

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of Auckland Standards Committee 3

**BETWEEN**

**LQ**

Applicant

**AND**

**VN**

Respondent

**DECISION**

**Background**

[1] In August 2009 the Auckland Standards Committee 3 determined to take no further action in respect of a complaint by LQ that VN had not completed his retainer to conclude a Relationship Property Agreement between her and her partner LR, in that he was unable to produce for her an executed copy of the Agreement.

[2] A question as to the whereabouts of the Agreement had arisen in September 2004 when LQ and LR had separated. At that time, LR's lawyers had inquired of VL where the document was. VN asserts that his wife VL (who works in his office) had rung LQ about the matter and that LQ had told her that she had both copies of the Agreement.

[3] VL then sent a letter to that effect to LR's lawyers.

[4] Nothing further arose at that time because the parties then reconciled. However, the whereabouts of the document became relevant again in 2009 when the parties finally separated.

[5] Shortly after making her complaint, LQ advised the Complaints Service that she had found a copy of the signed Agreement in her letterbox. She alleges that VN had either put it there himself or arranged for that to take place.

[6] VN denied that allegation, and has maintained at all times that LQ had taken both copies of the Agreement from his office in 2004 to arrange for an amendment to be made to the document and initialled by LR and his lawyer.

[7] LQ applied to this Office for a review of the Standards Committee determination, and on 23 June 2010 the LCRO issued a decision in which she reversed the determination of the Standards Committee and made a finding of unsatisfactory conduct against VN. VN was censured and ordered to pay the sum of \$1,942.00 to LQ by way of compensation within 30 days of the date of the decision. In addition, an Order for payment of costs in the sum of \$2,000.00 was made, such costs to be paid to the New Zealand Law Society within 30 days of the date of the decision.

[8] Payment to LQ was not made by VN until 24 March 2011.

[9] In the meantime, LQ had lodged a further complaint with the Complaints Service on 9 August 2010 regarding the failure by VN to make payment of the compensation to her in terms of the LCRO Order. She also complained about other aspects of VN's conduct which she had become aware of during the Standards Committee's investigation of her first complaint and the review which followed.

### **The Standards Committee determination**

[10] The Standards Committee determined to take no further action with regard to any of the complaints made by LQ. With regard to non compliance with the LCRO Order, the Committee determined that VN's conduct was reasonable in all of the circumstances. By this it is presumed that the Committee was referring to the various steps that VN had taken following the issue of the decision. The Committee also observed that the compensation Order was enforceable on application to the Court but that LQ had not done so.

[11] With regard to LQ's complaint about VN's communications with LR and his lawyer, the Committee recorded at [25] of its determination that LQ's complaint concerned VN's communications with LS. In the course of the review, it has become

apparent that her complaint predominantly concerned VN's communications with LT, the lawyer who was acting for LR in connection with the relationship property proceedings between LQ and LR. The Committee determined that there was no suggestion of a disclosure of privileged or confidential information to LR or to LS and that it was not inappropriate to correspond with those persons to the extent necessary to obtain information to assist VN to respond to LQ's complaint.

[12] LQ had also complained that she considered VN had lied to the Standards Committee about the date on which loan documents had been signed. In this regard the Committee accepted VN's explanation about the dating of the documents.

[13] The final matter about which LQ complained was that she had been billed for nonexistent attendances by VN. In this regard, LQ referred to [47] of the LCRO decision in which she referred to a bill of costs dated 8 November 2002 recording attendances by LQ at VN's office on various dates. When viewing VN's diary in the course of that review, the LCRO noted that there were no records in VN's diary of attendances by LQ on those days. LQ therefore contended that she had been billed for attendances which did not take place. The Committee treated this complaint as one of overcharging and applying the test set out in section 351 of the Lawyers and Conveyancers Act 2006, came to the view that VN's conduct in respect of his billing did not reach the necessary threshold such that disciplinary proceedings could have been commenced under the Law Practitioners Act 1982.

### **The review**

[14] By way of a preliminary comment, it is somewhat surprising that this complaint was referred to Auckland Standards Committee 3. This is the same Standards Committee which had considered the earlier complaint by LQ and whose determination the LCRO had reversed.

[15] The complaint by LQ is in respect of non compliance by VN with the Order of the LCRO reversing the Standards Committee determination and it would have removed any possibility for the Standards Committee to be influenced by its previous determination if this complaint had been considered by a different Standards Committee.

[16] This review proceeded with an initial hearing attended by both parties on 8 November 2011. VN was represented at that hearing by VM. It was necessary to adjourn this hearing because LQ needed to collect her children from school.

[17] A further hearing scheduled for 24 January 2012 was adjourned because of VN's ill health, and a further hearing scheduled for 15 March 2012 was adjourned because of VM's ill health.

[18] A request for an adjournment of the hearing scheduled for 11 April 2012 was also made due to VM's continuing ill health. This was declined for the following reasons:

- a) VN is a lawyer and was well able to represent himself.
- b) A review by the LCRO is an inquisitorial process which does not require representation by counsel.
- c) The major part of the review relating to non compliance with the previous decision of the LCRO had been heard.
- d) VM's submissions with regard to the request for production of the Agreement by LQ had been dealt with at the beginning of the previous hearing and thereafter it was largely VN who addressed the review hearing.
- e) If necessary, written submissions on any matter could be received by the LCRO subsequent to the review hearing.

[19] The hearing therefore resumed on 11 April 2012 attended by LQ, VN and his wife.

[20] At the end of the review hearing, I asked VN if it was intended that VM would provide written submissions. VN advised that VM had intended to provide written submissions as to the credibility of LQ, but that he was seriously ill. In the circumstances VN himself provided submissions as to credibility. It is not therefore necessary that completion of the review be deferred to allow VM to provide submissions as it would seem that there is little further if anything that he would add to the review.

### **The scope of a review**

[21] On the second day of the review hearing, VN made submissions as to the scope of a review. He referred to articles by Professor Duncan Webb on the LCRO website and in particular to Professor Webb's observation that the Lawyers and Conveyancers Act 2006 refers to a "review" rather than a "re hearing" or "appeal".

[22] Professor Webb goes on to say that

"...the review is not a de novo re hearing. As such the onus will lie on the applicant for review to show that the decision of the Standards Committee was wrong either in law, or that it rested on unsupportable factual inferences, or that

some discretion was exercised in an unreasonable or irrational way. ...It is only against that background that the LCRO is expected to come to his or her own view on the merits of the matter in issue”.

[23] To reach a view on the merits of a matter requires a full and thorough review of all of the material before the Standards Committee, and in some instances to allow further evidence to be presented.

[24] VN points to the comments made by Professor Webb that in matters of professional propriety and exercise of discretion, the LCRO should proceed with some caution.

[25] I do not disagree with any of these observations and have proceeded with this review bearing these principles in mind.

### **Compliance with the LCRO Order**

[26] It is important to record the chronology of events that took place subsequent to the LCRO decision. The decision was issued on 23 June 2010 and required payment of the sum of \$1,942.00 by way of compensation to LQ within 30 days of the date of the decision. Payment was therefore due to be made by 23 July 2010.

- On that date, VN wrote to the New Zealand Law Society requesting deferral of the requirement to pay the ordered damages and costs. Whilst I have not sighted the Law Society’s response, I would expect that it would have indicated to VN that the Society had no jurisdiction to defer the requirement to pay the specified amount to LQ.
- On 19 October 2010 VN sought a transcript of the review hearing.
- On 21 October 2010 this request was declined.
- On 1 December 2010 VN applied to the LCRO for a re-hearing.
- On 3 December 2010 this request was declined.
- On 28 January 2011 VN paid the sum of \$1,942.00 to LQ’s then lawyers, Swayne MacDonald. LQ declined to accept payment in this manner and on approximately 3 February 2011 Swayne MacDonald returned the funds to VN.
- On 24 February 2011 VN then applied to the LCRO for recall of her decision. This was declined on 3 March.
- On 24 March 2011 payment was finally made by VN to LQ as ordered.

[27] It is also noted that VN advised the Standards Committee that he intended to apply for judicial review of the LCRO decision but he did not pursue this.

[28] The terms of the LCRO Order were plain. VN was ordered “to pay to the applicant, compensation in total sum of \$1,942.00. This sum is to be paid to the applicant within 30 days of the date of this decision.”

[29] The Committee noted at [24] that “High Court rule 20.10 states that an appeal does not operate as a stay of enforcement of any order appealed against”. VN’s option was to apply for judicial review of the LCRO decision, as there is no right of appeal. Nevertheless, the Committee’s observation was to the effect that VN needed to apply for a stay of the Order if he wished to defer payment whilst he exercised the various options that he considered were open to him. He did not make any such application.

[30] Consequently there were no grounds on which VN could defer compliance with the LCRO Order. He clearly disagreed with the decision and the Order and continues to do so. However, lawyers are no different from any other person who is obliged to comply with an Order of a relevant authority, whether it is the Court, a Tribunal or the LCRO.

[31] On the other hand, persons in whose favour Orders are made by the LCRO are entitled to expect them to be complied with and it is disturbing that it was necessary for LQ to lodge a further complaint with the Complaints Service to endeavour to have VN comply with the Order. Even the lodging of the complaint did not act as a catalyst for VN to comply with the Order, and he continued in his opposition to the Order until some nine months after it was made.

### **The delay in payment**

[32] The Standards Committee recorded its reasons for determining to take no further action with regard to the non payment of the compensatory Order to LQ in the following way:

“[45] The Committee considered that [VN]’s delay in payment of the compensation was not unreasonable on the basis that [VN] had promptly, following receipt of the LCRO’s decision, applied for a transcript of the LCRO’s proceedings and a re-hearing by the LCRO and decisions on those applications re-hearing [*sic*] had not been obtained until late in 2010. [VN] had also relatively promptly, offered to pay the funds to the Law Society pending his attempt to have a rehearing or review. The Committee further noted that [VN] had ultimately made the payment to [LQ]’s solicitors and that [LQ] had instructed her solicitors to repay the amount to [VN] as payment had not been made to her, as ordered by the LCRO, in the manner in which she required it to be made. [LQ] had also

declined to allow her solicitors to take the compensation amount in payment of outstanding fees owed by her to that firm. The Committee found it difficult to understand why [LQ] simply did not direct her solicitors to forward the money to her rather than directing them to repay the money to [VN].

[46] The Committee considered that in light of the acrimonious relationship between the parties and [LQ]'s course of dealings with [VN], it was not unreasonable for [VN] to make payment to [LQ]'s solicitors and request a receipt from them. As noted above, [VN] had offered previously to make the payment in to the Law Society, to be held pending outcome of his application for re-hearing of the LCRO, but that proposal had been declined by the Society. The Committee did not consider [VN]'s conduct to be sufficiently grave as to amount to unsatisfactory conduct."

[33] I must record at this juncture that I do not agree with the Standards Committee. It is not reasonable for a lawyer to act otherwise than in strict accordance with the terms of any Orders made by a Standards Committee or the LCRO, or otherwise in accordance with any Orders made by the Court. VN did not take action with any degree of alacrity:

- The first step taken by him was to write to the New Zealand Law Society on the date on which payment was due requesting deferral of the Orders.
- Some four months after issue of the LCRO decision, he applied to the LCRO for a transcript of the hearing.
- Approximately one and a half months later he applied for a re-hearing.
- Some seven months after the LCRO decision he made payment to Swayne MacDonald which was not payment in terms of the Order.
- Some eight months after the Order he applied for a recall of the LCRO decision.
- Some nine months after the Order was made he finally made payment in accordance with its terms.

[34] These steps are not steps that could be described as having been taken "promptly" or even "relatively promptly" without any Court order staying the LCRO Order. VN had no legal grounds to defer payment to LQ.

[35] Having come to this view however, it is necessary to consider what consequences follow.

### **Unsatisfactory conduct**

[36] Unsatisfactory conduct is defined in section 12 of the Lawyers and Conveyancers Act. The relevant sub sections are:

- a) conduct of the lawyer or incorporated law firm that occurs at a time where he or she or it is providing regulated services and is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; or
- b) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including -
  - i. conduct unbecoming a lawyer or an incorporated law firm; or
  - ii. unprofessional conduct; or
- c) conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm, or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 7)

[37] Sub sections (a) and (b) both require that the conduct in question takes place at a time when a lawyer is providing regulated services. In the present instance, VN was not providing regulated services to LQ when he failed to comply with the LCRO Order. Consequently VN's conduct cannot be considered unsatisfactory conduct by reference to these provisions.

[38] In addition, it cannot be said that VN's conduct is in contravention of the Act. Whilst his conduct was in breach of an Order made pursuant to the Act, it is not conduct in breach of the Act per se. Similarly, it is not conduct that is in breach of any regulations or practice rules made pursuant to the Act.

[39] I am therefore drawn to the conclusion that a failure to comply with an Order of the LCRO (or a Standards Committee) can not constitute unsatisfactory conduct. As a result, no Orders can be made by a Standards Committee against a lawyer for failing to comply with an Order made by it or the LCRO.

[40] Whilst the initial reaction to this conclusion may be one of surprise, it is likely to be an intended outcome that a Standards Committee should not be in a position of making Orders against a person who fails to comply with one of its own Orders. Similarly, it would not be appropriate that a Standards Committee make Orders against a person who fails to comply with an Order of the LCRO as the matter may be brought before the LCRO on review.

[41] The only option open to a Standards Committee or the LCRO in these circumstances is to lay a charge of misconduct (as defined in section 7(b)(2)) before



the Lawyers and Conveyancers Disciplinary Tribunal. This defines misconduct as conduct of a lawyer which is unconnected with the provision of regulated services but which would justify a finding that the lawyer is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer. All other definitions of misconduct in section 7 apply only when the lawyer is providing regulated services.

[42] I must therefore consider whether VN's actions were such as would justify a charge before the Tribunal on this basis.

[43] VN was disgruntled with the LCRO decision. He took various steps, in what I would describe as a somewhat dilatory manner, contrary to the view of the Standards Committee. He finally made payment after some nine months of delay. While his response to the Order cannot be considered to be exemplary, it cannot be considered to be such as would render him to be a person who is not a fit and proper person or otherwise unsuited to engage in practice as a lawyer.

[44] A decision to lay charges before the Disciplinary Tribunal requires the exercise of a discretion. In the circumstances and after having considered all of the material, I have determined that it is not appropriate that I should exercise the discretion to lay charges before the Tribunal in this instance. As a result, I concur with the Standards Committee determination to take no further action in respect of this matter, although for somewhat different reasons.

[45] I recognise that this is a somewhat unsatisfactory outcome for LQ. However, as noted by the Standards Committee, she did have the option of applying to the Court for enforcement of the Order, and in doing so would have been able to apply for costs against VN. Section 215 of the Lawyers and Conveyancers Act 2006 provides that for the purpose of enforcing any Order of the LCRO for the payment of costs and expenses or both, a duplicate of the Order may be filed in the office of the Court named in the Order and thereupon becomes enforceable in all respects as a final judgement.

[46] Section 215 does not apply to an Order for compensation. However, this does not preclude ordinary proceedings being brought in the Court to enforce the Order, and this is what the Standards Committee referred to. It seems to me, that this would have been the best option for LQ to pursue.

### **Communicating with LR and his lawyer**

[47] At [25] of its decision, the Standards Committee noted that LQ had complained that Mrs VN had corresponded with LR and his lawyer LS. Whilst LQ did not refer to

LR's lawyer by name in her complaint, at the review hearing she identified the lawyer she was referring to as LT, who was acting for LR in the relationship property proceedings between himself and LQ and that it was the communications between VN and LT to which she was largely referring.

[48] VN does not dispute that he spoke to LR and LT about the contracting out Agreement. However, he denies that he communicated any information of a privileged or confidential nature to LT.

[49] LQ takes objection to the fact that VN spoke to LR and his lawyer at all about the matter. She does not know what the content of those discussions were but objects in principle to any discussions taking place at all.

[50] There is some basis for LQ's objection. Rule 8 of the Conduct and Client Care Rules provides as follows:

"A lawyer has a duty to protect and to hold in strict confidence all information concerning a client, the retainer, and the clients business and affairs acquired in a course of the professional relationship"

[51] It is not a case of a lawyer being able to decide what information may be communicated to a third party. A client has an absolute right for all information to be held in strict confidence. The mere fact that VN was communicating to LR's lawyer that there was some doubt surrounding the execution of the Agreement, would in itself bring into question the validity of the document, and VN had no control over how information imparted by him was used.

[52] VN argues that it was only fair that he be able to make inquiries as to whether LQ had produced her copy of the Agreement. He contends that if it was ascertained that LQ had dated the document, it would show that she was in possession of the document at the time when she is alleging that he ought to have had it, and that this would therefore vindicate his position.

[53] To some extent, that misses the point of the LCRO decision. At [53] of her decision the LCRO made the following comment:

"I proceed from the recognition that the Practitioner had the responsibility of showing that he had discharged his professional obligations with regard to completing the retainer and accounting for the documents. That is to say, the onus fell on him to show that he had discharged his professional obligations to the Applicant in relation to the legal services he was providing. In the absence of any evidence to clarify with any degree of certainty what became of the documents, I can conclude with a degree of confidence that the Practitioner failed to discharge the evidential burden required of him in this regard"

[54] Consequently, whether LQ had the document in her possession or not, the fact is that VN did not follow up with her (if indeed she had taken the documents) to ensure that the Agreement was completed correctly, and make arrangements with her for its safe keeping. That is the essence of the LCRO's determination.

[55] I have some difficulty with the proposition that it was acceptable for VN to breach the requirements of rule 8 for his own benefit, or, in any event, that a lawyer may exercise a discretion as to whether or not he or she complies with the requirements of the rule. LQ was entitled to have her privacy respected.

[56] In this regard, I would therefore disagree with the Committee when it stated that "it was not inappropriate for VN to correspond with LR or LR's lawyer to the extent necessary to obtain information to assist him respond [*sic*] to LQ's complaint". This is not an instance where I am disagreeing with the Standards Committee in the exercise of a discretion, or in matters of professional propriety. Instead, it does not appear to me that the Committee has taken the provisions of rule 8 into consideration at all, and having done so myself, I do not consider that there is any question that VN has breached the provisions of this rule.

[57] VN advises that he obtained the authority of LR's solicitor to discuss the matter directly with LR. It was LQ's authority that was required to discuss her affairs with LR, LT or LS. VN did not do this.

[58] A breach of the rules constitutes unsatisfactory conduct by reason of section 12(c) of the Lawyers and Conveyancers Act and there will therefore be a finding that VN's conduct in this regard constituted unsatisfactory conduct.

### **The loan documents**

[59] LQ's complaint in this regard is that VN lied to the Standards Committee when he stated that LQ attended at his offices on 14 October to sign the documents. She refers to loan documents dated 22 and 23 July 2002 and draws the conclusion that the refinancing documents were therefore signed months before the contracting out Agreement. The loan documents dated 22 and 23 July 2002 are in fact the Letter of Offer sent directly by the bank to LQ and LR. The procedure is that after the Letter of Offer was signed by them, the bank would then have written to VN with loan instructions.

[60] On 8 October 2002 LS returned the Loan Agreements and mortgage documents to VN following execution of the documents by LR. A copy of the mortgage

document has been provided and it is dated 11 October 2002. VN mistook this date for 14 October 2002 but in any event it is clear that what VN told the Standards Committee was correct other than an understandable error in referring to the date as being the 14<sup>th</sup> rather than the 11<sup>th</sup> of October.

[61] LQ accepts this position and it is appropriate that no further action be taken in connection with this complaint.

### **Billing for attendances not recorded**

[62] LQ refers to [47] of the LCRO decision which casts doubt on whether LQ attended at VN's office on particular dates which were apparently referred to in a bill of costs dated 8 November 2002 (or 2 November 2002 as referred to by the Standards Committee).

[63] I have not sighted a copy of the bill in question, but regardless of the dates referred to in the bill, LQ has not disputed that the work was carried out. Consequently, even if the dates referred to are wrong, VN carried out the work and is entitled to charge for that work. There is therefore no foundation to this aspect of LQ's complaint.

### **The letter to LS**

[64] LQ says that if VN had sent a copy of the letter dated 21 September 2004 sent to LS, to her, then she would have been aware of what was being alleged as to the whereabouts of the Agreement and the matter would not have assumed the importance or relevance that it now has. At [51] of her decision, the LCRO noted that a prudent solicitor would have copied the letter to LQ. A lack of prudence is not synonymous with a breach of ethical obligations, and I concur with the Standards Committee determination to take no further action in this regard.

### **Decision**

The determination of the Standards Committee to take no further action is confirmed, except in relation to the communication with LR and his lawyers, particularly LT.

In this regard, VN's conduct constitutes unsatisfactory conduct by reason of section 12(c) of the Lawyers and Conveyancers Act 2006 and rule 8 of the Conduct and Client Care Rules.

The determination of the Standards Committee is modified in that the reasons for taking no further action regard to the non compliance with the LCRO Order are as set out in [32] – [46] of this decision.

### **Order**

VN is reprimanded pursuant to section 156(1)(b) of the Lawyers and Conveyancers Act 2006. In this regard I have taken particular note of the distinction between a censure and reprimand as referred to by the High Court in *B v The Auckland Standards Committee of the NZLS and others* CIV- 2010-404-8451 9 September 2011. In that decision, the Court noted that a censure and a reprimand were not synonymous, and that a censure conveyed a greater degree of condemnation than a reprimand – refer [36].

### **Costs**

This review application has reversed the finding of the Standards Committee in one instance and in accordance with the LCRO costs guidelines, it is appropriate that an Order for costs be made against VN. In addition, I consider that although there has been no reversal of the Standards Committee decision with regard to the non compliance with the Order of the LCRO, the reasons for doing so differ. I consider that LQ's application for review was justified in this regard and that it is just that VN bear a portion of the costs of this review pursuant to section 210(3) of the Lawyers and Conveyancers Act 2006.

VN is therefore ordered to pay the sum of \$600.00 towards to the costs of this review, such sum to be paid to the New Zealand Law Society within 1 month of the date of this decision.

**DATED** this 3<sup>rd</sup> day of May 2012

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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:

LQ as the Applicant  
VN as the Respondent  
VM as representative for the Respondent  
The Auckland Standards Committee 3  
The New Zealand Law Society