LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2022] NZLCRO 084

Ref: LCRO 138 & 139/2021

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	**TZ** Applicant in LCRO 138/2021 Respondent in LCRO 139/2021
AND	**FK** Respondent in LCRO 138/2021 Applicant in LCRO 139/2021

DECISION

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

Introduction

[1] These are cross-applications for review.

[2] Mr TZ has applied to review the [AREA] Standards Committee's (Committee) determination that he was guilty of unsatisfactory conduct. By way of penalty, the Committee censured Mr TZ and ordered him to pay a fine of $5,000 together with costs of $2,000.

[3] Mr FK has applied to review the Committee's determination to take no further action on other aspects of his original complaint about Mr TZ's conduct.

Background

[4] Although these review applications are accompanied by six Eastlight folders of material, because of the conclusions I have reached about the issues engaged I consider that I can quite briefly set out the background and equally briefly summarise the parties' respective positions on those issues.

[5] Mr FK, as a sole director of two companies (the COMPANY A), objected to rating valuations set by the CITY COUNCIL (through COMPANY B (BA) across a number of years, in relation to several commercial properties owned by the COMPANY A.

[6] The COMPANY A's basic argument was that the rating valuations were too low.

[7] Other parties – being COMPANY A tenants in the properties – also opposed the rating valuations, though on grounds that they were too high.

[8] Mr TZ was acting for one of those parties.

[9] The objections were dealt with in separate hearings by the Land Valuation Tribunal (LVT). The LVT is generally presided over by a District Court judge chairing a panel which includes two valuers.

[10] Of relevance to the applications for review that I am considering was the LVT hearing relating to the 2012 rating year (the 2012 rates hearing). That hearing took place in CITY A between 19 and 29 August 2019.

[11] Several witnesses were called by the parties in that hearing. The focus of much of the evidence was the appropriate rating valuations for the properties in question. The parties held different views about that.

[12] Five valuers gave evidence in the 2012 rates hearing. Relevant to these review applications, the valuer witnesses included two retained by the COMPANY A (Messrs PD and WZ), and a Ms EU on behalf of BA.

[13] Mr FK also gave evidence.

[14] Mr TZ – as with others involved in the 2012 rates hearing – cross-examined opposing witnesses.

[15] The LVT issued its decision in the 2012 rates hearing, on 7 November 2019 (the XXXX rating decision).[1]

[1] *COMPANY C et ors v CITY A City Council* [XXXX] NZLVT XXX.

[16] Mr FK was concerned about Mr TZ's cross-examination of a number of witnesses in the 2012 rates hearing, believing it to have been improper. He also considered that Mr TZ's conduct during that hearing led to the LVT unfairly and unreasonably skewing the hearing processes and thus the outcome in a way which disadvantaged the COMPANY A.

[17] As well, Mr FK considered that Mr TZ's conduct towards the lay advocate representing BA (Mr RX), and the COMPANY A's counsel (Mr CL) was unprofessional and discourteous.

[18] The COMPANY A has judicially reviewed the 2012 rating decision as to alleged procedural missteps by the LVT during the hearing, and has also appealed its substantive 2012 rating decision (the challenges).[2]

Complaint

[19] On 1 September 2020, Mr FK complained to the New Zealand Law Society Complaints Service (Complaints Service) about Mr TZ's cross-examination of the COMPANY A valuers, Ms EU and himself during the 2012 rates hearing.

[20] The nub of Mr FK's complaint was that during Mr TZ's cross-examination of those four witnesses, he improperly and without any reasonable basis for doing so, sought to impugn their honesty.

[21] He put it in this way:

> I consider that Mr TZ's conduct in the course of the hearing was unfair, unethical and unduly maligning of me and other witnesses. [His] conduct in cross-examination … inappropriately descended into completely unjustified, denigrating and inappropriate personal attacks. … He relentlessly proceeded that I and other witnesses were orchestrating a factual sham in order to mislead the [LVT].
>
> I consider that Mr TZ has breached his duty to the [LVT] [in that his] conduct contributed to errors, unfairness and bias by the [LVT].

[22] Mr FK's complaint was extensive, in that he provided the transcript of the 2012 rates hearing (975 pages) and identified several passages from the notes of evidence which he alleged demonstrated that Mr TZ's cross-examination was improper and deserving of a professional disciplinary sanction.

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[2] The judicial review proceedings indirectly engage the issues raised by Mr FK in his complaint and review application. Judgment in the judicial review proceedings was delivered on 19 July 2022 (*COMPANY C et ors v LVT et ors* [XXXX] NZHC XXXX). I discuss this judgment further in my decision.

[23] Mr FK identified the following breaches by Mr TZ of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules):

(a) Rule 2.1: duty as an officer of the court;

(b) rule 10: failure to treat other lawyers with respect and courtesy;

(c) rule 12: failed to conduct the dealings with integrity, respect and courtesy;

(d) rule 13.2.1: failed to treat others involved in court processes with respect;

(e) rule 13.8 – attacking a person's reputation and corporate settings without good cause.

[24] Mr FK invited "a thorough review" of the transcript of the notes of evidence taken before the LVT. He also suggested that the Complaints Service should obtain a copy of the audio record of the proceedings "to ascertain Mr TZ's tone and behaviour" during hearing.

Response

[25] Mr TZ responded to Mr FK's complaint, in an email to the Complaints Service dated 3 October 2020. In summary, he said:

(a) The complaint was "entirely without merit and a manipulation of process."

(b) The complaint replicates allegations made in the judicial review proceedings in relation to the 2012 rates hearing. Those proceedings allege, amongst other matters, a breach of natural justice by the LVT in that it allowed certain cross-examination by Mr TZ.

(c) The judicial review proceedings, together with a number of related appeals, were to be heard in the High Court in May (and June) 2021.

(d) The complaint "amounts to something of a purported usurpation of the Court's function and threatens, inadvertently or otherwise, to distract from preparation for, and conduct of, extant litigation focused on the same underlying facts."

[26] Mr TZ attached copies of the pleadings in connection with both the judicial review and appeals that were then before the High Court.

Committee's Notice of Hearing

[27] The Committee resolved to set Mr FK's complaint down for a hearing on the papers and issued a Notice of Hearing to the parties on 12 January 2021. It identified the following issues as arising out of the complaint:

> Whether or not Mr TZ breached any of [rr] 2.1, 2.3, 10, 12, 13, 13.2.1 and 13.8 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 and/or otherwise engaged in unsatisfactory conduct for the purposes of s 12(b)(i) and (ii) of the Lawyers and Conveyancers Act (the Act) when cross-examining Mr FK and/or other witnesses and/or failed to fulfil his duty to the Tribunal by:
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> a. Overstepping the accepted and expected boundaries of robust cross-examination and/or inappropriately denigrating witnesses by:
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> (i) alleging fabrication of evidence by Mr FK and other witnesses with the intention to mislead the Tribunal, without just cause.
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> (ii) disrespectfully or otherwise inappropriately addressing accusations of dishonesty, improper intention, and lack of professionalism against any or all of Mr FK, Ms EU, Mr PD and Mr WZ.
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> b. Soliciting warnings from the Tribunal to witnesses on perjury, without justification.

Mr TZ's response to the Notice of Hearing

[28] Through his counsel Ms JS, Mr TZ responded to the Committee's Notice of Hearing in lengthy submissions dated 11 February 2001.

[29] I mean no disrespect to Ms JS by only briefly summarising those submissions:

(a) Mr TZ "wholeheartedly denies the complaint in its entirety."

(b) The extant judicial review proceedings rehearse many of the matters raised by Mr FK in his complaint. The complaint risks undermining the issues that are before the High Court.

(c) The proper forum in which to deal with the issues raised by Mr FK, which include that the LVT breached natural justice as a result of Mr TZ's conduct during the hearing, is in the High Court.

(d) In litigation, a lawyer has an obligation to follow client instructions (r 13.3 of the Rules). Cross-examination is "an essential element of counsel's role and the adversarial system. Its fundamental purpose is to expose defects in an opposing party's case by testing the observations, opinions, recollections and truthfulness of a witness."

(e) The judge in any proceedings is "the ultimate arbiter of counsel's conduct during cross-examination" and has the task of ensuring that proceedings are conducted fairly and within the bounds of the law.

(f) As well, opposing counsel have a role to play through the ability to make objections.

(g) At no point during Mr TZ's cross-examination of any of the witnesses, did the LVT intervene and take issue with him.

(h) On the contrary, the LVT took up some of Mr TZ's questioning. This suggests that the LVT considered that there was a reasonable foundation for the cross-examination. This included giving a perjury warning to one of the witnesses.

(i) COMPANY A's counsel made only one objection, which was not upheld.

(j) Questions put by Mr TZ in cross-examination were based on instructions as well as Mr TZ having a reasonable basis for putting the questions.

(k) Mr TZ was obliged to put the matters in cross-examination about which Mr FK complains. His advocacy was effective.

(l) "At all times, Mr TZ conducted himself with the appropriate level of professionalism and respect in accordance with his duties, while remaining a robust advocate."

Standards Committee determination

[30] Amongst the general observations made by the Committee, was the well-understood principle that Mr TZ's "primary duty was to act in the best interests of his client and to present the best possible case for his client."[3]

[31] The Committee also acknowledged that:[4]

> cross-examination of witnesses is an integral part of an adversarial process [and that] Mr TZ's task … was to test the [evidence of opposing witnesses] and generally to identify, explore and convince the Tribunal of any flaws and that evidence.

[32] Further, the Committee held that whether Mr TZ's cross-examination overstepped conventional boundaries and thus raised questions about the validity of the

[3] Standards Committee determination (26 July 2021) at [12].
[4] Also at [12].

LVT's decision, was not a matter for determination in a disciplinary context. It described as "irrelevant" the question of whether "any arguable procedural error by the [LVT] was partly a consequence of Mr TZ's advocacy."[5]

[33] The Committee identified several relevant rules as having application to its determination. These largely included those that had been referred to by Mr FK and his complaint. They were: rr 2.1, 10, 13.2.1, 12 and 13.8 of the Rules.

[34] The Committee also set out what it described as being the "various restrictions on the rigour with which a witness can be cross-examined [as a matter of law]." It described those restrictions in the following terms (the Committee's cross-examination principles):[6]

> a. Where a lawyer seeks to persuade a Court to disbelieve a witness, the lawyer must put the relevant matters to the witness;
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> b. the cross-examination must be relevant to the issues in dispute and not for a collateral purpose;
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> c. a lawyer must not be a party to the making of an allegation of (broadly) impropriety without satisfying himself or herself that reasonable grounds exist for doing so (commonly referred to as the *Gazley* principle);
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> d. a lawyer must not bully or attempt to humiliate a witness.

[35] In relation to the witnesses Messrs PD, WZ and FK, the Committee variously concluded that:

(a) There was "nothing unprofessionally disrespectful or discourteous towards Mr PD in terms of [the Rules] in the manner in which he had been cross-examined by Mr TZ";[7]

(b) It "could identify nothing unprofessionally disrespectful of or discourteous towards Mr WZ in terms of [the Rules] in the manner in which he had been cross-examined by Mr TZ";[8]

(c) It "concluded that the manner of Mr TZ's cross-examination of Mr FK was not unprofessionally disrespectful or discourteous to such a degree as to give rise to breaches of [the Rules] and did not appear to contravene [the cross-examination principles identified by the Committee]."[9]

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[5] At [15].
[6] At [13].
[7] At [43].
[8] At [48].
[9] At [86].

[36] The Committee began its consideration of Mr TZ's cross-examination of Ms EU, by noting the following:[10]

> On the basis of the transcript, the Committee considered that Ms EU's evidence appeared to have been careful, measured and professional. In that context, the Committee considered that the transcript evidenced several instances of arguable disrespect and/or discourtesy towards her.

[37] The Committee held that Mr TZ was wrong to have cross-examined Ms EU about a particular discussion with another witness and to have suggested to her that she had not referred to that discussion in her evidence in chief. The Committee held that "the [LVT] confirmed this to be the case."[11]

[38] Based on a number of passages of Mr TZ's cross-examination of Ms EU identified by the Committee, its conclusions were that he had been "disrespectful and discourteous in terms of [rr 13.2.1 and 12 of the Rules] [had contravened] … [the Committee's] cross-examination principles … and unprofessional in terms of [r 10 of the Rules]."[12]

[39] It held that "to assert fabrication of evidence by a witness without putting to the witness any basis for doing so was a serious breach of professional standards."[13]

[40] Mr FK had also complained about Mr TZ's conduct towards Messrs RX and CL.

[41] The Committee concluded that although Mr TZ's conduct towards them was less than ideal, it did not meet threshold for a finding of unsatisfactory conduct.

[42] The Committee held that Mr TZ's breaches of the rules in the manner in which he had cross-examined Ms EU, constituted unsatisfactory conduct. By way of penalty, the Committee censured Mr TZ, and ordered him to pay a fine of $5,000 together with costs of $2,000.

Review Applications

[43] Messrs TZ and FK filed their applications for review on 3 and 4 September 2021 respectively.

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[10] At [52].
[11] At [62].
[12] At [66].
[13] At [67].

[44] Mr TZ's review application concerned the finding of unsatisfactory conduct against him in relation to his cross-examination of Ms EU. He raised the following issues:[14]

(a) The Committee breached natural justice by failing to request specific submissions from Mr TZ about his cross-examination of Ms EU.

(b) The Committee breached natural justice by failing to request submissions from Mr TZ regarding appropriate orders.

(c) The Committee's decision to enquire into Mr FK's complaint interfered with due process because the matters were before the High Court.

(d) The Committee usurped the court's role in regulating a lawyer's behaviour.

(e) The Committee wrongly made an evaluation of Ms EU's evidence before the LVT. In doing so, its subsequent conclusions about Mr TZ's cross-examination were tainted.

(f) The Committee mischaracterised and misconstrued the nature of Mr TZ's cross-examination of Ms EU.

(g) Exchanges between the Judge and Mr TZ about his cross-examination were commonplace during a trial and did not indicate any underlying disciplinary issues requiring investigation.

[45] Mr FK's review application concerned the Committee's decision to take no further action on his complaints about the way in which Mr TZ had cross-examined Messrs RX, WZ, PD, CL and FK.

[46] Mr FK raised the following issues:

(a) He relied on all the matters set out in his original complaint to the Complaints Service. That complaint "comprehensively establishes why Mr TZ breached the standards required of lawyers."

(b) Mr FK also submitted that the review in this jurisdiction ought to await the outcome of the matters currently before the High Court. In that regard, Mr FK said that he agreed "that the Committee would have been assisted by the High Court's views before reaching its decision."

[14] Submissions of Ms JS (3 September 2021).

(c) During the appeals and judicial review in the High Court between 30 May and 10 June 2021, the presiding judge "made a number of comments expressing her dim views as to Mr TZ's conduct during the [2012 rates hearing]."

(d) Mr TZ's interactions with the LVT contributed towards that Tribunal's procedural errors.

(e) The Committee's overall assessment of Mr TZ's cross-examination of Messrs PD and WZ as not raising any professional disciplinary issues, was wrong.

(f) Significant aspects of Mr TZ's cross-examination "were unprofessionally disrespectful of and discourteous towards the experts [the valuers]" and breached the Rules.

(g) The Committee's conclusions about Mr TZ's treatment of Messrs RX and CL, were incorrect.

(h) The Committee's conclusions about Mr TZ's cross-examination of Mr FK, were also incorrect. In his review application, Mr FK identified several instances of unprofessional and otherwise improper cross-examination of him during the 2012 rates hearing.

[47] Each party responded to the other's review application. It is sufficient for me to simply record that the parties have diametrically opposed views as to Mr TZ's conduct during the 2012 rates hearing.

[48] Their responses to the opposing review applications largely repeated the matters that each had raised during the Committee's inquiry, as well as emphasising the positions each had staked out in their review applications.

Hearing in person

[49] Both review applications were progressed before me at a hearing by the Microsoft Teams platform, on 12 July 2022.

[50] Mr TZ appeared with his counsel, Ms JS. Mr FK appeared with his counsel Mr YV.

[51] Both counsel made submissions respectively supporting and opposing the review applications. Both answered questions from me during the course of the hearing.

[52] As well, both Messrs TZ and FK addressed me and answered questions from me.

[53] I confirm that I have read Mr FK's complaint and accompanying material and Mr TZ's response to that. I have also read the review applications and responses.

[54] There are no additional issues or questions in my mind that necessitate any further evidence, information or submissions from either of the parties.

Nature and scope of review

[55] The nature and scope of a review was discussed by the High Court in 2012, which said of the process of review under the Act:[15]

> … 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.
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> 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" …
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> … 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.

[56] In a later decision, the High Court described a review by a Review Officer in the following way:[16]

> [2] … A review by [a Review Officer] is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the [Review Officer's] own opinion rather than on deference to the view of the Committee.
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> …
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> [19] … A "review" of a determination by a Committee dominated by law practitioners, by the [Review Officer] who must not be a practising lawyer, is potentially broader and more robust than either an appeal or a judicial review. The statutory powers and duties of the [Review Officer] to conduct a review suggest it would be relatively informal and inquisitorial while complying with the principles of natural justice. The [Review Officer] decides on the extent of the investigations necessary to conduct a review in the context of the circumstances of that review. The [Review Officer] must form his or her own view of the

[15] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41] (citations omitted).
[16] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475.

> evidence. Naturally [a Review Officer] will be cautious but, consistent with the scheme and purpose of the Act … those seeking a review of a Committee determination are entitled to a review based on the [Review Officer's] own opinion rather than on deference to the view of the Committee. That applies equally to review of a [decision] under s 138(1)(c) and (2) [of the Act].
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> [20] … While the office of the [Review Officer] does not have the formal powers and functions of an Ombudsman, it can be expected to be similarly concerned with the underlying fairness of the substance and process of the Committee determinations in conducting a review.
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> [21] A review by the [Review Officer] is informal, inquisitorial and robust. It involves the [Review Officer] coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[57] Given those directions, my approach on this review has been to:

(a) independently and objectively consider all the available evidence afresh;

(b) consider the fairness of the substance and process of the Committee's determination;

(c) form my own opinion about all of those matters.

Discussion

[58] I consider that I can deal with both review applications in relatively short order as I regard the issues as being straightforward.

[59] The issues engaged are:

(a) Did the Committee misdirect itself when assessing Mr TZ's cross-examination of Ms EU?

(b) If so, should the Committee's finding of unsatisfactory conduct be reversed?

(c) If that finding is reversed, should I conduct a fresh assessment of Mr TZ's cross-examination to determine whether conduct issues arise?

(d) Are the Committee's conclusions that Mr TZ's cross-examination of Messrs PD, WZ and FK did not raise any conduct issues, justified on the evidence available to it?

(e) If not, should I conduct a fresh assessment of that cross-examination to determine whether conduct issues arise?

(f) Are there any other aspects of Mr TZ's conduct during the 2012 rates hearing which require disciplinary intervention?

[60] In fact, these issues engage a broader question about whether it is appropriate for the lawyer's disciplinary processes to consider a complaint about the way in which a lawyer has cross-examined in a hearing presided over by a decision-maker in another jurisdiction.

Analysis

[61] In my view, the Committee made two errors.

[62] It wrongly made an evaluation of Ms EU's evidence before the LVT, and based its conclusions about Mr TZ's cross-examination of her on that evaluation.[17]

[63] Secondly and more fundamentally, it wrongly decided to inquire into Mr FK's complaint about Mr TZ's cross-examination of the four witnesses, and other aspects of his conduct during the 2012 rates hearing, in the first place.

Witness assessment by the Committee

[64] It bears repeating what the Committee said at [52] of its determination:

> On the basis of the transcript, the Committee considered that Ms EU's evidence appeared to have been careful, measured and professional. In that context, the Committee considered that the transcript evidenced several instances of arguable disrespect and/or discourtesy towards her.

[65] I consider that the Committee's description of Ms EU's evidence as being "careful, measured and professional", is a synonym for the Committee expressing a positive view about the reliability and credibility of that evidence.

[66] In my respectful view, the Committee was wrong to assume that it could accurately comment on the reliability and credibility of viva voce evidence given in another jurisdiction by a witness whom the Committee had not seen, and whose evidence was challenged; and to purport to do so on the basis of a transcript of the evidence.

[67] It was the Committee's positive assessment of the reliability and credibility of Ms EU's evidence which became the springboard for its conclusions about Mr TZ's cross-examination of her.

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[17] This was not seriously challenged by Mr FK. His position is that aspects of Mr TZ's cross-examination of Ms EU were so improper that they speak for themselves.

[68] This is evident from the way in which the Committee framed its reasoning in [52]. It said that it was the “context [of its assessment of Ms EU’s evidence]” which informed its conclusion that aspects of Mr TZ’s cross-examination of her were inappropriate.

[69] Evidence evaluation – particularly when that evidence has been challenged as it was here – can only be properly carried out by the decision-maker/s before whom the witness has given their evidence (or in some circumstances by an appeal forum in that jurisdiction).[18]

[70] It was not only wrong for the Committee to assume that it could evaluate Ms EU’s evidence, but also dangerous.

[71] The transcript of evidence given by a witness in any proceedings is but one part of the context in which that evidence must be assessed.

[72] The manner in which a witness might respond to questions, observed by the decision-maker, may also be a relevant consideration (although I acknowledge that reliance upon body language when assessing a witness is also fraught with difficulty).

[73] The decision-maker is in the best possible position to evaluate evidence given before them. They see and hear the witness; they understand the context in which the witness has given evidence and they measure the evidence against what other witnesses have said. Decision-makers may also (and in the 2012 rates hearing, did) ask a witness to clarify aspects of their evidence. All of this is critical to the way in which the decision-maker then assesses the evidence that has been given.

[74] It is difficult to see how reading a transcript of something said in another jurisdiction can provide an accurate or meaningful insight into whether the evidence given was credible and reliable.

[75] It does not matter that, in this case, there were exchanges between Mr TZ and the LVT about some of his questioning of Ms EU, and he was required to modify some of his questions. Those exchanges present as being unremarkable and would not be out of place in any proceedings in which a witness is being challenged. They were not

[18] Interestingly, in an interlocutory ruling in connection with the judicial review proceedings, the High Court noted that "[the LVT] permitted cross-examination of Mr FK, and the expert witnesses called by [the COMPANY A] in reasonably forthright terms. The [LVT] itself, or more particularly the presiding judge also joined in the questioning…". See *COMPANY C Ltd & COMPANY D LTD v Land Valuation Tribunal & Ors* [XXXX] NZHC XXXX at [13]. Of course, this was part of an interlocutory judgment and certainly not the last word on the LVT's overall management of the hearing; however, describing cross-examination as having been conducted "in reasonably forthright terms" is not the same as saying that it was improper.

exchanges in which it could be remotely said that the LVT considered that Mr TZ had improperly crossed a line.

[76] It cannot be the case that whenever a judicial officer disallows an aspect of a lawyer's cross-examination (but takes no other steps), disciplinary intervention is then warranted.

[77] Because I have concluded that the Committee was wrong to evaluate Ms EU's evidence – let alone simply on the basis of a transcript of the evidence – and to use that evaluation as a yardstick for measuring aspects of Mr TZ's cross-examination, it must follow that its conclusions about that cross-examination from a disciplinary perspective, were flawed and cannot be sustained.

[78] I have considered whether to return the question of Mr TZ's cross-examination of Ms EU to a differently constituted Committee for inquiry, but without any attempt at witness evaluation by that Committee.

[79] For his part, Mr FK has urged me to carry out my own assessment of that cross-examination.

[80] However, and as I shortly explain, at a more fundamental level I do not consider that it was appropriate for the Committee to have inquired into any of Mr TZ's cross-examination in the 2012 rates hearing.

[81] For reasons which follow, I consider that Mr FK's complaint ought to have been dealt with by the Committee on the basis that there was an alternative remedy available.[19]

[82] Mr FK's principal concern is that Mr TZ's conduct derailed the 2012 rates hearing to the extent that the LVT's processes and decision were compromised.

[83] However, the appropriate place for those concerns to be aired is by appeal or a similar process (which is, in fact, what the COMPANY A has done).

[84] Alternatively, the Committee – having recognised that these were proceedings in another – indeed specialist – jurisdiction presided over by an engaged decision-maker who had not referred any aspect of Mr TZ's conduct during the 2012 rates hearing to the Complaints Service – could properly have concluded that further disciplinary inquiry in those circumstances was neither necessary nor appropriate.[20]

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[19] Section 138(1)(f) of the Act.
[20] Section 138(2) of the Act.

Decision to inquire in the first place

[85] As indicated by me above, I consider that the Committee's more fundamental error was to consider that it was appropriate to inquire into a complaint about the nature of a lawyer's cross-examination during a hearing in another jurisdiction, in which the decision-maker had taken an active role and where that decision-maker had neither criticised the cross-examination (beyond normal oversight) nor considered it necessary to invite the Complaints Service to apply a disciplinary lens to the questioning.

[86] It is so well-known as to almost approach the trite to observe that individual decision-makers in any jurisdiction have the authority – whether by legislation or by implication arising out of any legislation or other power – to regulate and thus control proceedings over which they are presiding.[21]

[87] At a fundamental level this means ensuring that the proceedings are conducted fairly and in accordance with relevant evidential and procedural laws, regulations or rules (including case-law).

[88] This includes ensuring that lawyers who are appearing as advocates do not overstep applicable obligations and limitations when dealing with witnesses – whether their own witnesses or another party's.

[89] It also includes ensuring that exchanges between lawyers during a hearing are conducted with appropriate professionalism, respect and courtesy.

[90] The Committee's cross-examination principles set out by me above at [34], endeavoured to state what it considered to be the law relating to cross-examination.

[91] I am not sure that I would agree that is an accurate description of the "law" as it relates to cross-examination.

[92] That being said, because of the conclusions I have reached in this case it is not necessary for me to endeavour to formulate a set of principles about the approach to assessing cross-examination in a disciplinary context.

[93] I would simply observe that a starting point might be s 85 of the Evidence Act 2006 (EA), which provides:[22]

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[21] See for example *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536 per Lord Diplock.

[22] Acknowledging that this section was amended on 21 December 2021. That said, the amendment does not substantially alter my analysis.

> **85 Unacceptable questions**
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> (1) In any proceeding, if the Judge considers a question, or the way in which it is asked, is improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand, the Judge must disallow the question or direct that the witness is not obliged to answer it.
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> (2) Without limiting the matters that the Judge may take into account for the purposes of subsection (1), the Judge may have regard to—
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> (a) the age, maturity, or vulnerability of the witness; and
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> (b) any physical, intellectual, psychological, or psychiatric impairment of the witness; and
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> (c) the linguistic or cultural background or religious beliefs of the witness; and
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> (d) the nature of the proceeding; and
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> (e) in the case of a hypothetical question, whether the hypothesis has been or will be proved by other evidence in the proceeding; and
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> (f) the nature of previous questions and any cumulative impact the questioning may have on the witness.

[94] This section is aimed at judges because it requires judicial intervention to disallow questions of the type described. Although the section refers to "questions" rather than just cross-examination, it nevertheless provides a tolerably clear indication to lawyers about statutory limits on cross-examination.

[95] Naturally, not every question of the type described if asked and disallowed, will lead a decision-maker to conclude that the questioning was such that disciplinary inquiry of the lawyer's conduct by a Standards Committee was necessary.

[96] The decision-maker is in the best possible position to decide whether a particular question or questions giving rise to a s 85 of the EA intervention, gives rise to professional conduct issues requiring disciplinary inquiry.

[97] Section 92 EA – described as being "cross-examination duties" – encapsulates the well understood requirement for matters in dispute to be put to a witness being cross-examined.[23]

[98] In this regard I would certainly go further than the Committee, which appeared to limit the s 92 EA requirement to circumstances where cross-examination was focused

[23] Otherwise known as the rule in *Brown v Dunn* (1893) 6 R. 67, H.L.

on a witness's credibility. Cross-examination challenging a witness's reliability (as opposed to their credibility) is also clearly captured by s 92 EA.

[99] However, unless there were some broader underlying competency issues, I think it is unlikely that a decision-maker would refer the conduct of a lawyer who has failed to put matters in cross-examination, to the Complaints Service.

[100] If a decision-maker considered that a lawyer's cross-examination of a witness or witnesses in a proceeding before that decision-maker warranted disciplinary investigation, then I would think that a Standards Committee might usefully begin its assessment of the conduct by reference to rr 13.8 and 13.10.2 of the Rules and/or s 12(b) of the Act.

[101] Rule 13.10.2 of the Rules provides:[24]

> A lawyer cross-examining a witness must not put any proposition to a witness that is either not supported by reasonable instructions or that lacks foundation by reference to credible information on the lawyer's possession.

[102] Rule 13.8 relevantly provides:

> A lawyer engaged in litigation must not attack a person's reputation without good cause in court.…

[103] Section 12(b) of the Act describes unsatisfactory conduct as including:

> conduct of [a] lawyer … that occurs at a time when [they are] providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptably, including –
>
> (i) conduct unbecoming a lawyer…; or
>
> (ii) unprofessional conduct.

[104] I have reservations about whether r 13.1 of the Rules – or many of the other rules referred to by the Committee in its determination – would have ready application to an inquiry into a lawyer's cross-examination in a case.

[105] For example, r 13.2.1 of the Rules requires a lawyer to "treat others in court processes with respect."

[106] Arguably, perhaps, "others in court processes" could include a witness giving evidence.

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[24] See also r 13.10.3, which also deals with limits on the types of matters that can be put to a witness in a question. This rule would seem to include questions put in evidence in chief and re-examination.

[107] As against that however, I do not think that this particular requirement sits neatly with a cross-examiner's task which, at its heart, is to challenge the evidence of the witness they are cross-examining. For example, the very opposite of "respect" may be necessary when cross-examination goes to credibility rather than reliability.

[108] But as I have said, I do not consider it necessary to formulate a set of principles about the approach to assessing cross-examination in a disciplinary context. This is because, more fundamentally, this particular complaint ought not to have been inquired into in the first place.

[109] It can reasonably be assumed that if a decision-maker does not limit a lawyer's questions, then the decision-maker did not regard those questions as warranting judicial intervention.

[110] It is difficult to imagine why a Standards Committee, in those circumstances, would consider that some professional conduct issue in relation to the questions nevertheless arose.

[111] It is also reasonable to suggest that not every judicial rebuke of counsel during a hearing will require separate disciplinary inquiry.

[112] A decision-maker is an eye-witness to the arena of battle, and is in the unique position of being a litigation expert (by dint of their judicial role) whose task it is to ensure that all is conducted lawfully and fairly.

[113] This occurs in the context of what is obviously contested litigation: that is to say, opposing views and evidence about the issue to be determined. This is hardly a forum in which the participants are sharing a joint vision.

[114] Anyone involved in a court or tribunal hearing, whether lawyer, party or witness, can safely presume that their views or their evidence will be tested, and sometimes rigorously. In the case of witnesses, that conventionally occurs during cross-examination.

[115] As indicated above, it can reasonably be expected that the presiding decision-maker will ensure that all relevant rules are observed and enforced. This includes protecting witnesses from improper attack by a lawyer.

[116] Judges and other decision-makers are familiar with the lawyers' disciplinary machinery. All judges and most decision-makers – at some earlier point in their careers – were subject to professional regulation and many have participated in the disciplinary processes as either counsel or a decision-maker.

[117] The learned author in *Lawyers' Professional Responsibility* put it in this way:[25]

> Most disciplinary proceedings arise out of client complaints; it is these that bring to the attention of the relevant body the need to investigate a lawyer's professional conduct. Courts also play a role, as they cannot overlook issues of misconduct that arise in the course of matters before them, but must draw these to the attention of the relevant body. This is indeed apt; by their daily interaction with lawyers, judges are positioned to observe lawyer (mis)conduct, and because of their legal training, are able to evaluate lawyer conduct.
>
> [Citations omitted]

[118] It is reasonable to presume that if a decision-maker considers that a lawyer's conduct during a case deserves to be drawn to the attention of the Complaints Service, the decision-maker will take that step.

[119] It would then become a matter of the Committee deciding whether and how to proceed with that referral.

[120] However, where the decision-maker has taken an active role in the case before them (as was the case in the 2012 rates hearing), including exercising their right to question witnesses, from a disciplinary perspective the assumption that one of the lawyers has committed a conduct breach through their cross-examination, in full view of the decision-maker, diminishes significantly.

[121] Furthermore, any concerns by one party that the other side's lawyer's conduct has derailed the proceedings and impugned the eventual outcome, must first be dealt with by the conventional appeal (or related) process.

[122] There really is no room for disciplinary inquiry whilst that process is taking place.

[123] I would go further and suggest that even in the absence of an appeal or related process which includes grounds of lawyer conduct, disciplinary bodies should be slow to inquire into a lawyer's conduct during a case, when there has been no formal referral to the Complaints Service by the judge or decision-maker.

[124] I regard it as very problematic for a Standards Committee to assume the role of arbiter of a lawyer's cross-examination in a case that has been presided over by a judicial officer, when that judicial officer has not taken steps themselves to formally draw the lawyer's conduct to the attention of the Complaints Service.

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[25] GE Dal Pont *Lawyers' Professional Responsibility* (5th ed, Thomson Reuters, Sydney, 2010) p 773 at para [24.10]. The reference in the passage cited to "misconduct" is almost certainly a generic reference to a conduct lapse, rather than to the New Zealand definition of "misconduct" in s 7 of the Act.

[125] Doing so, in my view, amounts to a de facto review of a judicial officer's management of a case. This is hardly the role of a lawyers' disciplinary body.

[126] I am not to be taken as saying that a disciplinary inquiry could never be contemplated in a complaint about a lawyer's cross-examination during proceedings in another jurisdiction. But I would venture to suggest that those circumstances will be infrequent and are likely to arise when the decision-maker (or an appellate jurisdiction) has referred the conduct to the Complaints Service.

[127] Even if it could be said that the judicial officer could, or even should, have taken some steps to rein-in a lawyer's cross-examination, very careful consideration should still be given as to whether it is appropriate to assume some after-the-event oversight of another judicial officer's proceedings and express an opinion about something the decision-maker did not.

[128] The lawyers' disciplinary processes must avoid being substitutes for proper appeal procedures, which should be the first port of call for a party to proceedings who has concerns that the outcome of those proceedings has been tainted by a lawyer's conduct.

[129] Where, as here, the proceedings in question have been presided over by an engaged and experienced-decision-maker (sitting with two valuers), there must be considerable deference to those on-the-spot decision-makers' assessments of what took place before them. Their assessments about the propriety of a particular event during those proceedings is based on an overall involvement in and understanding of the case as a whole.

[130] In my view there was no basis for the Committee to consider and assess any aspect of Mr TZ's cross-examination of the four witnesses identified by Mr FK in his complaint.

[131] For completion, I consider that the same principles apply to Mr FK's complaints about Mr TZ's conduct towards Messrs RX and CL during the hearing.

[132] A presiding judicial officer is in the best and appropriate position to determine whether what one lawyer has said to another during the course of the hearing has crossed a professional line. It can reasonably be expected that judicial officers will not be slow in calling-out conduct which crosses that line and, if necessary, refer the conduct to the Complaints Service.

[133] Because I have concluded that Mr FK's complaints ought never to have been the subject of a Committee inquiry, it follows that it is not appropriate for me to independently assess the complaints and form a view about them.

Significance of the judicial review judgment

[134] My decision deals with the Standards Committee's determination in relation to which, at the time it was delivered, the various appeals and the judicial review in connection with the several LVT hearings (including the 2012 rates hearing) had only just been heard.[26]

[135] Accordingly, the only material before the Committee was the transcript of the 2012 rates hearing before the LVT, together with the complaint and response materials which included some interlocutory rulings in connection with the appeals and judicial review.

[136] My decision essentially boils down to the proposition that on the basis of that material, it was wrong for the Committee to embark upon inquiry into Mr TZ's conduct during the 2012 rates hearing.

[137] It is often said both by Standards Committees and Review Officers, in deciding to take no further action on a complaint about a lawyer's conduct during the course of the hearing, that if there is subsequent judicial criticism of that lawyer's conduct during the hearing – such as in an appeal (or similar) – then it is open for the complainant to make a fresh complaint on the basis of that criticism.

[138] The High Court's judicial review judgement is an example of subsequent proceedings in which criticism of a lawyer could be the basis for a fresh complaint.

[139] Alternatively, as Review Officer I could treat the judgment as "fresh evidence" and decide whether to accept it on that basis, and consider it together with all the other material before me.

[140] I consider that it would be an artifice to ignore the judgment.

[141] Further, I do not consider it necessary to invite the parties to make submissions about its effect on the conduct issues at large in Mr FK's complaint and review.

[142] I now explain why.

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[26] The judicial review proceedings were heard during June and September 2021.

[143] I have read that judgement, with considerable care. Its focus is, of course, on the way in which the LVT (in particular the presiding judge) managed the 2012 rates hearing.

[144] The High Court found that "the [LVT's] conduct of the [2012 rates hearing] and its interim … decision disclosed apparent bias. As a result, the [2012 rates hearing] was unfair."[27]

[145] Although the Court set aside parts of the LVT's interim decision in the 2012 rates hearing, its substantive decision was not set aside.

[146] The Court dealt with the challenges to the judge's management of the 2012 rates hearing, from [39] – [126] of its judgement. The parties to this review application will, by now, be very familiar with those passages.

[147] For the purposes of disciplinary inquiry in connection with Mr TZ's conduct during the 2012 rates hearing, I observe that the High Court made no critical comments about his cross-examination of any of the witnesses, with one exception which I will deal with further below.

[148] It is clear that the High Court conducted a meticulous analysis of significant passages of the evidence given before the LVT, and was – it must be observed – highly critical of the judge's involvement as reflected in those passages.

[149] It would have been perfectly reasonable for the High Court to have also expressed a view about Mr TZ's cross-examination, as that was generally the trigger for much of the criticised judicial intervention.

[150] By the lack of any criticism of Mr TZ's conduct, I conclude that the High Court did not consider that his conduct warranted judicial comment or criticism, much less any formal referral to the Complaints Service.

[151] The one exception concerned a part of Mr TZ's cross-examination of Mr FK in which "[Mr TZ] compared Mr FK with [Redacted], by suggesting Mr FK adopted the [Redacted] approach in answering questions." The Court referred to this as an "unfortunate analogy."[28]

[152] The Court referred to s85 EA, and the requirement for a judge to disallow unfair or improper questions and said: [29]

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[27] At [200].
[28] At [85].
[29] At [87].

> [T]he Judge did not curb [Mr TZ's] criticism of [Mr FK], despite [Mr FK] describing it as "derogatory". Nor did the Judge exercise his discretion to disallow such questions of the witness for being unfair or improper. The omission to do so leaves an impression that the [LVT] condoned the imputation that Mr FK legitimised false statements, more so than [Redacted].

[153] I do not read those comments as suggesting that Mr TZ's cross-examination on that issue reached the level whereby disciplinary inquiry was justified. The Court appeared only to indicate that this was one of those occasions on which a Judge should perhaps have disallowed a question as infringing s 85 EA.

[154] It would be absurd to suggest that every time a judge disallows (or ought to have disallowed) a question under that provision, disciplinary inquiry via the Complaints Service should follow. As I have been at pains to express elsewhere in this decision, the overall management of, including assessments of counsel's conduct during, a hearing resides solely with the presiding judicial officer.

[155] Nevertheless, where it has been found by an appellate body that a judicial officer ought to have disallowed counsel's question or questions as infringing s 85 EA, it is still open for the appellate body to make its own disciplinary referral about counsel's conduct, if appropriate.

[156] I do not consider that the High Court's judgement in the judicial review proceedings gives indication that any of Mr TZ's cross-examination, including the reference to [Redacted] and a comparison with Mr FK, was deserving of disciplinary inquiry.

[157] To embark upon such an inquiry in the absence of either severe criticism by a judge or a separate judge-triggered complaint, would be akin to substituting a judge's first-hand views with a Committee's impressions.

Decision

[158] Pursuant to s 211(1)(a) of the Act, the decision of the Committee is:

(a) Reversed as to the finding of unsatisfactory conduct against Mr TZ. The censure, fine and costs orders fall away.

(b) Confirmed as to the decision to take no further action on the complaints about Mr TZ's cross-examination of Messrs PD, WZ and FK though on the basis that any further action is inappropriate.

(c) Confirmed as to the decision to take no further action on the complaints about Mr TZ's conduct towards Messrs RX and CL during the 2021 rates hearing though on the basis that any further action is inappropriate.

Anonymised publication

[159] Pursuant to s 206(4) of the Lawyers and Conveyancers Act 2006, I direct that this decision may be published but without any details that may directly or indirectly identify the parties, or any other person named in this decision.

DATED this 26TH day of JULY 2022

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R Hesketh
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 TZ as the Applicant and Respondent
Mr FK as the Respondent and Applicant
Ms JS and Mr DM as counsel for Mr TZ
Mr YV and Mr OX as counsel for Mr FK
[AREA] Standards Committee
New Zealand Law Society