

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

DS

Applicant

AND

TL

Respondent

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

DECISION

Introduction

[1] Ms DS has applied for a review of the Standards Committee decision in relation to her complaint against Mr TL. Her complaint related to Mr TL's conduct when he acted for a foreign investor who purchased land in Region without the required Overseas Investment Office (OIO) consent.

[2] The Standards Committee concluded that Ms DS did not have sufficient personal interest in the subject matter of the complaint pursuant to s 138(1)(e) of the Lawyers and Conveyancers Act 2006 and decided to take no further action. The only connection Ms DS has with the subject matter of the complaint is that she is a resident of Town. However she claims a personal interest in Mr TL's conduct because of the impact on Town which she describes as a small town.

Background to Review

[3] In seeking a review Ms DS submits that as a New Zealand citizen she has a duty to complain when a lawyer breaks the law to advantage his client. She considers the

Standards Committee should have investigated the subject matter of her complaint. She therefore asks this Office to investigate her allegation that Mr TL advised his client not to seek OIO consent when it was buying the land, knowing that his client would lose the sale if he did, and that the OIO almost never refuses retrospective consent.

[4] Ms DS says that either Mr TL was reckless when advising his client and this resulted in an evasion of the Overseas Investment Act 2005 (OIA), or alternatively that he advised his clients to breach the offence provisions of the OIA. She accordingly submits that Mr TL's conduct was at the very least unsatisfactory.

Review on the Papers

[5] Ms DS and Mr TL have both consented to this review being undertaken on the papers.

Nature and Scope of Review

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

... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" ...

... the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

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

A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

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

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

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

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

Reasons

[9] Having carefully considered the information provided by the parties I conclude that further inquiry into Ms DS' complaint is inappropriate. The Standards Committee's decision to take no further action is confirmed, but pursuant to s 138(2) of the Act, rather than s 138(1)(e), for the following reasons:

- (a) The OIO has jurisdiction over offences under the OIA. The Standards Committee and LCRO lack the jurisdiction to review or entertain appeals against decisions of the OIO.
- (b) Ms DS lacks a proper evidential basis to support her key allegation against Mr TL. While it appears that Mr TL may have given wrong advice to his clients, the OIO is the more appropriate body to consider whether Ms DS' speculations about whether the advice he provided might be linked to the commission of an offence under the OIA.
- (c) The OIO has carried out an investigation into the circumstances surrounding Mr TL's advice to his client. The evidence does not suggest that at the time of the Committee's decision the OIO had reached a point where it considered it has reason to prosecute for an offence under the OIA based on Ms DS' concerns.
- (d) Mr TL was not acting for Ms DS, nor did he have any contact with her. In the circumstances, Ms DS is a third party to whom Mr TL owes only very limited professional obligations, none of which are relevant to the complaint.
- (e) The purpose of Ms DS' complaint appears to have been to have Mr TL held accountable for his professional conduct. There is no evidence of anything improper in Ms DS having brought her concerns to NZLS. That is not to say Ms DS should necessarily have been a party to any inquiry commenced by the Standards Committee.

- (f) The Act provides for any person to make a complaint about a lawyer's conduct. People should not be discouraged from bringing legitimate conduct concerns to the attention of NZLS as the regulatory body for lawyers. A determination made under s 138(1)(f) may tend to have that effect, but may also be a precursor to the commencement of a decision by a Committee of its own motion pursuant to s 130 of the Act, where the Committee considers inquiry is warranted.
- (g) Mr TL generally denies Ms DS has grounds for complaint, but his ability to defend himself is compromised because communications between him and his clients are confidential and may also be privileged. Any such correspondence should not properly be disclosed to Ms DS in the Standards Committee and review processes.
- (h) If Mr TL's client has concerns about his advice, any such complaint is private between them. Ms DS is not properly a party to that.
- (i) I take it that much, if not all, of the information that may be evidential has been disclosed to the OIO for it to consider as part of its investigation into the advice Mr TL provided to his client.
- (j) It appears Mr TL's conduct may yet be the subject of investigation by the OIO. If the outcome of that process is critical of Mr TL's part in the purchase, there may be evidence to support a new complaint. The Act does not limit who might make such a complaint.
- (k) There is insufficient evidence available on review to determine whether a disciplinary response to Mr TL's conduct is appropriate.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is amended to record that further action on Ms DS' complaint is inappropriate pursuant to s 138(2) for the reasons set out above.

DATED this 15th day of June 2016

D A 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:

Ms DS as the Applicant
Mr TL as the Respondent
The Area Standards Committee
The New Zealand Law Society