

LCRO 49/2012

CONCERNING

An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of the [South Island] Standards Committee

BETWEEN

MR UN
Applicant

AND

MR OL
Respondent

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

DECISION

Background

[1] This is an application by Mr UN for a review of a Standards Committee decision dated [2012]. In that decision the Standards Committee decided to take no action in relation to Mr UN's complaint against Mr OL (the practitioner) who was acting in court related proceedings against him. At the relevant times, Mr UN was representing himself.

Complaint

[2] In his complaint to the Lawyers Complaints Service dated [2012] Mr UN says the following:

- He was representing himself in proceedings before the High Court, in which he was seeking leave to appeal out of time against a District Court decision.
- The practitioner was representing the other party.

- During the course of argument before the High Court Judge, the practitioner submitted that Mr UN owned property (land) overseas.
- Mr UN acknowledges that this submission is privileged (in the sense that it was made in the course of judicial proceedings and is thereby a complete defence to any claim for defamation).
- Mr UN told the Judge that he did not own any property either in New Zealand or overseas, and that his only income was National Superannuation.
- The High Court Judge accepted Mr UN's submission about property ownership.
- Mr UN's application to bring the appeal out of time was dismissed, and the practitioner's client was awarded costs.
- The resultant costs award left Mr UN insolvent and so he began the "No Asset Procedure"¹ (NAP), which is a one-off alternative to bankruptcy under the Insolvency Act 2006 and allows eligible insolvent people to reorganise their affairs without the restrictions of bankruptcy. The procedure may be challenged by creditors.
- The practitioner was instructed to oppose Mr UN's application to come under the NAP, and made the same submission about overseas property ownership to the Official Assignee that he had made to the High Court.
- Mr UN repeated his denial to the Official Assignee.
- Mr UN does not consider that the practitioner's submission to the Official Assignee is privileged. He considers that it is defamatory, malicious, false and it carried with it the implication that he (Mr UN) had committed the offence of misleading the Official Assignee, contrary to s 440 of the Insolvency Act 2006.
- Mr UN believes that the practitioner has abused his position.

Practitioner's response to the complaint

[3] The practitioner responded to the complaint on [2012]. In essence he says:

- Mr UN and the practitioner's client have been involved in disputes over many years. Most of these have involved proceedings before the courts, initiated by Mr UN.

¹ Complaint to Lawyers Complaints Service dated [2012] at [6].

- In 2006 Mr UN was unsuccessful in District Court proceedings against the practitioner's client. He appealed that decision and then withdrew it. He then tried to reinstate the appeal in 2010 but was unsuccessful and had [costs] awarded against him.
- The practitioner was instructed by his client to oppose the No Asset Procedure, since Mr UN had sufficient capital to travel to, and live [overseas] for six months of each year, and had received funds from the sale of a matrimonial home at an earlier time which was sold after Mr UN and his wife separated.
- The practitioner and his client believe that Mr UN was concealing assets to avoid paying the costs awarded against him.
- Additionally the practitioner has been unable to locate a physical address to effect service of documents on Mr UN, and this has added to the belief that Mr UN has been evasive. In fact Mr UN was living [with a friend] at the relevant time.
- The practitioner denies that the submission he made to the Official Assignee was malicious and false. He submits that it:²

is simply a case of a creditor endeavouring to have its debt paid by a person who is trying to avoid the consequences of his self initiated actions [against the practitioner's client] ... [Mr UN's] own secrecy has led to information about him being difficult to verify.

Complainant's response to the practitioner

[4] In his response to the practitioner dated [2012] Mr UN:

- Denies that he has provided a misleading address.
- Asserts that he has answered all of the Official Assignee's questions "fully".³
- Attaches a copy of a document forwarded to him by his former wife which purports to show that a particular property in another country is jointly owned by her and her partner. In a covering email Mr UN's former wife says that Mr UN does not now nor has he ever had any interest in that particular property.
- He reiterated that his complaint against the practitioner was:⁴

² Mr OL's submissions to Lawyers Complaints Service dated [2013] at [4].

³ Mr UN's submissions to New Zealand Law Society dated [2012].

That [the practitioner] stated to the Official Assignee that I was the owner of a property [overseas] which I was trying to conceal. He knew this statement to be false. He was both committing an offence in doing so and imputing to me a criminal act.

Standards Committee processes

[5] The Standards Committee conducted its hearing on the papers, pursuant to s 153 of the Lawyers and Conveyancers Act 2006. As indicated above, it had the benefit of all of the material that had been provided to the Lawyers Complaints Service by the parties.

Issues summarised by the Standards Committee

[6] The Standards Committee records that it considered the complaint [in 2012]. However that appears to be a typographical error, as it had before it Mr UN's letter dated [early February]. The Standards Committee decision is dated [late February] 2012, which is more likely to be the date on which the matter was considered by it. The error is of no consequence however as the Standards Committee has considered Mr UN's complaint, the practitioner's response to the complaint and Mr UN's response to that.

[7] The Standards Committee decision helpfully sets out its role in dealing with complaints against practitioners. The decision sets out a summary of the complaint and the response to it, as well as Mr UN's further comments. The decision concludes by accepting the practitioner's explanation that his submission to the Official Assignee was reasonably made and not knowingly false (having regard to the information in his possession). The Standards Committee held that the practitioner was acting in good faith and doing what he believed was correct.

Standards Committee determination

[8] After weighing those matters up, the Standards Committee resolved to take no further action on Mr UN's complaint, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006. That section gives a Standards Committee a discretion to take no further action on a complaint if it appears that, having regard to all of the circumstances, further action is unnecessary or inappropriate.

⁴ Above n3.

LCRO: Hearing on the papers

[9] Both the practitioner and the complainant have consented to this review being undertaken on the papers pursuant to s 206(2) of the Lawyers and Conveyancers Act 2006. This process allows a Legal Complaints Review Officer to conduct the review based on the available information if the LCRO considers that the review can be adequately determined in the absence of the parties.

The Review

[10] In his application for review Mr UN makes the following comments:

- That the Standards Committee failed to address his complaint (set out above).
- That the practitioner, in his submission to the Official Assignee, committed an offence against s 440(1)(a) of the Insolvency Act 2006 in that he knowingly made a false statement to the Official Assignee.
- That in so doing the practitioner also suggested that Mr UN had committed the same offence (by denying that he had an interest in property overseas).

[11] Mr UN also attached to the Review a copy of the practitioner's response to the original complaint as well as his own response to that – which included the email from his former wife and the document purporting to show that he did not own property overseas with her. In handwritten comments on the practitioner's response, he describes the suggestion that he owns property overseas as "rubbish"⁵ and queries some of the practitioner's assertions about other assets he was alleged to own. He also wonders whether the practitioner was displaying "paranoia"⁶ in his response to the complaint.

[12] The outcome that Mr UN seeks is to have the practitioner "disciplined correctly and apologise ... and reimburse me the review fee".⁷

[13] Separately, [in March], Mr UN provided this Office with a copy of undated correspondence that he had sent to the Official Assignee, in which he accepts that the practitioner's comments about his share in a matrimonial home may have been relevant, but Mr UN considers the comment about property owned overseas to be "a

⁵ Mr UN's handwritten amendments to Mr OL's submissions dated [2013].

⁶ Above n5.

⁷ Above n5.

malicious falsehood ... defamatory clearly an offence under [s] 440 (1a & 1b) of the Insolvency Act”.⁸

[14] Mr UN has emphasised in both his complaint and this Review that when he informed the High Court in 2010 that he did not own property overseas (contrary to the practitioner’s submission that he did) the High Court Judge accepted that he did not.

[15] In his response to the review, the practitioner essentially reiterated the submissions that he made to the Standards Committee and says further that Mr UN is misusing the LCRO review procedure to avoid paying the costs which the High Court ordered in 2010.

Discussion

[16] I have had the benefit of considering all of the material that was provided to the Standards Committee, as well as Mr UN’s review and the additional material he provided, and the practitioner’s comments in response.

[17] The only issue for me to consider and decide is whether the practitioner was in breach of any of his professional obligations when he repeated a submission to the Official Assignee that he had earlier made to the High Court, to the effect that Mr UN owned property overseas, in circumstances where the High Court had accepted Mr UN’s submission that he did not.

[18] It is a clear and unambiguous requirement that a lawyer must never mislead or deceive a court. Rule 13 of the Lawyers: Conduct and Client Care Rules 2008 is entirely devoted to this principle. The reason is clear; the business of the courts would grind to a halt if the unqualified word of a lawyer could not be accepted.

[19] Indeed underpinning the practice of law is a requirement for honesty, integrity, trustworthiness and the dignified transaction of a client’s affairs. A glance through the Lawyers: Conduct and Client Care Rules 2008 reveals regular references to “respect and courtesy”. One of the purposes of the Act is “to maintain public confidence in the provision of legal services ...”.⁹

[20] Duties of honesty, respect and dignity owed to a court apply with equal force to a lawyer’s day to day dealings with other lawyers, clients and members of the public. The privileges of practicing law carry with them solemn responsibilities. Where lawyers

⁸ Correspondence from Mr UN to Assistant Official Assignee undated.

⁹ Lawyers and Conveyancers Act 2006 s 3(1)(a).

are found to have breached these duties, the consequences can be serious and, for the lawyer, uncompromising.

[21] It is a serious matter to suggest that a lawyer has been less than truthful in his or her dealings with other members of the public; all the more so when the allegation is that the lawyer has knowingly misled a public official such as the Official Assignee. The evidence to support such a claim must be compelling.

[22] I am sure that Mr UN does not lightly make this allegation against the practitioner. Equally however, the practitioner has emphatically denied the suggestions of dishonest or improper conduct. His position is that he had been instructed to recover a debt from a litigant who, according to his client, had shown no goodwill, and by that fact, appeared to have something to hide.

[23] When reviewing the material before me, I note that despite Mr UN's claims that the practitioner has offended against s 440 of the Insolvency Act 2006, there is no evidence that this has been investigated by either the Official Assignee or the Police, or that the Official Assignee has given the claim any substance. Mr UN clearly drew his concerns to the Official Assignee, as discussed earlier but nothing appears to have resulted from this. Equally, Mr UN's concern that the practitioner's submission may have put him (Mr UN) in peril of a full investigation under s 440 of the Insolvency Act 2006, have also apparently come to nothing.

[24] I can well understand Mr UN's concern that despite him telling the High Court that he did not own property overseas, and having that submission accepted, the practitioner subsequently persisted with the submission to the Official Assignee. However the exchange in the High Court was by submission only, evidence was not given and challenged by cross examination. If the practitioner's instructions, including the circumstances in which they were given, were that there was more to it than what Mr UN had told the High Court, then the practitioner was entitled to press that point in another forum. It is also noteworthy that the letter and document from Mr UN's former wife (whatever value they may have), did not materialise until after Mr UN had made his complaint.

[25] The practitioner's experiences on behalf of his client in dealing with Mr UN reveal some difficulties, so it is not surprising that he was instructed to pursue the matter of costs collection decisively. That is not to say that Mr UN was being deliberately difficult – rather, his personal circumstances were unusual. Indeed he

even describes himself as living a “peripatetic life”.¹⁰ Lawyers must of course make allowances for such circumstances – but equally they may take proper and decisive action to prosecute their client’s interests. In this case the practitioner’s client (and apparently the practitioner as well) questioned the position taken by Mr UN which they perceived as inconsistent with other matters of which they were aware or perceived to be the case in relation to Mr UN.

[26] The evidence to support a claim that a lawyer has behaved in a dishonest or misleading way must be compelling, and it is the responsibility of a complainant to provide it. In the circumstances of this case I am not persuaded that the practitioner has acted in the way alleged by Mr UN. Neither the practitioner nor his client were obliged to take the Judge’s acceptance of Mr UN’s evidence as fact, in relation to an uninvestigated question about property ownership. The practitioner’s actions on behalf of his client may have been firm, but in the circumstances and background outlined above, I agree with the Standards Committee determination.

Decision

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

DATED this 9th day of April 2013

Hanneke Bouchier
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 UN as the Applicant
Mr OL as the Respondent
Mr OK as a related person or entity
[A South Island] Standards Committee
The New Zealand Law Society

¹⁰ Above n3.