LCRO 11/2011

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Wellington Standards Committee 2
BETWEEN	
	EA of Wellington Applicant
AND	
	WELLINGTON STANDARDS COMMITTEE 2 Respondent

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

DECISION

Background

[1] On 18 September 2008, the New Zealand Law Society received a confidential report from a practitioner written in terms of Rules 2.8 and 2.9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. In that report, the practitioner advised the Society that he had reasonable grounds to suspect that the Applicant had been guilty of misconduct or unsatisfactory conduct.

[2] The report arose primarily as a result of litigation commenced in the District Court at [North Island] by the Applicant for the recovery of fees invoiced by Counsel instructed by the Applicant on behalf of the defendants in the proceedings.

[3] The practitioner advised that in the course of the proceedings, a number of matters emerged which suggested misconduct or unsatisfactory conduct which were unfavourably commented on by the Judge in his decision.

[4] On 20 November 2009 Wellington Standards Committee 2 passed the following resolution:-

> That the Standards Committee 2 has reasonable cause to suspect that [EA], lawyer, has been guilty of conduct of a kind specified in section 130(c) of the Lawyers and Conveyancers Act 2006 and hereby causes an investigation to be made into this matter.

[5] The matters into which the Standards Committee had decided to inquire were the subject of appeal to the High Court, and the Standards Committee decided to await the outcome of the appeal before proceeding with its own motion investigation.

[6] On 17 August 2010, the Complaints Service wrote to the Applicant in the following terms:-

> As you are aware, the Committee decided to investigate of its own motion certain matters raised in the course of proceedings in the District Court, [North Island].
>
> Matters were put on hold pending completion of Court proceedings.
>
> As the Court proceedings have now concluded, the Committee considers it appropriate that its investigation progress. Please provide a response to the matters raised in the letter to you dated 2 December 2008 (copy attached). Your response is requested by 23 September 2010.

[7] On 23 September 2010, the Applicant wrote to the Complaints Service and raised a preliminary point, which is the subject matter of this review.

[8] The Applicant submitted:

[a] All of the conduct to be investigated by the Committee took place prior to the commencement of the Lawyers and Conveyancers Act 2006, on 1 August 2008.

[b] The Standards Committee motion to investigate was passed on 20 November 2009.

[c] Section 351(1) of the Lawyers and Conveyancers Act governs the circumstances in which complaints about conduct which took place prior to 1 August 2008 may be accepted by the Complaints Service established under the Lawyers and Conveyancers Act.

[d] As section 351(1) referred only to “complaints” in respect of conduct prior to 1 August 2008, it did now allow for “own motion” investigations to be conducted.

[e] The proposed investigation under the "own motion" resolution was therefore invalid.

[9] On 13 December 2010, the Complaints Service wrote to the Applicant as follows:-

> We refer to your letter of 23 September 2010.
>
> In your letter you raise a 'preliminary point' in relation to the own motion inquiry presently before Wellington Standards Committee 2. In essence, you suggest that the Committee does not have jurisdiction to proceed with an own motion inquiry relating to conduct pre-dating the Lawyers and Conveyancers Act 2006.
>
> Your letter was put before the Committee at its meeting on 18 November 2010 and the jurisdictional issue that you have raised was considered.
>
> The Committee remains of the view that it does have jurisdiction to commence and continue an own motion inquiry of this kind. Accordingly, the own motion inquiry will continue and the Committee seeks your response to the matters raised in the letter to you dated 2 December 2008 (copy attached) by Friday, 4 February 2011.

[10] On 14 January 2011 this Office received an application for review of that decision.

The review

[11] The application for review contained the essence of the Applicant's reasons for the review.

[12] This Office raised the preliminary issue as to whether or not the decision to continue with the own motion investigation communicated to the Applicant by the Complaints Service in its letter of 13 December, constituted a *"determination, requirement, or order made, or direction given, by a Standards Committee … in relation to any act, omission, allegation, practice, or other matter that the Standards Committee …is inquiring into, of its own motion, under section 130(c)"* in terms of section 195 of the Act (the letter mistakenly referred to section 194). If it were not, then the decision to continue with the investigation would not be reviewable.

[13] Counsel for the Applicant (Mr EB) responded in some detail, and advised that he wished to appear in support of his submissions.

[14] A hearing was scheduled for 7 June 2011, and on 1 June I advised the Standards Committee that it would be desirable for the Committee to provide submissions, preferably to be presented in person at the hearing.

[15] The Committee was unable to arrange to be represented at the hearing, nor did it provide any submissions. It referred me to a decision of the New Zealand Lawyers and

Conveyancers Disciplinary Tribunal, *Auckland Standards Committee 1* v *Brett Dean Ravelich* [2011] NZLCDT 11, in which the matter which is the subject of this review was considered by the Tribunal.

[16] That decision was issued on 29 April 2011, and therefore could not have formed the basis of the Committee's decision, although I anticipate that the Committee may have had the benefit of the views of Counsel for the Standards Committee in that decision when coming to its decision to continue with this investigation.

[17] On 8 June 2011, I requested the Standards Committee to provide me with a copy of the Opinion referred to in the Standards Committee file and by which it was no doubt guided in coming to its decision.

[18] On 20 June 2011 the Committee advised that it objected to the production of the Opinion, and the Legal Standards Officer advised in a subsequent telephone conversation that the Committee did not consider that legal advice in the form of an Opinion, constituted a document which the LCRO could require to be produced pursuant to section 204(b) of the Lawyers and Conveyancers Act. That question remains to be determined.

[19] Nevertheless, the Standards Committee did indicate in its letter of 15 February 2011 that the Committee was willing to participate in the proceedings in any way suitable to the LCRO, and again in its letter of 3 June noted that "should your office require further information of a type that the Complaints Service can assist with" to let the Service know.

[20] It would have been of considerable assistance in conducting this review, to be acquainted with the reasons for the Standards Committee decision, or to receive submissions subsequently, or indeed to have a copy of the Opinion on which presumably the Standards Committee based its decision. The question to be considered in this review raises an important issue, to which the Applicant and her Counsel have devoted considerable time resulting, presumably, in some not inconsiderable cost to the Applicant.

[21] Mr EB also produced further detailed submissions at the hearing, having received the copy of the Tribunal decision with the Committee's letter of 3 June, being one working day prior to the date of the hearing. I am grateful to him and the Applicant for providing these submissions.

The Complaints Service letter 13 December 2010

[22] The preliminary question to be considered is whether the content of the Complaints Service letter constituted a *"determination, requirement, or order made, or direction given, by a Standards Committee …in relation to any act, omission, allegation, practice or other matter that the Standards Committee …is inquiring into."*

[23] This question was discussed in some detail in Lydd v Maryport LCRO 164/2009. At paragraph 30 the LCRO determined that a right to review existed in respect of the following:-

[a] a determination under section 152;

[b] a requirement under sections 141 or 147;

[c] an order made under section 156;

[d] a direction given pursuant to sections 142 or 143.

[24] In reaching his decision, the LCRO rejected the submission by the Applicant in that case, that any decision of a Committee which was more than trivial or merely administrative was a decision which is prima facie reviewable, and applying the conclusions reached, the LCRO concluded that the determination in that case to appoint an investigator was not a determination that was reviewable by the LCRO.

[25] The decision communicated in the letter of 13 December does not fall within any of the categories identified by the LCRO.

[26] It must be recognised, that the decision which the Applicant is seeking to have reviewed, is not the decision to conduct an own motion investigation. It is the decision by the Committee in response to the preliminary issue of jurisdiction raised by the Applicant. As such, it is a separate and distinct question raised by the Applicant to be answered by the Committee.

[27] Mr EB makes the following points in support of his view that the decision in the letter of 13 December constitutes a reviewable determination:

[a] The Committee considered and made a substantive decision on the preliminary point raised.

[b] The decision is a decision "in relation to" the acts into which the Standards Committee is inquiring.

[c] The determination is a determination in respect of a procedural question which relates to the reference to a "direction" where used in section 195(1).

[28] I have reached the view that the decision communicated in the letter of 13 December 2010 is a reviewable decision for the following reasons:-

[a] The preliminary issue constitutes a separate and distinct question to be determined by the Committee. The Committee considered the question and came to the view that it had jurisdiction to commence and continue the investigation. If it had concluded that it did not have jurisdiction, that would have been the end of the investigation. It is difficult to see this in any other way than that it constitutes a determination, albeit that it is not a determination pursuant to section 152.

[b] The decision as to jurisdiction could be raised by the Applicant in an application for review of the Committee's decision following completion of its investigation. Section 200 of the Lawyers and Conveyancers Act requires the LCRO to conduct a review with as little technicality as is permitted by the Act, a proper consideration of the review and the principles of natural justice. Nothing would be achieved by deferring a decision on this issue until the investigation is completed and a decision issued.

[c] The Standards Committee itself acknowledges in its letter of 3 June 2011, that the decision may well be seen as akin to a direction or a procedural order, and therefore is reviewable in terms of section 195(1).

Jurisdiction

[29] The substantive question to be determined is whether the Standards Committee has jurisdiction to institute an own motion inquiry into conduct which took place prior to 1 August 2008.

[30] The issue was identified by the Applicant in a letter of 23 September 2010 to the Committee. The applicant identified that the jurisdiction of the Standards Committee to inquire into the matter arises under section 351(1) of the Lawyers and Conveyancers Act, as all conduct in question took place prior to 1 August 2008.

[31] The applicant argued that section 351(1) referred only to "complaints" which is defined in section 6 of the Act as a complaint under section 132. That section provides that "any person" may complain to the appropriate Complaints Service.

[32] The Standards Committee own motion investigation however is undertaken pursuant to section 130(c) of the Act, and does not therefore constitute "a complaint" in terms of section 351(1).

[33] The applicant argued that therefore the purported commencement of the investigation was ultra vires and invalid.

[34] As noted, this question was considered by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal in *Auckland Standards Committee 1 v Brett Dean Ravelich,* referred to in paragraph [15]. It is to be noted that the question was raised by the Standards Committee and addressed by Counsel for the Committee. It was not specifically addressed by Counsel for the practitioner, as the practitioner wished to plead guilty to the charges. Consequently the Tribunal had the benefit of submissions only from Counsel for the Standards Committee.

[35] By comparison, in the matter before me, the Applicant wishes to challenge the decision of the Committee, and Counsel has made comprehensive submissions in support of that position.

[36] It should be noted, that decisions of the NZLCDT are not binding on the LCRO or form any precedent to follow. Having said that, I have found it most useful in effectively arguing the position adopted by the Committee, in the absence of any submissions from the Committee directly.

[37] The Tribunal identified the question as being whether the transitional provisions of the Act, (i.e. section 351) provides for both modes of commencement of disciplinary proceedings (i.e. complaint and own motion) where conduct occurring prior to 1 August 2008 is the subject of disciplinary proceedings after that date.

[38] The facts of the case before the Tribunal required consideration of whether conduct which took place prior to 1 August 2002 could be considered in an own motion investigation. This was the issue which Counsel for the practitioner addressed. It was, however, in the course of considering that issue that the issue which is the subject of this review became apparent to Counsel for the Standards Committee.

[39] The Tribunal observed in paragraph [41] of its decision that "*in the same way as the Law Practitioners Act enabled a charge to be brought after either a complaint or an own motion investigation, the Lawyers and Conveyancers Act enables charges to be brought following either a complaint utilising section 132, or an own motion complaint,*

as noted in section 130(c). As noted, the transitional provisions of section 351 deal only with matters arising from "complaint"".

[40] The Tribunal was urged by Counsel for the Standards Committee that it should read into the transitional provisions a reference to own motion matters as well as to complaints in accordance with what Counsel submitted was well-established principles of statutory interpretation as applied by the Court of Appeal in *R v McKay* [2001] 1 NZLR 441. In that case the Court found that the drafting of some of the processes and procedures in the Criminal Procedures (Mentally Impaired Persons) Act 2003, resulted in an unworkable process in some situations. The Court considered that a literal reading of the Act would result in an absurd situation which Parliament could not have intended. As a consequence, the Court considered that it was "a plain case where the Courts are required to fill in the gaps in the statute so as to make the legislation work" (page 538).

[41] The Court's role is, however, limited to making the Act work as Parliament must have intended. (*Northland Milk Vendors Association Inc. v Northern Milk Limited* [1988] 1NZLR 530).

[42] It was submitted by Counsel for the Standards Committee that the matter before the Tribunal was such a case, i.e. that the Tribunal should read into the transitional provisions of section 351, provisions extending the operation of that section to own motion investigations.

[43] The Tribunal accepted this submission and in paragraph [68] of its decision recorded the reasons it considered it could properly read into section 351 a reference to own motion matters. These were:

> (a) The scheme of the Law Practitioners Act and the scheme of the Lawyers and Conveyancers Act both allow disciplinary charges to be initiated by either a complaint being received by the Law Society complaints service, or a matter otherwise coming to the Law Society's attention (eg a report from a Law Society inspector) leading to an own motion commencement by its appropriate Standards Committee. To maintain that consistency of approach, the provisions bridging the transitional period created by the repeal of the former Act and the enactment of the new Act should similarly allow and maintain both processes. Not to do that leaves an inexplicable gap in the transitional provisions, which would then be limited to complaints.
>
> (b) There is no substantive difference in the rights or obligations of the person charged, or the processes followed, whether the proceedings arise from an own motion or a complaint.
>
> (c) Established principles of statutory interpretation, as indicated by *McKay* and *Northern Milk*, recognise the necessity of reading in provisions to fill a gap in

> provisions where an Act does not adequately provide for a situation that should be provided for to enable the legislation to operate effectively.
>
> (d) This is an area of professional discipline, with the relevant legislation focusing on public protection and confidence regarding legal services. In that area the Tribunal should be cautious in allowing preliminary technical process issues, with no real bearing on the rights of the person charged or the substantive process followed, to preclude the ability of the Tribunal to hear a matter.

[44] I would be inclined to agree with the Tribunal, if not to take that approach meant that the New Zealand Law Society was effectively prevented from investigating on its own motion, conduct which took place between 1 August 2002 and 31 July 2008.

[45] However, that is not the case. Section 136 of the Lawyers and Conveyancers Act provides:-

> Without limiting the right of any person to make a complaint under section 132, it is declared that a complaint under that section may be made by –
>
> (a) a member of Council of the New Zealand Law Society or a person acting on its behalf; or
>
> (b) a member of the Council of the New Zealand Society of Conveyancers, or a person acting on its behalf.

[46] Consequently, it cannot be said that the Act is unworkable resulting in an absurd situation if the ability to commence an own motion investigation was not read into section 351.

[47] The Tribunal described the use of the section 136 procedure as a "strained interpretation of the operation of the Act" resulting in an "incredibly clumsy" procedure. Nevertheless, it does result in the Law Society having the ability to effectively institute an own motion investigation without the need to read words into the Act, a process which the Courts have indicated should only be done so as to make the legislation work as Parliament must have intended.

[48] Mr EB for the Applicant, submitted that Parliament had been quite careful in enacting the transitional provisions in the form as they stand, and that to read words into the Act as decided by the Tribunal was to usurp the role of Parliament. I tend to agree with that view.

[49] In adopting this view, I have had some reference to previous decisions of this Office, and in particular *Client Z and Client Za v Lawyer B*, LCRO 04/2008. In that decision the LCRO observed that:-

(a) The regulatory nature of the Act means that explicit specification of a specific power ought to be required, and there should be judicial restraint from writing in matters which might have been subject to regulation but have not been made express.

(b) Prior precedent making generous correction of legislative oversight was undertaken in circumstances where there were no transitional provisions at all properly justifying a clear conclusion that Parliament could not have intended such a regulatory gap.

(c) The Act in this case strongly distinguishes itself by the comprehensive transitional provisions relating to complaints and disciplinary framework in sections 350 to 361.

(d) Alternative arguments under the Interpretation Act do not provide assistance.

[50] I am aware of course that previous decisions of this Office are no more binding on me than decisions of the Tribunal. Nevertheless, the previous decision of the LCRO does not require words to be read into the Act.

[51] Mr EB made several preliminary submissions against reading in words to the Act. The first of these was the approach that should be taken to the interpretation of legislation. He referred to section 5(1) of the Interpretation Act 1999 which provides that "the meaning of an enactment must be ascertained from its text and in the light of its purpose." The Supreme Court set out the approach to this in *Commerce Commission v Fonterra* [2007] NZSC 36:-

> [22] It is necessary to bear in mind that section 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose that meaning should always be cross-checked against purpose in order to observe the dual requirements of section 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[52] Mr EB also referred to the *Department of Internal Affairs v Biggs* DC Kaikohe CRI 2008-027-000851 29 April 2009 at paragraph 38 which provided two general points of principle:

[a] The general approach is to give provisions their "natural and ordinary" meaning; and

[b] That the substitution of words should only be undertaken in very strong cases.

[53] He points also to the Privy Council decision in *Reid v Reid* [1982] 1 NZLR 147,150 where it was stated that:-

> Their Lordships have in mind what was said by Lord Mersey in *Thompson v Goold* and Co. [1910] AC 409, 420: "It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do."

[54] In addition, he refers to a further rule identified in that decision at page 151, that *"...in statutory interpretation there is a presumption against a change in terminological usage; it is a sound rule of construction to give the same meaning to the same words occurring in different parts of an Act of Parliament …".* (Cleasby B in *Courtauld v Legh* [1869] LR4 XTXCH 126/130).

[55] Turning to the wording of section 351, Mr EB submitted that the plain language of that section refers only to complaints. He noted that *"as a result of the statutory definition of complaint, and the particular specifications provided for complaints in section 132, the meaning of "complaint" in section 351 cannot be ambiguous, unclear, or subject to extension to incorporate "own motion" inquiries. The rule of consistent terminological usage from Reid supports this. These combine to reject any suggestion that section 351 uses the word "complaint" in a compendious sense broader than the defined usage of section 6."*

[56] Mr EB makes the point that the Lawyers and Conveyancers Act took some ten years or more to develop. It was not a case where legislation was rushed. He points to the recognition in the Act of the use of express language in sections 350 and 353 to cover own motion inquiries, and the consistent approach in sections 351 and 352 in referring only to complaints, a matter with which the Tribunal disagreed with Counsel for the Standards Committee in the Ravelich decision.

[57] Mr EB submits there is clear evidence within the Act that the drafters were well aware of the need to distinguish between complaints and other matters. He points to the following examples:-

(a) the genesis of complaints in section 132, compared to own motion investigations in section 130;

(b) the separate empowering provisions within sections 152(1)(a) and (b) providing separately for determinations on complaint and own motion matters;

(c) the separate provision for review rights in regard to Standards Committee decisions on complaints in section 194, as opposed to decisions on own motion inquiries in section 195;

(d) the powers of the LCRO in section 209 which apply to any "complaint, matter or decision" rather than merely using the word "complaint" to refer to all of the categories.

[58] He also makes some interesting observations as to the structure of the Act with regard to complaints and discipline. He firstly refers to section 120 which identifies the four purposes of that Part of the Act (Part 7), one of which is to provide a framework for complaints and discipline, but in which "own motion" inquiries do not figure.

[59] Sections 121 to 124 relate to the establishment of the Complaints Service, and then sections 132 to 140 provide details of the complaints system. He submits that the overriding tool is that of the "complaint", which may be accessed not only by clients, but by "any person" (section 132) including the Law Society through section 136.

[60] His view is that own motion inquiries are an ancillary or subordinate aspect of the protections provided to the consumer. I am not sure I necessarily agree with that view, or that is the way in which the Act will develop. In particular, as in this case, I expect that the Complaints Service will readily make use of the own motion process to consider and investigate reports pursuant to Rule 2.8 and 2.9, although it could be argued that as those reports are to be made to the Law Society, the procedure envisaged by section 136 is the manner in which those reports should come before the Complaints Service.

[61] The relevance of this submission for the present issue, is however, that considerable thought has clearly been given to the distinction between complaints and own motion investigations, to the extent that it is not possible in my view, to come to the conclusion that the drafters of the Act and Parliament overlooked the distinction when it came to a consideration of section 351.

[62] More importantly, Mr EB points to the approach of own motion inquiries in the Law Practitioners Act 1982. Under that Act, own motion inquiries were set in motion by the District Council pursuant to section 99 of the Law Practitioners Act. This is reflected in the provisions of section 136 of the Lawyers and Conveyancers Act. That approach was not considered to produce an unworkable or absurd result, and there is no reason to suggest that the transitional provisions should not be treated similarly.

[63] The own motion provision in section 130(c) of the Lawyers and Conveyancers Act represents a departure from the provisions of the Law Practitioners Act, and it is more than likely that Parliament intended the procedure which applied at the time to apply to conduct which took place between 1 August 2002 and 31 July 2008.

[64] However, it is not necessary to decide what Parliament would have intended or not. The transitional provisions contained in section 351 are clear and unambiguous. There is no need to read in words to that section to make the Act workable. Applying the principles referred to in the various decisions provided by Mr EB, it is neither necessary nor appropriate to read any additional words into that section.

[65] Having considered the submissions for the Standards Committee in *Ravelich*, and the Tribunal decision, and having heard from Mr EB, I am not persuaded that there is a need to read into section 351 an ability for the Standards Committee to institute an own motion inquiry pursuant to section 130(c) in respect of conduct which took place prior to the commencement of the Lawyers and Conveyancers Act. Section 136 provides an entirely appropriate procedure to bring such matters before the Standards Committee and this procedure is neither unworkable nor absurd. I also disagree with the Tribunal when it describes this procedure as one which is a strained interpretation of the Act, or incredibly clumsy. It was, after all, the process used by District Councils to commence an own motion inquiry under the Law Practitioners Act 1982.

[66] It necessarily follows that this will result in a reversal of the decision by the Standards Committee to commence and continue with the inquiry into the matters identified by it in its letter of 2 December 2008. I do not consider, and this was acknowledged by Mr EB, that this decision in any way precludes the New Zealand Law Society making a complaint to the Complaints Service pursuant to section 136 of the Act.

Decision

The determination of the Wellington Standards Committee 2 as set out in its letter of 13 December 2010, namely, that it has jurisdiction to commence and continue the own motion inquiry pursuant to the resolution dated 20 November 2008, is reversed.

DATED this 24th day of June 2011

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Owen Vaughan
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:

EA as the Applicant

EB as the Applicant's Counsel
The Wellington Standards Committee 2
The New Zealand Law Society