

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of the Nelson Standards Committee

**BETWEEN**

**MR JR**

Applicant

**AND**

**QL**

Respondent

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

**DECISION**

**Background**

[1] Mr JR (the Applicant) sought a review of a decision of a Standards Committee which determined to prosecute him before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal. The matters giving rise to that decision arose from a complaint from QK and QJ, who were long standing friends of the Practitioner, and for whom he acted in relation to the purchase, and subsequent sale, of a property.

[2] The Practitioner made a personal advance of money to Messrs QK and QJ for the purchase and development of the property. The Practitioner repaid this money back to himself on settlement. The anticipated profit was not realised. The complainants subsequently filed complaints with the New Zealand Law Society alleging that the Practitioner's participation was on the basis of a joint venture/partnership arrangement and questioned the Practitioner's repayment of money to himself. The Practitioner contended that the arrangement was simply a loan which was repayable.

[3] The issues examined by the Committee were whether the Practitioner had advised the clients to seek independent legal advice, whether the Practitioner had deducted funds without the authority of the clients, whether the Practitioner had failed to distinguish between his professional position and his own (personal or business) interests, and finally whether the Practitioner's conduct amounted to misconduct.

[4] When the Standards Committee notified the complaint to the Practitioner, it received a response from the Practitioner's Counsel stating: -

I am instructed that, while he does not accept the substance of the complaint made, as (the Practitioner) has relinquished his practicing certificate and retired from legal practice he has no interest in engaging in further process relating to it. I therefore have no further instructions in this matter.

[5] The Standards Committee wrote to the Practitioner confirming that his Counsel's advice was that he did not intend to respond to the complaint. The Committee informed the Practitioner that notwithstanding the complaint would be dealt with in the normal way at the next meeting of the Committee and a decision made as to whether to enquire in to the complaint or not.

[6] A letter sent the following month by the Committee to the Practitioner informed him of the Committee's resolve to enquire into the complaint and set the matter down for a hearing, attaching a notice of hearing and inviting his written submissions. The Committee asked the Practitioner to forward his file which the Practitioner did.

[7] Nothing further was heard from the Practitioner before the Standards Committee issued its decision. The background to the complaint was set out in some detail, and the issues before the Committee were identified. The Committee noted that in the absence of any substantive response from the Practitioner, the Committee was left to consider the complaint only on the basis of the material before it (this was the complaint, the Practitioner's file and information provided by the complainants). The Committee noted there was no correspondence which gave history to the party's arrangements at the time of the purchase or during the development phase. The Committee added that there was little on the file providing any detail about contributions or arrangements between the parties, and no correspondence or discussion between the Practitioner and the complainants prior to the funds being deducted.

[8] The concerns of the Committee were whether the Practitioner had breached his professional obligation as set out in Chapters 3 (3.4 (a) and 3.5), 5 (5.4.1, 5.4.2, 5.4.3, 5.4.4), 6 (6.1) and 11 (11.1) of the Lawyers Conduct and Client Care Rules 2008. The

Committee was of the view that each aspect of the complaint, if found proven, was capable of reaching a threshold of misconduct or alternatively, given that the issues were so closely interwoven, then taken together these issues were capable of reaching such a threshold as proven. On this basis, the Committee determined that the matter should be referred for prosecution.

### **Review Application**

[9] The Practitioner's review application rested on a number of grounds. He referred to a very difficult period which he had recently experienced, which affected his ability to respond to the complaint, so it had been considered by the Standards Committee with no more than his simple denial of it. He explained he was no longer a practising lawyer, and that it ought to have been clear from the file that there was no joint venture or partnership, and no conflicts of interest or need for independent advice. The Practitioner referred to his file as evidence of no wrong doing.

[10] A review hearing was held, where the Practitioner attended with the support of his Counsel, JS. Counsel's submissions were largely advanced on two fronts. The first explained the extremely difficult personal circumstances that the Practitioner had endured in recent times, which accounted for his inability to engage with the Standards Committee in its enquiry.

[11] The second ground advanced was based on the cost of a prosecution which, submitted the Practitioner, was unjustified in the circumstances. He particularly referred to the Committee's obligation to promote mediation, conciliation or negotiation as the means of resolving a dispute, none of which had been offered to the Practitioner in this case.

[12] Counsel stated that it was known to the Standards Committee that the Practitioner had surrendered his practising certificate and accepted that he was not suited to the practice of law. Finally Counsel submitted that a prosecution did not assist in protecting the public because the Practitioner was no longer practising. He questioned whether the significant costs associated with a prosecution could be justified in all of these circumstances.

[13] Counsel submitted that the Practitioner was willing to be reprimanded, and to consent to the removal of his name from the Roll, all of which could be achieved without further cost to anyone.

[14] Counsel did acknowledge that the Practitioner's failure to have responded to the Standards Committee was a flaw but submitted that he was nevertheless entitled to make the above submissions. He particularly emphasised that the purposes of the statute being for the protection of the public, and in the circumstances (including the Practitioner's willingness to be removed from the Roll) he could see no useful public interest being served by proceeding to prosecution.

## **Considerations**

### *Practitioner's circumstances*

[15] I accept the explanation of the Practitioner that he found himself in exceedingly difficult personal circumstances at the time which affected his ability to answer the complaints. However, he did not inform the Committee of his difficulties or seek an extension of time to respond, as he might have done. There is nothing on the file to show that the Committee was aware of any reasons why the Practitioner did not respond to the complaints, having simply been informed that the Practitioner was no longer in practice and had no interest in engaging further with the process.

[16] A Standards Committee is not prevented from undertaking a disciplinary enquiry for reason of a lawyer surrendering his or her practising certificate. Nor is the cost of a prosecution a proper consideration where such a step is justified.

[17] There can be no criticism of the Committee for not exploring mediation, as was submitted for the Practitioner. The Committee was faced with allegations of a potentially serious nature, and with no explanation from the Practitioner, the Committee was unable to resolve the conflicts between the complaint and the Practitioner's denial, solely on the basis of the Practitioner's file.

### *Scope of review*

[18] Previous decisions of this office have noted that it is well established that the ground for review of a prosecutorial decision is limited and that only in exceptional cases will such a decision be reversed on review. Previous decisions by this office<sup>1</sup> have outlined those situations as where the decision to prosecute was:

- 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),

---

<sup>1</sup> LCRO 133/09 *Poole v Yorkshire*.

- c) Exercised in a discriminatory manner,
- d) Exercised propitiously, in bad faith or with malice.

[19] It is clear that all of the above grounds relate to one or other defect in the process by a decision maker.

[20] With reference to the above, if the conduct was manifestly acceptable then this might be evidence of some improper motivation in the bringing of prosecution. However, in this case it is quite clearly arguable that the conduct complained of fell short of professional standards.

[21] In a recent High Court decision, *Orlov v New Zealand Law Society and Ors* Heath, J. referred to a threshold that needed to be met before a referral should be made to the Disciplinary Tribunal.<sup>2</sup> His Honour imported into the Lawyers and Conveyancers Act 2006 the threshold test that applied under the former Law Practitioners Act 1982, concluding that the conduct complained of needed to be of 'sufficient seriousness' to warrant a referral. His Honour referred to a significant threshold being needed, indicating that the likely penalty of suspension or striking off would satisfy the test. Overall it was made clear that conduct matters that were capable of being determined adequately at Standards Committee level should not go to the Tribunal.

[22] The *Orlov* case does not appear to have imposed a wholly rigid framework for prosecutorial decisions but makes clear that only serious professional matters should be referred, and that it is not open to a Standards Committee, when making a referral to the Tribunal, to combine serious conduct matters which could lead to a finding of 'misconduct', with other less serious matters that fall within the parameters of 'unsatisfactory conduct'.

[23] The matter before the Court in that case did not require his Honour to consider whether there might be other reasons for a referral, and it is useful to recognise that there may be matters involving conduct issues of some seriousness and where the conflicts in evidence make the formal court-like procedures of the Tribunal a more appropriate forum for disciplinary enquiry.

[24] I also noted that, regarding the extent of reasons that should be provided for a prosecutorial decision, *Orlov* confirmed that it is sufficient if a Standards Committee

---

<sup>2</sup> *Orlov v New Zealand Law Society* (No 8) [2012] NZHC 2154.

states its view that the conduct, if found proven, could reach the threshold of a finding of 'misconduct'.

[25] In the present case the Practitioner failed to provide an explanation to the Standards Committee, and the Committee perceived that there was conflict between the evidence before it. The Committee concluded that the conduct, if found proven, was capable of a finding of 'misconduct'. A finding of 'misconduct' can only be made by the Disciplinary Tribunal. Whether the conduct in this case is found to be 'misconduct' is a matter for the Tribunal, as is any penalty that may follow.

[26] In my view, both the nature of the conduct, and procedures available to the Tribunal, make the referral appropriate. Having considered the submissions for the Practitioner, and all relevant matters, I can find no grounds for interfering with the Standards Committee decision in this case.

*Additional comment*

[27] For various reasons that need not be stated, the Practitioner felt unable to respond to the complaint and did not respond to the complaint despite notification and a notice of hearing having been served. However, he had the assistance of Counsel and it could not be said that he was unsupported in communicating with the Standards Committee. The response received by the Committee left the impression that the Practitioner had no interest in becoming involved in the enquiry.

[28] There may however, be situations where for reasons unknown to a Standards Committee, a lawyer fails to respond to a complaint despite regular correspondence and a Notice of Hearing. In such circumstances Standards Committees may give some thought to whether circumstances exist which may affect the Practitioner's ability to respond or participate. There can be no objection to the Committee making an enquiry into a Practitioner's non-response, and where reasons are found to exist, to make such accommodations as appeared to the Committee to be reasonable in the circumstances, such as, for example, deferring the Committee's investigation.

[29] If a Standards Committee becomes aware, through its own enquiry or otherwise, of impediments to a lawyer's ability to participate in a disciplinary enquiry, my view is that it is incumbent on the Committee to consider whether accommodations should be made as the circumstances warrant.

**Decision**

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

**DATED** this 7<sup>th</sup> day of September 2012

---

Hanneke Bouchier

**Legal Complaints Review Officer**

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

JR as the Applicant  
JS as Counsel for the Applicant  
QL as the Respondent  
The New Zealand Law Society