should have taken this step. That submission is an issue which deserves some comment as it has been raised on a number of occasions during the course of the review.

[34] Section 158 of the Lawyers and Conveyancers Act 2006 (the Act) provides that if a Standards Committee makes a determination of a kind described in ss 152(b) or (c) the Standards Committee must give written notice of the determination to persons who may apply for a review, and the determination must (*inter alia*) include reasons.<sup>15</sup>

[35] It is to be noted that the requirements of s 158 do not apply to a determination under s 152(2)(a) i.e. a decision to lay charges before the Tribunal. If a decision is made to lay charges before the Tribunal, s 154(a) requires the Standards Committee to frame charges and subsection (b) requires the determination and a copy of the charges

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<sup>13</sup> See for example, *Poole v Yorkshire* LCRO 133/09.

<sup>14</sup> See for example, *RV v Auckland Standards Committee* LCRO 299/2011.

<sup>15</sup> Section 158(2)(a) Lawyers and Conveyancers Act 2006.

to be given to the person to whom they relate.

[36] It has been noted by this Office that Standards Committees have regularly refrained from issuing charges until the review period has passed, and/or until the review is disposed of. In this regard I have previously acknowledged that this is a pragmatic response to the possibility that the Standards Committee determination may be reversed, modified, or confirmed by this Office.<sup>16</sup>

[37] Having said that, there is no provision in the Act which provides that the lodging of a review application acts as a stay, and s 154 imposes an obligation to frame and serve the charges on the party chargeable. In that regard therefore, the actions of the Standards Committee in this instance in framing and serving the charges conforms to the requirements of the Act.

[38] Mr VQ's submission contrasts with those of other Counsel, who have argued that draft charges at least should be provided as soon as possible so as to be available during the course of a review.<sup>17</sup>

[39] In the present case, the availability of the charges proved useful to identify that the Committee intended to bring a charge of misconduct as defined in s 7(1)(b)(ii) of the Act (conduct unrelated to the provision of regulated services).

[40] The reason for Mr VQ's submission became clear when it was ascertained that he was arguing for the LCRO to limit the charges in the way that he was proposing and to that extent, although he accepted that there was no restriction on the Committee framing and serving the charges, he nevertheless submitted that they be treated as draft charges.

#### **When did Mr VP enter into an intimate personal relationship with Ms AK?**

[41] Before considering the definition of the term 'client' in Rule 5.7, it is important to first address the question as to the date on which Mr VP entered into an intimate personal relationship with Ms AK. This is an important question, since, if it is a date earlier than acknowledged by Mr VP, and is during a period when Mr VP had current instructions from Ms AK, then the Committee's definition becomes academic.

[42] The Committee made no finding as to the date on which Mr VP entered into an intimate personal relationship with Ms AK. It noted that it may have commenced prior

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<sup>16</sup> *FT v NSC* LCRO 261/2010 at [54].

<sup>17</sup> Above n 16 at [34].



to June 2010, but acknowledges that the identified date of 22 June 2010 presents as the most likely commencement date.<sup>18</sup> However, the Committee also conjectured that if the child born in April 2011 was fathered by Mr VP as alleged by certain witnesses, then the starting date of the relationship would have been around July 2010.

[43] Mr VP has admitted that the relationship commenced in November 2010, albeit he had previously denied that there had ever been any intimate relationship.

[44] The simple fact of the matter is, that there has yet to be a conclusive finding of fact as to when the relationship commenced. The investigator appointed by the Committee interviewed a number of witnesses and provided their statements. These statements are not of course in the form of sworn evidence. The Committee did not meet or interview those persons directly and they were not subject to any cross-examination. In addition, as mentioned above, the Committee has noted that there is a lot of additional information that was not before the Committee.

[45] Proceedings before the Tribunal allow for witnesses to provide direct evidence, to be cross-examined, and to be questioned by Tribunal members. It is a forum which is far better suited to a consideration of disputed facts than either the Standards Committee or a review by the LCRO. For this reason alone, I consider that this matter should go before the Tribunal to enable it to make a finding of fact as to when the intimate personal relationship commenced between Mr VP and Ms AK.

#### **The definition of 'client' in Rule 5.7**

[46] The question as to the definition of the word 'client' in Rule 5.7 assumes importance if it is found that the intimate personal relationship between Mr VP and Ms AK post-dated 12 August 2010 when Mr VP ceased to act for Ms AK.

[47] The Committee formed the view that the word 'client' (inasmuch as Rule 5.7 is concerned) should be construed to include both former and prospective clients.

[48] Mr VQ submits that in reaching this view, the Committee made an error of law. Whilst he concedes that the word is not defined in the Rules, he argues that it is nevertheless defined by reference to Chapter 4 of the Rules which refers on a number of occasions to a client "retaining" the services of a lawyer. Mr VQ argues that the word 'client' is therefore defined by reference to when a lawyer is "retained" by the client.

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<sup>18</sup> Above n 5.

[49] With reference to the relevant timeframe in 2010, Mr VQ argued that Ms AK retained Mr VP from 22 June 2010 until 12 August 2010 (and was therefore only a 'client' during that period) and consequently any charge against Mr VP should be limited to that timeframe only. This is the essence of Mr VQ's submissions in support of the review application. If that restriction were to be imposed, and it was determined that the relationship between Mr VP and Ms AK commenced after 12 August 2010, then the basis for that charge would of course disappear.

### **The Committee's view of the relationship**

[50] At this stage, I digress to consider the other elements of the Standards Committee determination. At [40] - [42], [46] and [47], the Committee made numerous references to the inappropriate nature of Mr VP's relationship with Ms AK, given her age, difficult financial circumstances, and her alcohol and drug dependencies; resulting in her being an extremely vulnerable young person susceptible to influence.

[51] These comments all express a strong disapproval of Mr VP's conduct, whether or not it was constrained within the confines of Rule 5.7. That view necessarily leads to a charge of misconduct in terms of s 7(1)(b)(ii) that Mr VP is not a fit and proper person to engage in practice as a lawyer. Mr VQ had not recognised the possibility of a charge in these terms, and it was therefore helpful to note that one of the charges provided by the Committee was framed accordingly. There was no challenge from Mr VQ to a charge in these terms.

### **Summary**

[52] Consequently, as I perceive Mr VP's review application, it is that the Committee made an error of law in its definition of the word 'client' in Rule 5.7, and that any charge based on a breach of that Rule should be limited to the period from 22 June 2010 to 12 August 2010.

[53] It is at this stage that I need to remind myself of the previous approach to decisions to prosecute adopted by this Office. In *Poole v Yorkshire*<sup>19</sup> the LCRO identified the bases on which a decision to prosecute could be revisited. They include situations in which the decision to prosecute was:<sup>20</sup>

- [a] significantly influenced by irrelevant considerations,
- [b] exercised for collateral purposes unrelated to the objectives of the statute in

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<sup>19</sup> Above n 13.

<sup>20</sup> Above n 13 at [21].

question (and therefore an abuse of process),

[c] exercised in a discriminatory manner,

[d] exercised capriciously, in bad faith or with malice.

No submissions have been advanced by Mr VQ on any of these grounds.

[54] I have already concluded that the question of fact as to when the intimate personal relationship commenced between Mr VP and Ms AK should be considered by the Tribunal. In addition, the charges in terms of s 7(1)(b)(ii) and the second charge relating to misleading the Tribunal are to be considered by the Tribunal.

[55] I consider that the submission Mr VQ has made in this review is one which should properly be argued before the Tribunal in defence of the charge. It does not come within the category of the circumstances where this Office would interfere with a decision to lay charges and indeed, Mr VQ is not advancing the proposition that the decision to lay charges itself should be reversed. Rather, he submits that I should restrict the charge laid by the Committee to the period of time he refers to.

[56] This would constitute an unwarranted interference with the discretion of the Committee. It is the Committee which has determined to lay the charges and is responsible for framing and prosecuting the charge. Any objection to the wording of the charge (and naturally any defence to the charge as framed) are properly matters to be argued before and considered by the Tribunal with the benefit of full submissions from both parties.

[57] In the circumstances, I do not intend to interfere with the discretion of the Committee to lay and prosecute charges in accordance with its determination in the form it sees fit.

### **Decision**

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

### **Costs**

In accordance with the Costs Orders Guidelines issued by this Office it is usual where an adverse determination is confirmed for costs to be awarded against a practitioner. The determination of the Standards Committee has been confirmed. This application was limited to legal submissions and in the circumstances a reduction from the usual costs is justified. Accordingly, pursuant to s 210(1) of the Lawyers and Conveyancers

Act 2006 Mr VP is ordered to pay the sum of \$600 to the New Zealand Law Society by way of costs by no later than 22 June 2013.

**DATED** this 22<sup>nd</sup> day of May 2013

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**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 VP as the Applicant  
Mr VQ QC as the Representative for the Applicant  
Canterbury Westland Standards Committee as the Respondent  
Mr AJ as the Representative for the Respondent  
New Zealand Law Society  
Secretary for Justice