

LCRO 359/2013

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of the [Area] Standards Committee

**BETWEEN**

**SW**

Applicant

**AND**

**LM**

Respondent

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

**DECISION**

**Introduction**

[1] Mr SW has applied for a review of the determination by [Area] Standards Committee to take no further action in respect of his complaint that Mr LM had attacked his reputation without good cause in proceedings before the High Court where Mr LM was acting for the Official Assignee in an application to extend Mr SW's period of bankruptcy.

**Background**

[2] Mr SW was adjudged bankrupt in October 2009.

[3] The Official Assignee objected to Mr SW being automatically discharged from bankruptcy in October 2012 and sought orders from the High Court that the period of bankruptcy be extended.

[4] Mr LM acted for the Official Assignee.

[5] Following a 10 day hearing, Mr LM made the following introductory remarks<sup>1</sup> to his closing submissions which comprised some 100 pages of written material:<sup>2</sup>

Broadly speaking, what we have is a situation where Mr SW has salvaged money from his crumbling entities that were ultimately held for the benefit of him and his former family. In doing so he has disregarded the interests of his creditors and his prior family. He turned his back on Mrs SW and his 4 children leaving them to live an impoverished life while he secured for his new family hundreds of thousands, if not millions of dollars of wealth. It is largely the subterfuge employed in doing so that is at the heart of this proceeding.

[6] Mr SW complained about statements made by Mr LM in those submissions.

[7] At the time the Standards Committee considered Mr SW's complaint and made its determination, the Court had not issued its judgment. At the review hearing on 30 August 2017 Mr SW provided the Court's judgment. This has been largely disregarded in conducting this review because the review by this Office involves a consideration of the Standards Committee's investigation, and its determination which has been confirmed on review. This Office must reach its own view of the complaint independent of the findings of any other court or tribunal.<sup>3</sup>

### **Mr SW's complaints**

[8] Mr SW's complaints were that Mr LM was in breach of r 13.8 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules (the Rules) and that he had attacked Mr SW's reputation without good cause. Mr SW said:<sup>4</sup>

... I am of the view that he lacked sufficient objectivity as counsel and his submissions were more akin to grandstanding to provoke media interest than for the Court. Not only do I deny Mr LM's allegations, no direct evidence was led in the course of the examination supporting such submissions.

There were no reasonable grounds for Mr LM's submission and, therefore, I believe that Mr LM's submissions were unwarranted, irresponsible, unnecessary and in breach of Rule 13.8.

There were numerous other extravagant claims made by (sic) Mr LM in his closing submissions that were not supported by evidence. However my concern primarily relates to the claims made by Mr LM about my family that had no relevance to the issues before the Court and in light of their personal nature, simply did not need to be made by him.

In the circumstances, I consider Mr LM's conduct to be unprofessional and in breach of his ethical duties.

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<sup>1</sup> These comments were made from handwritten notes and do not form part of the 100 pages of written submissions prepared by Mr LM.

<sup>2</sup> At the review hearing, the parties confirmed this is a correct transcript of Mr LM's comments.

<sup>3</sup> *Dorbu v Lawyers and Conveyancers Disciplinary Tribunal and NZLS CIV 2009-404-7381* at [29].

<sup>4</sup> Complaint SW to Lawyers Complaints Service (26 July 2013) at 2.

**Request**

I request that the Standards Committee investigate the above complaints and implement and provide suitable remedial action.

**Remedy Sought**

I believe this is an appropriate case for censure or reprimand and that the Standards Committee procures a full, unequivocal and unrestricted apology for Mr LM.

I look forward to hearing from you

[9] Mr SW sought that Mr LM be censured or reprimanded and requested the Standards Committee to “procure a full, unequivocal and unrestricted apology from Mr LM”.<sup>5</sup>

**The Standards Committee determination**

[10] The Standards Committee considered rr 13.8 and 13.8.1 of the Rules, which state:

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.

13.8.1 A lawyer must not be a party to the filing of any document in court alleging fraud, dishonesty, undue influence, duress, or other reprehensible conduct, unless the lawyer has taken appropriate steps to ensure that reasonable grounds for making the allegation exist.

[11] The Committee noted “*the subject matters of the public examination in the High Court where Mr SW’s conduct, dealings and property*”.<sup>6</sup>

[12] Having noted this, the Committee reached the view that “Mr LM’s submissions were not irrelevant to the proceedings”.<sup>7</sup>

[13] The Committee also concluded that the submissions had not been made “without cause” and therefore neither of the rules had been breached.

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

<sup>6</sup> Standards Committee determination (15 November 2013) at [31] (emphasis added).

<sup>7</sup> At [31].

## The application for review

[14] Mr SW provided the following grounds in support of his application for review:<sup>8</sup>

1. With respect to paragraphs 26 and 28 of the Decision, the Committee erred:
  - a. In its considerations of Rule 13.8 in noting that Mr LM *“had no duty to protect and promote”* my interests. Rule 13.8 provides that *“a lawyer engaged in litigation must not attack a person’s reputation **without good cause**”*; and
  - b. In stating that Rules 13.8 and 13.8.1 *“require Mr LM to take appropriate steps to ensure that reasonable grounds (or good cause) for making the allegation exist”*.

The combined effect of these errors was that the Committee assessed Mr LM’s conduct on an incorrect and lower threshold because:

- a. The threshold of “reasonable grounds” is less than “good cause”; and
  - b. The test is whether Mr LM had **good cause** to make his submissions, not whether Mr LM had a duty *“to protect and promote”* my interests.
2. With respect to paragraphs 32 of the Decision, the Committee erred in relying on Mr LM’s assertion that he relied on volumes of documentary evidence and notes of evidence because:
    - a. The Committee did not have the benefit of reviewing the documentary evidence and notes of evidence; and
    - b. Mr LM did not provide the Committee with any evidence supporting the claims that I have turned my back on my ex-wife and children from my first marriage and secured for my new family hundreds of thousands if not millions of dollars of wealth. Not only do I deny such claims, there is simply no evidence to support such claims and, in any event, the claims were simply beside the point for the purpose of my application for discharge from bankruptcy.

The combined effect of these errors was that the Committee assessed Mr LM’s conduct without the benefit of all relevant facts.

3. As a result of the above errors, the Committee erred in its conclusions at paragraphs 31 and 32 of the Decision that *“Mr LM’s submissions were not irrelevant to the proceedings”* and *“the submissions were not made without good cause”*.

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<sup>8</sup> SW application for review (6 December 2013) at 1–2.

## Review

### *Delegation*

[15] The review progressed by way of an applicant only hearing in Auckland District Court on 30 August 2017 attended by Mr SW and Mr LM's representative, Mr C. Mr LM was not required to attend and did not exercise his right to do so.

[16] The hearing was conducted by Mr Vaughan acting as a delegate duly appointed by the Legal Complaints Review Officer (LCRO) pursuant to cl 6 of sch 3 of the Lawyers and Conveyancers Act 2006 (the Act). The LCRO has 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 after receipt of Mr Vaughan's report and discussion.

### **Nature and scope of review**

[17] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:<sup>9</sup>

... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

The Review Officer has broad powers to conduct his or 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. These powers extend to "any review" ...

... the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[18] More recently, the High Court has described a review by this Office in the following way:<sup>10</sup>

A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO

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<sup>9</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

<sup>10</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

coming to his or her own view of the fairness of the substance and process of a Committee's determination.

## Discussion

### *Rule 13.8*

[19] Before commencing a review of the material provided, it is necessary to carefully examine r 13.8 and 13.8.1, which Mr SW submits have been breached:

1. There must be an "attack on a person's reputation".
2. The "attack" must be made "without good cause".
3. The attack must be made either:
  - (i) in court, or
  - (ii) in documents that have been "filed in court".
4. The documents must allege "fraud, dishonesty, undue influence, duress or other reprehensible conduct".<sup>11</sup>
5. The allegations may not be made unless "the lawyer has taken appropriate steps to ensure that reasonable grounds for making the allegation exist".

### *Was there an "attack" on Mr SW's "reputation"?*

[20] A person's "reputation" may be good or bad, but the primary meaning of the word, as defined in the *Oxford English Dictionary* is "the condition, quality or fact of being highly regarded or esteemed; credit, fame, distinction; respectability, good report".<sup>12</sup>

[21] Taking that definition as the starting point obviates the need to establish what Mr SW's reputation was. That is not a process that a Standards Committee or this Office should engage in.

[22] Not all the statements complained of by Mr SW can be considered to be an "attack" on his reputation. It is only those statements which are not capable of being established by fact which can fall into that category. Words or statements which are

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<sup>11</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 13.8.1.

<sup>12</sup> *Oxford English Dictionary* (3rd ed, online ed, Oxford University Press, Oxford, 2009).

expressions of opinion, or have an emotive flavour, could be considered to be an “attack” as distinct from statements which are considered to be based on fact. The following words or statements used by Mr LM in his submissions fall into this category:

- (a) Mr SW “disregarded” the interests of his creditors and his prior family – it was not possible for Mr LM to know Mr SW had regard to the interests of those people or disregarded them.
- (b) Mr SW “turned his back” on his former wife and his four children – that assumed an active decision to ignore the needs of his former wife and children.
- (c) Mr SW left them to lead an “impoverished” life. An investigation into the lifestyle of Mr SW’s former wife and children was not relevant or appropriate to the court proceedings and certainly not a matter which is appropriate for this review to inquire into.

*Was the “attack” made “without good cause”?*

[23] It was unnecessary to use any emotive words or statements. The application by the Official Assignee would stand or fall on the facts.

*Was there an attack in Court*

[24] The words or statements about which Mr SW complains were part of Mr LM’s oral introduction to the 100 pages of written submissions he addressed.

*Were there documents “filed in court”?*

[25] The words or statements about which Mr SW complains were not part of Mr LM’s written submissions.

*Had Mr LM taken appropriate steps to ensure reasonable grounds existed?*

[26] Having isolated the words and statements that were emotive in character, the remainder of the words and statements that could be described as an “attack” on Mr SW’s reputation were:

- (a) Mr SW “salvaged money from his crumbling entities that were ultimately held for the benefit of him and his former family”.

- (b) He “channelled that salvaged property through into new structures for the benefit of his new family”
- (c) He “secured for his new family hundreds of thousands if not millions of dollars of wealth”.
- (d) The “subterfuge employed in doing so is at the heart of this proceeding”.

[27] The test to be applied in determining whether Mr LM has breached the r 13.8 or not is whether he had taken appropriate steps to ensure reasonable grounds existed for making these statements. The test is not whether or not they were proven to exist or were accepted by the court as sufficient evidence to support the application by the Official Assignee.

[28] The hearing before the court occupied 10 days during which vast amounts of oral and documentary evidence was produced. It is impossible to assert that Mr LM had not taken appropriate steps to ensure reasonable grounds existed for making the statements referred to above.

[29] What is left therefore is whether or not it was appropriate for Mr LM to have used the words identified in paragraph [22] above. In this regard, the context of the statements needs to be considered.

#### *Context*

[30] The statements complained of were made as introductory remarks to detailed closing submissions following a 10-day hearing. In these submissions Mr LM referred to and summarised evidence given by witnesses in the course of the trial.

[31] Mr SW has emphasised there had been significant media interest in the trial and the media had been present throughout much of the hearing. He accused Mr LM of “playing” to the media.

[32] During the trial Mr LM says the media had been warned by the Associate Judge “that matters relating to the relationship property proceeding were not to be reported.”<sup>13</sup>

[33] In his complaint Mr SW says that the Associate Judge “advised counsel and the news media that matters between my ex-wife and me and matters concerning our children were confidential and were not to be reported on”.<sup>14</sup> This did not amount to a

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<sup>13</sup> Letter from [Law Firm A] to New Zealand Law Society (19 August 2013) at [12].

<sup>14</sup> Letter of complaint SW to New Zealand Law Society (26 July 2013).



prohibition against referring to matters relating to Mr SW's family. It was a direction to the media.

[34] In any event, having made such a direction, it was to be expected that the Associate Judge himself would comment adversely if he considered any person involved in the proceedings had not complied with his directions.

[35] There is no evidence the Associate Judge made adverse comments about Mr LM's remarks.

#### *Motivation*

[36] Mr SW accuses Mr LM of a lack of objectivity. He asserts that Mr LM acted to validate the content of a report provided by the Official Assignee to the Court, which he believes Mr LM had authored. That is disputed by Mr LM. In any event, whether that is the case or not, is irrelevant for the purposes of determining whether or not Mr LM has breached the Rules.

#### *Exercise of discretion*

[37] A Standards Committee and this Office have discretion as to whether or not a finding of unsatisfactory conduct follows a breach of the Rules. In the present instance, and given the context within which the remarks were made, it is reasonable to exercise that discretion to take no further action in respect of a complaint about words that occupied approximately six typed lines and which were then followed by submissions set out in 100 typed pages. Stepping back, and taking an overview of all of the facts and circumstances it is inconceivable that a disciplinary finding should be made against Mr LM and penalties imposed for a breach of the Rules. It is understandable that Mr SW was sensitive to negative comments made about his treatment of his former wife and children but, at most, it can be acknowledged that Mr SW's sensitivities have been offended. That is not a reason for making an adverse disciplinary finding against a lawyer.

#### **Summary**

[38] Mr LM's comments were made in court, not in documents filed in court which is a pre-requisite for a breach of r 13.8.1. Having considered all of the matters raised before the Standards Committee and on review, it is appropriate to take no further actions in respect of Mr SW's complaints.

**Decision**

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

**DATED** this 26<sup>th</sup> day of September 2017

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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 SW as the Applicant  
Mr LM as the Respondent  
Mr C as the Respondent's Representative  
Mr H as the Related Person  
[Area] Standards Committee  
The New Zealand Law Society