

CONCERNING

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

AND

CONCERNING

a determination of the [City] Standards Committee [X] that the matter be considered by the Disciplinary Tribunal

BETWEEN

BW

Applicant

AND

**[City] STANDARDS
COMMITTEE [X] (own motion
investigation)**

Respondent

DECISION

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

Introduction

[1] Mr BW has applied for a review of a determination by the [City] Standards Committee [X] pursuant to s 152(a)¹ of the Lawyers and Conveyancers Act 2006 (the Act) that the “matter and any and all issues involved in the matter be considered by the New Zealand Disciplinary Tribunal”.²

Background

[2] Mr BW was one of three directors of the incorporated firm [ABC Limited] (the firm). He was authorised to operate the firm’s trust account. Concerns were identified with the firm’s trust account, and a review was carried out by the New Zealand Law Society (NZLS) Inspectorate (the Inspectorate). The Inspector produced a Trust

¹ The reference to s 152(a) is an error. The correct section reference is s 152(2)(a).

² The reference to "the New Zealand Disciplinary Tribunal" is an error. The Disciplinary Tribunal referred to in s 152(2)(a) is defined in the Act as the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

Account Review Report³ (the report) in which he identified what he described as “significant issues”⁴ regarding payments made from the trust account to a company associated with Mr BW.

Trust Account Review Report

[3] The report says:

Payments to [EFG] Limited

Payments to [EFG] Limited (a company associated with Mr BW) appear to deprive his employer of income, i.e. no bill and no trust ledger balance left, whilst putting money into the BW family coffers and avoiding the Official Assignee. Mr BW was adjudicated bankrupt on 20 September 2012 and the company was incorporated fourteen days after on 4 October 2012. When I asked Mr BW during my review of some of the related files – who is [EFG] – he was vague and not forthcoming. The files don’t explain why the payments were made. It was only after a company search that Mr BW’s association with the company was revealed. Further enquiry will be necessary to establish the full extent of payments to [EFG]. The quickest way may be for the firm to order bank traces on payments between the trust account and the company’s account from the date of Mr BW’s bankruptcy. The firm has already undertaken work in this regard and has discovered a lot more transactions of this nature. The results of this work will be available in due course.

The review identified seven such payments between 8 January 2014 and 19 March 2014 totalling \$9,929.71.

Payments appear to have been made without documentary support. Similarly statements do not appear to have been issued to clients in a timely manner. Procedures/controls around these matters should be reviewed to ensure that requests for payment are properly supported, patterns of payments are identified and questioned and statements are issued to clients promptly upon completion of the matter.

[4] The report says that the “review was limited in its scope and was risk-based. It was a short inspection that was mainly focused on month-end balancing procedures”,⁵ and that the Inspector believed he had identified:⁶

Significant non-compliance: we have concluded our review and we confirm that we have found significant areas of non-compliance with the Lawyers and Conveyancers Act 2006 or the relevant Regulations or Rules listed in section 6.2 of this report. These areas of non-compliance are detailed in section 3 of this report.

[5] Trust account reconciliation and supporting documentation, with general trust accounts and specific client documents were identified as having been considered.

Referral to the Standards Committee

³ Trust Account Review Report, [ABC] Limited, 6 May 2014.

⁴ At [3].

⁵ At [2.2].

⁶ At [2.1].

[6] On 20 May 2014 the NZLS Inspector advised NZLS's Auckland Lawyers Complaints Service (LCS) that he had identified issues that "appear to involve dishonesty on the part of Mr BW, employee solicitor", which the Inspector believed should be referred to a Standards Committee for consideration. He also said that the firm had identified a number of "like transactions" after making further enquiry, and that he understood Mr BW had "acknowledged the impropriety of these transactions". The Inspectorate forwarded a copy of the report to the LCS on 20 May 2014.

Standards Committee Process

[7] The LCS emailed the report to members of the Standards Committee,⁷ with an agenda note dated 6 June 2014, and a request that the Committee give urgent consideration to commencing an own-motion investigation, based on the findings in the report, and further information contained in spreadsheets provided by one of Mr BW's former co-directors in the firm, Mr KL.

[8] Mr KL said the spreadsheets he had created represented data from the firm's trust account that showed a pattern of behaviour by Mr BW in connection with unauthorised trust account transactions over several years. He alleged Mr BW had mismanaged client and firm funds totalling over \$300,000.

Own Motion Inquiry – s 130(c)

[9] The Committee considered the report and spreadsheets, and decided to commence an own-motion inquiry pursuant to s 130(c) of the Act.⁸

[10] The LCS notified Mr BW of the Committee's own-motion investigation by email on 12 June 2014.

[11] Mr KL provided further information on 27 June 2014, again in the form of spreadsheets which he says represent data from the firm's trust account, documenting transactions by Mr BW on various client files during the years ended 2009 to 2014.

[12] LCS sent that further information on to Mr BW on 9 July 2014, with an indication that matters of concern to the Committee in the own-motion investigation included:

- Dishonest payments from the [ABC] trust account to entities which you have/had an association (as detailed in the schedules provided by [ABC] and the NZLS Inspectorate report);
- Diverting fees payable to [ABC] to entities with which you have/had an association (as detailed in the schedules provided by [ABC]); and
- Unauthorised borrowing from clients (as detailed in the schedules provided by [ABC]).

⁷ Email LCS to W, X, Y and Z (lay member) (6 June 2014).

⁸ Emails Committee Members to LCS (6 June 2014 and 9 June 2014).

[13] Mr BW was invited to cooperate in the investigation, and to correspond with the Committee in writing.

[14] Mr BW wrote to the Committee on 22 July 2014, noting the matters of concern raised and saying:

I admit the dishonest payments, the diversion of fees and the unauthorised borrowings, but I do clarify those borrowings in Paragraphs 4 and 5 below

The borrowings from [various individuals, trusts and companies]... have been repaid...

Though not strictly done by the rules, this borrowing was "authorised" with the clients and I have been paying interest monthly for some years. I continued to act for [client] in 2012/13.

All other items in the spreadsheet of 27 June 2014 are diverted fees, not loans...

In respect of any borrowings in the two spreadsheets, such clients have been repaid without loss...

The bulk of others would be diverted fees where the aggrieved party is [ABC]/NP/KL.

I have indicated to NP and KL that once I am out of bankruptcy I will consider paying them back for some or all of the diverted fees.

Those small amounts highlighted as loans in Mr KL's spreadsheet of 19 June 2014 would indicate that the clients would not be paying a fee in the clearance of the loans, as stated by Mr KL in his spreadsheet. Such amounts would therefore be potential diverted fees...

[15] Mr BW then summarised his personal and professional history, and referred to continuing improprieties in his professional conduct since late 2008/early 2009. He said he did not seek to excuse what he describes as his misconduct, but sought to explain the background, including his personal circumstances and health issues. He refers to declined indemnity insurance claims, judgments against him, threatened and actual bankruptcy with a declaration being made on 20 December 2012. He expressed the view that responsibility for claims made against him should have been borne by all three partners, not just him, although he also says that once out of bankruptcy he hopes to repay some or all of the diverted fees back to his co-directors, and finally that:

As regards the unauthorised borrowings, [t]hat should not have occurred given my years of practice and also given my years as trust account supervisor. Nevertheless all such borrowings (Paragraphs 4 and 5 above) have been repaid to those clients, without loss.

[16] The Committee considered the matter on 19 August 2014, and issued a notice of hearing dated 28 August 2014, sending copies to Mr BW and Mr KL offering both the opportunity to make submissions to the Committee. The notice of hearing referred to the three areas of concern identified to Mr BW on 9 July 2014, with the second point modified to reflect what the Committee described as the misappropriation of fees payable to the firm by diversion to entities related to him. The notice of hearing

referred to the possibility that the Committee may determine the matter by a referral to the Tribunal, or make orders under s 156 of the Act.

[17] The LCS then sought to clarify the evidence contained in the spreadsheets Mr KL had provided, with assistance from NZLS' Financial Assurance Manager (FAM).⁹

[18] Mr BW provided further submissions on 29 September 2014 (dated 26 September 2014), attaching his earlier letter of 22 July 2014, and reiterated:

...that the unauthorised borrowings have been repaid in full to clients without loss. Such borrowings should not have occurred...

As to diverted fees, such that occurred before 20 September 2012 (date of bankruptcy) were while I was still a partner/director/shareholder of [ABC]/[ABC] Limited.

Such diverted fees that occurred after 20th September 2012 (date of bankruptcy) were while I was employed as a solicitor at [ABC], and although no longer a director of [ABC] Limited, nevertheless I still "held" shares in [ABC] Limited albeit those shares are under the control of the Official Assignee.

[19] Under cover of an email dated 2 October 2014,¹⁰ the FAM produced a spreadsheet which he says summarises the information Mr KL provided dated 27 June 2014, regarding transactions on various client files between 2009 and 2014 (the FAM summary). The FAM summary indicated that at least \$139,687.14 of client money had been stolen, at least \$464,683.18 of client money had been taken by way of "authorised loans", and that it would be necessary to ascertain whether those amounts had been repaid. The FAM said he had identified indications of offending that appeared to "have been continuous throughout the period, peaking in 2013", and that "it is quite likely that other moneys have been misappropriated from clients but remain undiscovered".

[20] The FAM summary was provided to Mr BW (but not Mr KL), and he was given the opportunity to comment before the Committee met to consider the matter.¹¹

Hearing and Determination

[21] Mr KL made no comments, and no further comments were received from Mr BW before the Committee conducted a hearing on the papers on 22 October 2014. Having inquired into the matter, and conducted a hearing on the papers, the Committee recorded its determination to refer any and all issues involved in the matter to the Tribunal. The determination contained no discussion or reasons. The Committee also resolved to refer the matter to the Police pursuant to the provisions of s 188(2)(e) of the Act.

⁹ Email LCS to NZLS (29 September 2014).

¹⁰ Email NZLS to LCS (2 October 2014).

¹¹ Letter LCS to BW (7 October 2014).

Standards Committee Determination – Reasons

[22] The issue of a determination which contained no discussion or reasons accords with the provisions of s 158 of the Act, and the judgment of the Court of Appeal in *Orlov v NZLS*.¹²

[23] The dilemma the absence of discussion or reasons presents on review has been referred to in other decisions from this Office,¹³ which is required by s 213(2) of the Act to provide reasons for its decisions.

[24] In *Deliu v Hong*¹⁴ the High Court held that a Review Officer must reach his or her own view of the evidence before him or her,¹⁵ although the High Court recognised that “[i]t was particularly problematic when the Standards Committee did not provide full reason for its decision, so that the Review Officer had to attempt to deduce those reasons”.¹⁶

[25] Although the Committee has provided no reasons for its determination, in this case in addition to the Committee’s file documenting its own motion inquiry, NZLS has provided this Office with a copy of the prosecution proceedings it has filed in the Disciplinary Tribunal.¹⁷ The prosecution proceedings include two charges against Mr BW, and the evidence relied on to prove the charges. I will return to those later.

Review Application

[26] Mr BW objects to the referral to the Tribunal. In his application for review, he submits that the Standards Committee should deal with the matter and impose appropriate penalties, which he proposes should be censure, a fine or “suspension for a time”.

[27] Mr BW cites the risk of the Tribunal imposing harsher penalties on him, and the undesirability of publication, which he considers the firm would be keen to avoid. He refers to and repeats the submissions he put before the Committee.¹⁸

[28] Mr BW gives no indication that he intends to contest the allegations that have been made against him in the course of the Committee’s own motion investigation. However, he refers to events in 2009 when his “former partners indicated that [he] was personally liable for” certain actions, and that the liabilities were not those of the firm.

¹² *Orlov v NZLS* [2013] NZCA 230, [2013] 3 NZLR 562 at [54](f).

¹³ AE – An application for review of a prosecutorial decision LCRO 93/2013 and 338/2013.

¹⁴ *Deliu v Hong* [2012] NZHC 158 at [43].

¹⁵ At [41].

¹⁶ At [42].

¹⁷ Letter and attachments NZLS to LCRO (10 March 2015).

¹⁸ Letter BW to NZLS (22 July 2014).

He says that his then partners required [him] to repay...loans, if necessary by getting [his] mother to sell her commercial property to repay them.

[29] Mr BW says he formed the view that the liability should have been a firm liability, not a personal one. He describes further “indignation with [his] former partners” in 2014, due to his removal as a director of trustee companies, conflict over dealings with the firm’s shares and securities registered under the Personal Property Securities Register. He describes what he considers to be his need to protect himself from being “hoodwinked by [his] former partners”.

NZLS Prosecution Proceedings

Charges

[30] As mentioned above, NZLS says it has laid two in the Disciplinary Tribunal both alleging misconduct¹⁹ by Mr BW as a partner in an incorporated law firm, and relating to breaches of the regulations that govern lawyers’ operation of their trust accounts.

NZLS Evidence

[31] Attached to the charges are copies of two affidavits containing evidence NZLS relies on to prove the charges.

[32] One affidavit is by Mr KL,²⁰ Mr BW’s co-director, and attaches various documents in support of the assertions made in his evidence. Mr KL deposes that he interrogated the firm’s records after errors attributed to Mr BW were identified in the course of an audit of the firm’s trust account. Mr KL says he identified other trust account anomalies involving diversion of client monies to companies associated with Mr BW. He says he and his co-director, Mr NP, confronted Mr BW with his findings, and that Mr BW made admissions of conduct which, if proven, constitute serious breaches of the Act and regulations made under it.

[33] The other affidavit is by MG, and was sworn on 6 March 2015. Mr MG deposes to being the Regional Team Leader for LCS. He attaches as exhibits to his affidavit a copy of the report, a letter from NZLS to Mr BW notifying him of the Committee’s decision to refer matters to the Tribunal, and a copy of the decision.

Decision on the papers

[34] This review has been conducted in the absence of the parties, with their consent, pursuant to s 206(2) of the Act, on the basis of the information, records, reports and documents that are available on review.

¹⁹ Pursuant to Lawyers and Conveyancers Act 2006, ss 7(1)(a)(i) and 7(1)(a)(ii).

²⁰ Affidavit of Mr KL sworn 5 March 2015.

Role of the Legal Complaints Review Officer

[35] The role of the Legal Complaints Review Officer (LCRO) on review is to reach her own view of the evidence before her. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting her own judgement for that of the Standards Committee without good reason.²¹

[36] It falls to this Office to determine whether there are sufficient grounds to justify the matter being referred to the Disciplinary Tribunal,²² bearing in mind “a decision under s 152(2)(a) does not determine the outcome of the complaint. It only determines which body should be seized of it”.²³

[37] Reviews by this Office are to be “conducted with as little formality and technicality and as much expedition as is consistent with the requirements of the Act, proper consideration of the review and the rules of natural justice”.²⁴

[38] In fulfilling the role required of it, this Office has proceeded with caution when considering whether or not to interfere with a decision by a Standards Committee to refer a matter to the Tribunal. Previous decisions from this Office have discussed the principles to which a Review Officer has regard when reviewing decisions to prosecute, and consideration has been given to principles in various court decisions where a decision to prosecute might be revisited. These include situations in which a decision to prosecute was:²⁵

- a. significantly influenced by irrelevant considerations;
- b. exercised for collateral purposes unrelated to the objectives of the statute in question (and therefore an abuse of process);
- c. exercised in a discriminatory manner;
- d. exercised capriciously, in bad faith, or with malice.

[39] The Court of Appeal has expressed the view that:²⁶

Having regard to the legislative purposes of consumer protection and the maintenance of public confidence in the provision of legal services, it is... important that the Tribunal be able to determine some complaints even though the likely sanction will not involve striking off or suspension. The complaints may for example involve complex issues of law or fact or be likely to result in a significant precedent.

²¹ Above n 14.

²² RB v [Area] Standards Committee X LCRO 092/2014.

²³ Above n 12 at [50].

²⁴ At [23].

²⁵ Above n 13 at [31].

²⁶ Above n 12 at [54(h)].

[40] Although there is no threshold test to be met before a matter can be referred to the Tribunal,²⁷ logically, if the conduct in question was manifestly acceptable, a decision to prosecute should be set aside.

[41] The Court of Appeal considered it “unlikely that Parliament intended only the cases that might warrant strike or suspension should come before it”.²⁸ The Court recognised the importance of the Tribunal getting “the big picture”,²⁹ and the “unfortunate practical consequence of fragmenting the disciplinary process in cases involving multiple complaints of varying degrees of seriousness against the same practitioner”.³⁰

[42] Consideration of decisions to prosecute should not be.³¹

...unduly fettered or constrained by rigid adherence to a set of specific criteria. It is important to keep in mind the nature of the LCRO jurisdiction and in particular the ability of a Review Officer to consider all matters relevant to the complaint, and their capacity to bring independent judgement to each case.

[43] This Office is not in a position to determine the sufficiency of the evidence or the strength of the complaint. Those are matters for the Tribunal.³²

[44] The Court of Appeal has also identified a number of differences between Standards Committees and the Tribunal, including:³³

Unlike a Standards Committee, the Tribunal must hold its hearings in public and parties are entitled to be heard in person or through counsel. Also unlike a Standards Committee, the Tribunal may make a finding of misconduct as well as a finding of unsatisfactory conduct. The Standards Committees’ jurisdiction does not extend to making findings of misconduct. The Tribunal also has a wider range of sanctions available to it in the event of a finding of misconduct or unsatisfactory conduct, including the powers of suspension and strike off.

[45] I have taken all those considerations into account in formulating the decision that follows. This decision confirms the decision of the Standards Committee subject to two modifications to correct what appear to be minor or typographical errors in the decision.

Discussion

[46] Mr BW’s review application is essentially a request that this Office return the Committee’s decision to it, with a direction to impose orders under s 156(1) of the Act.

²⁷ At [53] – [54].

²⁸ At [54(g)].

²⁹ At [54(h)].

³⁰ At [54(i)].

³¹ Above n 22 at [27].

³² Above n 12 at [71].

³³ At [20].

He is concerned that the Tribunal may impose a disproportionate penalty, and may publish its decision, identifying him and the firm.

[47] Although the Standards Committee has power to censure and impose a fine, it has no power to suspend Mr BW, which is one of his three suggestions.

[48] The Tribunal may dismiss any charge laid before it that is not made out, or to make findings of unsatisfactory conduct and misconduct.

[49] If one or more of the charges is made out against Mr BW, professional disciplinary consequences may follow that are beyond the scope of the orders available to a Standards Committee or this Office.

[50] The Tribunal may make the same orders that are available to a Standards Committee and this Office under s 156 of the Act, as well as a range of other orders including suspension and striking off.³⁴

[51] Mr BW's concern that the Tribunal may impose a penalty against him that is disproportionate is met by his ability to challenge the Tribunal's decision to a higher authority.

[52] Mr BW admitted conduct alleged against him in the course of the own motion inquiry to the Standards Committee.

[53] The Committee was not in a position to determine the full extent of Mr BW's conduct when it made the decision.

[54] Inquiries at the date of the decision disclose conduct that is alleged to have occurred over several years.

[55] The conduct on which the Committee based its decision relates to what appear to be multiple breaches of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 and the Lawyers and Conveyancers (Lawyers: Conduct and Client Care) Rules 2008 in relation to the firm's trust account, and mishandling the firm's money.

[56] Although his admissions to the Standards Committee may present something of an impediment, it is open to Mr BW to contest evidence before the Tribunal.

[57] As directors of the firm, Mr BW, Mr KL and Mr NP are all professionally responsible for the proper administration of the firm's trust account. The deficiencies identified in the report may carry potential exposure for all three of them.

[58] There is potential for evidential conflict between Mr BW and his co-directors.

³⁴ Lawyers and Conveyancers Act 2006, s 242.

[59] Interrogation of evidence relating to the firm's trust account would require expert evidence. A contested hearing may involve professional and lay witnesses.

[60] Any cross examination of Mr KL and Mr MG could not properly be dealt with by a Standards Committee, or in the inquisitorial framework of a review process.

[61] Any questions of shared responsibility can be identified in the course of a Tribunal hearing, and, if necessary addressed.

[62] Any privacy concerns raised by Mr BW or the firm can be considered by the Tribunal in the context of name suppression orders.

[63] The conduct alleged relates directly to the Act's purposes of maintaining public confidence in the provision of legal services, and protecting consumers of legal services.

[64] Section 4 of the Act sets out the fundamental obligations of lawyers, which include the obligation to act independently in providing regulated services to clients. The conduct alleged indicates the interests of the firm's clients have been relegated to second place.

[65] The conduct alleged is inconsistent with fiduciary duties and duties of care that lawyers owe to their clients, and is antithetical to the protection of client interests.

[66] There is no evidence of discrimination by the Committee. The information provided by Mr KL, and Mr BW's admissions, to the Committee support the proposition that the discretion to prosecute was not exercised in a manner that was discriminatory towards Mr BW.

[67] There is no evidence of caprice, bad faith or malice by the Committee.

[68] Any prejudice to Mr BW in cost, delay, anxiety or otherwise is outweighed by the public interest in having the matter and any related issues considered and determined by the Tribunal. Mr BW is entitled to be heard, through counsel if he so chooses, before any finding is made against him. The full range of disciplinary sanctions are available to the Tribunal.

[69] Given the temporal scope and potential complexity of the evidence, it is appropriate that the Tribunal "gets the big picture".³⁵

[70] I do not consider this to be a "petty or trivial" case,³⁶ such that it should not be referred to the Tribunal.

³⁵ Above n 12, at [54(h)].

³⁶ At [54(d)].

[71] Overall, I am satisfied that the Committee had sufficient grounds to refer the matter and any and all issues involved in the matter for consideration by the Tribunal. The Committee's decision is therefore confirmed subject to two amendments to correct minor or typographical errors. The determination to refer to the Tribunal was recorded as having been made pursuant to s 152(a) of the Act. The correct section reference for a referral to the Disciplinary Tribunal is s 152(2)(a).

Costs

[72] The LCRO has discretion to order costs pursuant to s 210 of the Act, and the LCRO's Costs Orders Guidelines (the guidelines). Mr BW consented to this decision being made on the papers. He is in bankruptcy. If the charges are made out against him before the Tribunal, he is likely to face a costs order in that jurisdiction. In the circumstances, I do not consider it appropriate to order Mr BW to pay costs on review.

Outcome

[73] Pursuant to s 211(a) of the Lawyers and Conveyancers Act 2006 the determination that the matter and any and all issues involved in the matter be considered by the Disciplinary Tribunal pursuant to s 152(2)(a) of the of the Lawyers and Conveyancers Act 2006 is confirmed.

DATED this 8th day of April 2015

D Thresher
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr BW as the Applicant
 Mr KL as a related person as per section 213
 Mr NP as a related person as per section 213
 [City] Standards Committee [X]
 The New Zealand Law Society