LCRO 122 /09

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Auckland Standards Committee 4 of the New Zealand Law Society
BETWEEN	**Ms CAMBRIDGE** of Auckland Applicant
AND	**Mr WHITEHAVEN** of Auckland Respondent

DECISION

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

Application for review

[1] An application was made by Ms Cambridge for a review of a resolution by the Auckland Standards Committee 4 that the complaint by Mr Whitehaven against her be heard on the papers and not in person. I observe that an application for review of an earlier determination in the matter has been previously heard and considered by me. I there considered that there had been flaws in the process of the Standards Committee and directed it to reconsider the matter which it is proceeding to do.

[2] At the outset of the hearing I noted that there were two matters that needed to be considered. The first is whether the decision of the Standards Committee that the matter will be heard on the papers is itself reviewable. The second is whether (if it is reviewable) in all of the circumstances it is proper for me to interfere with the exercise of the Standards Committee's discretion.

[3] Ms Cambridge desired to be heard in person on this matter and a hearing was conducted on 3 September 2009 with her and her counsel, Mr Cambridge present. No other parties attended that hearing.

[4] The right to apply for a review is set out in ss 194 to 197 of the Lawyers and Conveyancers Act (the Act). The only applicable section here is s 194 which deals with applications in relation to complaints. That section states that a person in respect of whom a complaint was made may apply for a review of "any determination, requirement, or order made, or direction given, by a Standards Committee (or by any person on its behalf or with its authority)".

[5] In the present case the decision of the Committee to conduct a hearing on the paper is clearly not a determination (which is the final disposition of the matter by the Committee), nor is it an order (which are made once the determination is made pursuant to s 156). Neither does it appear to be a direction. The decision that the matter be heard on the papers is not directing Ms Cambridge or any other party to take any particular step. A Standards Committee may "direct" publication of its decisions under s 142 and it is likely that this is that direction that is properly the subject of the power of review. I note that other directions that can be made by the Standards Committee are found in s 153(1) (a hearing is to be on the papers unless the Standards Committee otherwise "directs") and s 143 (a Standards Committee may "direct" that negotiation or mediation occur s 143). However taking into account the nature of a review and the preliminary nature of those decisions (which are discussed below) it appears unlikely that those decisions are able to be the subject of a review prior to a determination.

[6] Mr Cambridge suggested that the decision to conduct a hearing on the papers was a "requirement" under s 194 in so far as Ms Cambridge was required not to appear at the hearing. I do not think that this can be correct. The absence of an entitlement to appear in person cannot be properly framed as a requirement. Section 141 provides that the Committee may "require" a person complained against to appear before it to make an explanation. Similar powers to impose requirements to produce documents exist under s 147. It is presumably the exercise of these powers to require attendance and explanations that are contemplated to be reviewable.

[7] It is also relevant that the Standards Committee has made no final determination on the matter of the complaint by Mr Whitehaven, rather the decision in respect of which a review is sought is simply a preliminary decision in respect of the procedure to be adopted. While I acknowledge that the review jurisdiction of the Legal Complaints Review Officer is distinct from that of judicial review, the principle that a decision which

does not of itself affect the rights or interests of a party is not reviewable is relevant in determining whether the legislation contemplated a review of the decision to conduct a hearing on the papers. More specifically where the decision is preliminary in nature this will weigh against a review power existing: *Marlborough Aquaculture Ltd v Chief Executive, Ministry of Fisheries* [2003] NZAR 362.

[8] It is accepted that where the issue at stake is of considerable significance and there is likely to be a breach of natural justice then it may be appropriate to review a decision even though it is "interlocutory" or preliminary in nature: *Attorney-General v Zaoui* [2005] 1 NZLR 690 (CA). However the present case has little in common with *Zaoui* which concerned the refugee status of a person seeking asylum in New Zealand.

[9] For these reasons I conclude that I do not have jurisdiction to review the decision of a Standards Committee to hear a matter on the papers.

Merits

[10] Mr Cambridge focussed his submissions on the substantive question of whether the decision of the Committee to hear the matter on the papers was defensible. It is appropriate that I give a view in that regard.

[11] Section 153 of the Act makes it clear that hearings of the Standards Committee are presumptively on the papers unless the Committee decides otherwise. This is consistent with the requirement of s 120 (2)(b) that complaints be resolved expeditiously. The procedure is explicitly summary in nature. This is consistent with the fact a Standards Committee determines matters only at the lower end of the spectrum of professional wrongdoing (with charges of misconduct going before the Disciplinary Tribunal) and has lesser powers of sanction which do not extend to suspension or striking off. Unlike the Tribunal the proceedings of the Committee are private and an overt decision must be made by the Committee for any details of the matters before it to be published.

[12] The thrust of the argument for Ms Cambridge was that she ought, as a matter of natural justice, be given a right to be heard in person. Given that there is a presumption against a hearing in person Ms Cambridge must show that there is something which sets her position apart as being especially requiring of a hearing in person. Moreover, it would also need to be shown that the exercise of the discretion to conduct a hearing on the papers was wrongly exercised and was irrational or unreasonable in some way.

[13] I observe that the allegations against Ms Cambridge, while of professional significance, are minor. While it is obviously possible that the Committee will make an adverse finding against her, there can be no suggestion that this conduct is at the

upper end of matters which can be disposed of by a Standards Committee. The seriousness of the allegation in this case does not make it especially warrant a hearing in person.

[14] It was suggested that this matter was particularly complex, nuanced and unusual and as such it was necessary for Ms Cambridge to be heard in person to explain the factual back ground properly. I cannot accept this to be the case. The complaint centres around a single message, albeit in the context of wider dealings in relationship property matters. Comments were also made about some of the material before the Committee being prejudicial and speculative. The Committee is well equipped to take account of these matters, and in any event the arguments about the weight to be given them can be made by written submissions. Ms Cambridge (and her partner Mr Cambridge) are experienced legal practitioners who are quite able to make their points to the Committee in written form. It was also noted that this matter concerned conduct which occurred prior to 1 August 2008 and therefore concerned the old standards as set out in the Rules of Professional Conduct for Barristers and Solicitors. I cannot see how that is particularly relevant. The Committee is a specialist tribunal and fully able to appraise itself of those matters. Reference was also made to the fact that the complaint was from another practitioner. It has always been the case that a lawyer may complain against another lawyer (see *B v Canterbury District Law Society* [2002] 3 NZLR 113. This does not set the complaint apart as particularly unusual. There is no special complexity in respect of this complaint that especially warrants a hearing in person.

[15] It was also suggested that an adverse finding would have significant effects on Ms Cambridge, her business and her reputation. While it is accepted that an adverse decision would be distressing to her, it is not at all clear that it would affect her professional reputation or her business. It was noted that it would require disclosure to her insurer. While this may be the case there was no suggestion that this would have an adverse impact on cover or premiums. Neither was there any suggestion that this consideration would be any different in respect of other complaints against other practitioners (to which the presumption against a hearing in person would apply).

[16] Mr Cambridge also expressed doubts in the ability of the Standards Committee to properly consider the matter. In so doing he referred to the inadequacy of the Committee's earlier decision and the fact that on review I directed that it be reconsidered. There is no merit in this suggestion. While the Committee's earlier decision was found to be flawed there can be no suggestion that the Committee is other than a competent and properly constituted tribunal. It there was an inference that its members will not impartially and professionally consider this matter it is rejected.

[17] The fundamental thrust of the argument was that in any case justice requires that a person who is accused of wrongdoing is entitled to a hearing in person. A number of comparisons were drawn. Mr Cambridge noted that when he has acted as a costs reviser he invariably saw both the lawyer and the client before providing a decision on the revision. This argument ignores the clear direction in the Act that lawyers against whom complaints and allegations are made are not to be given a right to be heard in person but rather are to exercise the right to be heard by making submissions in writing.

[18] I also observe that parties have a right to be heard in person on review by this office. The powers on review are broad and extend to receiving new evidence and making new enquiries. While a summary procedure by the Standards Committee may not produce the right result every time the existence of a review procedure is a safety net for any errors that might creep in due to any shortcomings of a procedure that balances rigour against effectiveness.

[19] While I am not required to decide the point, I cannot see that the decision of the Standards Committee to consider this matter on the papers was made other than properly.

Costs

[20] Section 210 of the Act provides me with a discretion to impose orders of costs. In this case Ms Cambridge has applied for a review and required to be heard in person. Her application has not been successful. In such a case it is appropriate that she bear a portion of the costs of the review. I take into account the *Costs Guidelines* of this office. Under those guidelines the benchmark in a straightforward review when the matter is heard in person is an order of $1200. I observe that those guidelines do not contemplate an “interlocutory” application such as the present and a reduction in that sum is therefore appropriate. In light of this an order of costs of $600 is imposed on Ms Cambridge.

Decision

[21] The application for review is declined on the basis that I have no jurisdiction to consider it.

[22] Ms Cambridge is to pay $600.00 in respect of the costs incurred in conducting this review pursuant to s 210 of the Lawyers and Conveyancers Act 2006. Those costs are to be paid to the New Zealand Law Society within 30 days of the date of this decision.

DATED this 4th day of September 2009

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Duncan Webb
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 Cambridge as Applicant
Mr Whitehaven as Respondent
The Auckland Standards Committee 4
The New Zealand Law Society