

LCRO 5/2017

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 [X]

BETWEEN

QU

Applicant

AND

JP, YE AND KJ

Respondents

DECISION

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

Introduction

[1] Mr QU has applied for a review of a decision by the [Area] Standards Committee [X] to take no further action in respect of his complaint concerning the conduct of Mr JP, Mr YE and Mr KJ.

Background

[2] The background to this review is comprehensively set out in the Committee's decision.

[3] I do not propose to elaborate at length on that background except to note that

- (a) Mr QU filed complaints against Mr YE and Mr JP with the New Zealand Law Society Complaints Service.
- (b) Those complaints were not upheld.

- (c) Mr YE's firm had commenced proceedings in the District Court for recovery of fees owed by Mr QU.
- (d) The progress of those proceedings had been stalled by the complaints inquiries.
- (e) On receiving copies of the Standards Committee decision, those decisions were attached to a memorandum filed with the Court to reactivate the proceedings which were unable to progress (in respect to a claim for recovery of outstanding fees) whilst there were conduct complaints awaiting determination.
- (f) The memorandum was forwarded to the Court by a practitioner in Mr YE's firm (Mr KJ).

The complaint and the Standards Committee decision

[4] Mr QU made complaint that the practitioners had breached their obligations, to ensure that Standards Committee decisions remained confidential, by forwarding the decisions to the Court.

[5] Mr QU submitted that the trial judge would likely be influenced by the decisions, and that the trial would be prejudiced.

[6] He maintained that his complaint engaged the three practitioners as follows:

- (a) Mr YE had breached confidentiality when he had provided a copy of the decisions to Mr KJ, when Mr YE understood that the decision would be forwarded to the Court by Mr KJ.
- (b) Mr JP had breached confidentiality when he provided a copy of the decision pertaining to his complaint to [law firm] (Mr YE's and Mr KJ's firm).
- (c) Mr KJ had breached confidentiality by disclosing the decisions to the Court.

[7] The Committee delivered its decision on 16 November 2016. In determining to take no further action on the complaint, the Committee concluded that:

- (a) There had been a breach by the practitioners.

- (b) Not every breach demanded a disciplinary response.
- (c) The Committee was being asked to take disciplinary action on the basis of a disclosure to genuinely interested and necessarily involved parties.
- (d) No disciplinary sanction was necessary.

Application for review

[8] Mr QU filed an application for review on 2 January 2017.

[9] He submitted that:

- (a) The Committee's decision to reach a preliminary view, and to advise the practitioners of that indication without requiring a response from them was a breach of natural justice; in that it gives indication of outcome being advised before inquiry was completed.
- (b) When he received notice of the Committee's decision, the decision referred to [law firm] (Mr YE's firm) rather than the practitioners.
- (c) The Committee had incorrectly applied regulation 31 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.
- (d) The Committee's decision was invalid as the Committee had not made a final decision.
- (e) The Committee had failed to have regard to all the circumstances of his case.
- (f) Mr JP was not a party to the District Court proceedings.
- (g) The Committee had failed to consider the possibility of members of the public accessing the Court file.
- (h) The District Court had a genuine interest in not receiving the information contained in the decisions.

[10] Mr YE provided response to Mr QU's application. He submitted that:

- (a) Discovery is an exception to the rule about confidentiality.

- (b) There are many situations where confidential documents are discovered in Court proceedings and are admissible evidence.
- (c) Section 69 of the Evidence Act 2006 provides that the Court retains an overriding discretion as to disclosure of confidential information in the context of “public interest” considerations.
- (d) The intent of regulation 31 is to prevent disclosing identities and information about practitioners and complaints to the public through publication.
- (e) Mr QU is the complainant in the decision, and the defendant in the Court proceedings.
- (f) A copy of the decision was sent to the Court in the context of a case management conference.
- (g) The Standards Committee decisions were not given in evidence or discussed in open Court or disclosed in any public forum.
- (h) The decision did not lose its confidentiality, simply because it was considered in a Court proceeding.
- (i) There was no third party involved, nor any suggestion that the decision was made public.

Hearing on the papers

[11] At the hearing convened to consider Mr QU’s review of the first Committee decision, the parties were advised that this review would be conducted on the papers, to which there was no objection taken, and directions were made for filing of further submissions.

[12] This review has been undertaken on the papers pursuant to s 206(2) of the Lawyers and Conveyancers Act 2006 (the Act), which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all the information available if the LCRO considers that the review can be adequately determined in the absence of the parties].

Nature and scope of review

[13] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:¹

... 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.

[14] More recently, the High Court has described a review by this Office in the following way:²

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

[15] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee’s determination, has been to:

- (a) Consider all of the available material afresh, including the Committee’s decision; and
- (b) Provide an independent opinion based on those materials.

Analysis

[16] I agree with the Committee that the practitioners had breached confidentiality provisions when they forwarded the decisions to the Court.

[17] I am not persuaded, however, that the breach requires a disciplinary response.

¹ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

² *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

Procedural irregularities

[18] Mr QU submits that the Committee had not reached a final decision, and that the decision issued on 16 November 2016 did not have the status of a final decision.

[19] He reaches this conclusion after perusing file notes prepared by the Legal Standards Officer assisting the Committee which recorded that the practitioners were advised that the Committee had reached a preliminary view as to outcome, their view being that no findings would be made against the practitioners. The practitioners were offered opportunity to respond, but indicated that they did not wish to do so.

[20] Mr QU argues that none of the documents he has seen give indication that the Committee had reached a final decision.

[21] I do not agree with the construction that Mr QU places on the file notes.

[22] I think it self-evident that the Committee, having considered the issue, reached a view that it would take no further action on the complaint. It appears to have been the case that the Committee, as Committees do on occasions, had considered the complaint and reached a view without requiring response from the practitioners. Having formed a view that it did not require a response from the practitioners, it then proceeded to inform them of its view.

[23] In taking issue with the description of the Committee having formed a "preliminary view", Mr QU argues that further steps were required, suggesting that there would have been no point in offering the practitioners opportunity to respond if it was the case that the inquiry had been completed.

[24] I do not accept that as a practical or reasonable construction to be placed on the process.

[25] In my view, the Legal Standards Officer was indicating clearly to the practitioners that no further steps would be taken, but at the same time providing them with opportunity to comment if they wished to do so.

[26] The decision delivered on 16 November 2016 is delivered in standard form. It is described as a "notice of decision". It is signed off by the Committee's convenor. The decision advises the parties of their option to exercise a right of review. The decision presents in every respect as a final decision recorded in conventional form.

[27] Mr QU argues that the Committee had failed to correctly apply s 138(2) of the Act.

[28] He submits that the section requires the Committee to consider whether any further action is unnecessary or inappropriate, and that there must be a positive finding that further action is unnecessary or inappropriate. He suggests that the Committee made no such finding. Its decision is therefore invalid.

[29] With every respect to Mr QU's argument, it is compellingly clear from the Committee's decision that having completed its inquiry and concluding that there had been a breach, the Committee then determined, as it was entitled to do, that the breach did not require a disciplinary response. In exercising that discretion, the Committee provided reasons for its view. It provides explanation for its decision to take no further steps.

[30] In any event, procedural irregularities of the type contended for by Mr QU are capable of cure by the process of review.

Failed to take into account the circumstances of his case

[31] This argument must provide more than simple expression of disagreement with the emphasis the Committee placed on Mr QU's circumstances. It is understandable that Mr QU considers, in light of the decision made, that more focus should have been placed on the circumstances that he felt were of considerable importance and, to a large extent, this concern overlaps with his primary objection which was that the proceedings before the Court had been compromised.

[32] However, in my view, the decision gives clear indication that the Committee had turned its mind to the potentially compromising consequences of the decision being released to the Court, and had concluded that the close nexus between the complaints and the Court proceedings were factors that were required to be taken into account.

Breach of confidentiality

[33] Mr QU argues that the release of the decisions to the Court have materially compromised his position with the Court.

[34] The proceedings before the Court are for recovery of fees. As has been noted, those proceedings were required to be put on hold pending Mr QU's fee complaint being heard.

[35] He suggests that providing the decisions to the Court could compromise those proceedings, and had potential to adversely influence the outcome.

[36] In my view, Mr QU overstates his case.

[37] I do not propose to address every example raised by Mr QU to support his contention that his interests were significantly compromised, but rather to address in general terms the thrust of his concerns. This is not to indicate that I have not considered each of the issues raised by Mr QU. All matters raised have been considered.

[38] I do not consider that his position was likely compromised by the fact that the Committee decisions were forwarded to the Court.

[39] The Committee decisions were apparently attached to a memorandum that would no doubt in due course have arrived on the Court file.

[40] The Court environment is a secure and managed environment, in which all who handle the vast and diverse raft of documents that arrive at the Court on a daily basis are well schooled in the obligation to preserve and protect the confidentiality of all parties who are engaged in proceedings.

[41] I think it unlikely that the decisions would be viewed by any Judge presiding over any subsequent proceedings for recovery of fees as potentially compromising.

[42] Having had the benefit of conducting the review of the Committee's first decision, I am aware of the arguments that Mr QU indicates that he intends to raise as a defence to the fee claim brought by the practitioner. I say "intends" as it was my understanding from the first review hearing that Mr QU had not, at the stage when that review was heard, filed any affidavit evidence in response to the practitioners' claim, or filed any counterclaim with the Court.

[43] It was the practitioners' view that Mr QU was cynically engaging the complaints process in a transparent attempt to delay the Court process.

[44] Whilst I make no comment on that, it was both the view of the Committee, and myself and LCRO delegate Roderick Joyce QC on review, that the defences Mr QU was raising, and presumably intending to advance in the Court, in response to the practitioners' claims, were defences grounded in negligence.

[45] Those defences would inevitably require the marshalling and placing before the Court of comprehensive and specialist evidence. Mr QU's case is yet to be put to the Court. The approach that a Committee is required to adopt when addressing complaint of professional lapses is an inquiry quite distinct from the examination

conducted by the Court in negligence proceedings. The first Committee decision emphasises that the disciplinary process cannot be used to litigate conduct of trial issues. Importantly, the Committee decisions reinforce the fact that Mr QU is able to have his case heard in the District Court, and that the Court would be better placed to examine the issues in a full witness action, with the benefit of full discovery and cross-examination.

[46] If it was the case that the District Court Judge who is to eventually hear the case had read the Committee decisions (and that is not established) it would be expected that the presiding Judge would have a clear understanding of the distinction between a conduct inquiry and a negligence action, and the minimal impact of the former on the latter.

[47] In any event, Mr QU's concerns regarding possible prejudice are matters that he is able to raise with the Court. I have confidence that if any Judge considered that reading of the decisions would create a genuine possibility of contaminating the trial process, a recusal would inevitably follow and appropriate directions would be made.

[48] In reaching a similar view to the Committee that no disciplinary sanction was required, I pay particular attention to the facts of this particular case. Proceedings had been filed in the Court. The proceedings had stalled. On receipt of the Committee decisions it was understandable that the practitioners considered it necessary to advise the Court of the disciplinary outcome. They clearly overlooked the requirement of strict confidentiality when they sent the decisions to the Court, but this error, in my view, was understandable.

[49] The complaints had become procedurally linked to the Court proceedings. To a degree, the matters overlapped.

[50] I think it reasonable to surmise, in the circumstances, that the practitioners genuinely overlooked the requirement for confidentiality. This was not a situation where documents were being disseminated indiscriminately or being sent to parties that were not involved in the matters. The documents were sent to a Court which was awaiting indication from the parties as to the outcome of the disciplinary inquiry.

[51] Mr YE argues that discovery is an exception to the rules about confidentiality. He notes that section 69 of the Evidence Act provides that the Court retains an overriding discretion as to disclosure of confidential information in the context of "public interest" considerations.

[52] That is the case, but arguments as to admissibility are to be signalled to the Court, with the Court then exercising its discretion.

[53] A breach of the Act, if established, does not automatically attract a disciplinary sanction. In *Burgess v Tait* the Court observed that:

The ability to take no further action on a complaint can be exercised legitimately in a wide range of circumstances, including those which would justify taking no action under s 138(1) and (2). It is not confined to circumstances where there is no basis for the complaint at all.³

[54] That position was affirmed in *Chapman v Legal Complaints Review Officer* where the Court the observed that:

... it appears to me that the LCRO may have assumed that her finding of unsatisfactory conduct inevitably led to the setting aside of the Committee's decision to take no further action under s 138. No point has been taken on this but any such assumption would be incorrect. The discretion which s 138 confers subsists throughout.⁴

[55] In *CW v XB* the LCRO held that "an honest mistake is not a proper basis for disciplinary action".⁵

[56] In conducting a review, the LCRO may exercise any of the powers that could have been exercised by the Standards Committee in the proceedings in which the decision was made or the powers were exercised or could have been exercised.⁶

[57] Included in those powers is the ability to exercise a discretion to take no action, or no further action on the complaint.⁷ That discretion may be exercised in circumstances where the Review Officer, having regard to all the circumstances of the case, determines that any further action is unnecessary or inappropriate.⁸

[58] I am not persuaded that it is necessary or appropriate to interfere with the Committee's decision to take no further action on the complaint. In reaching that view, I have given careful consideration to the purposes and objectives of the disciplinary complaint process, and in particular, its focus on consumer protection. I have also carefully considered the history of the dealings between the parties, and the submissions filed.

³ *Burgess v Tait* [2014] NZHC 2408 at [82].

⁴ *Chapman v Legal Complaints Review Officer* [2015] NZHC 1500 at [47].

⁵ *CW v XB* LCRO 213/2010 at [16].

⁶ Lawyers and Conveyancers Act 2006, s 211(1)(b).

⁷ Section 138.

⁸ Section 138(2).

[59] I do not consider that any issues of consumer protection are engaged by the complaint.

[60] I see no grounds which could persuade me to depart from the Committee's decision.

Decision

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

DATED this 31st day of March 2017

R Maidment
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 QU as the Applicant
Messrs JP, YE and KJ as the Respondents
Mr AB as a related person
[Area] Standards Committee [X]
New Zealand Law Society