

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

BETWEEN

NT

Applicant

AND

[CITY] STANDARDS COMMITTEE

Respondent

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

Review of a decision to prosecute

Introduction

[1] Mr NT has applied for a review of a determination dated 1 May 2014 by [City] Standards Committee that a complaint made about her by Mr and Mrs OL (the complainants) be considered by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (the Tribunal).

[2] There are three themes to the substance of Mr NT's conduct that form the backbone of this review:

- (a) the quality of her advice to the complainants;
- (b) her competence in conducting litigation; and
- (c) her fees.

Background

[3] Mr NT acted for the complainants in respect of a claim by them against a finance company, and a claim against them by a company that had received an assignment from the finance company of a debt the complainants had previously owed to the

finance company. The complaint related to the quality of the advice Mr NT had provided on the merits and risks of commencing and proceeding with the litigation, and on settlement offers. At its simplest, the complaint is that the complainants did not appreciate the strengths and weaknesses of their case, or the scope of the possible consequences of pursuing their claims through the District Court until it was too late.

[4] The complainants were also concerned about the level of fees they had incurred. Mr NT rendered 12 accounts for a total of \$28,832.13 for the work she did between April 2009 and April 2013 in preparing for and conducting the District Court proceeding, and in otherwise assisting the complainants.

[5] Mr NT's competence comes under scrutiny as a result of the comments of Judge Tuohy in his reserved judgment,¹ and his Ruling as to Quantum and Costs which followed, on [Date].

[6] In his reserved judgment Judge Tuohy was critical of the complainants' claim, saying that "its legal foundation is unclear", it did not clearly identify the causes of action and remedies sought, and that there were "deficiencies in the way it had been framed".² There were evidential difficulties for the complainants because they had not called any expert evidence, evidence they had provided was incomplete in material respects and did not support their claim and that a purported cancellation of the contract on Mr NT's advice was of no effect.³ Overall, the complainants secured very modest concessions, and the Judge disposed of the case by dismissing the complainants' claims and counterclaims, entering judgment in favour of the assignee, and inviting counsel to file memoranda on quantum and costs.

[7] In his Ruling on Quantum and Costs, the Judge identified some of the difficulties inherent in the proceeding. He referred to difficulties Mr NT had encountered in endeavouring to calculate the quantum of the judgment,⁴ claims by the first and second defendants for awards of increased or indemnity costs,⁵ and the numerous submissions made by Mr NT on behalf of the complainants, which he described as having been "made somewhat randomly".⁶

[8] The Judge accepted the defendants' submissions, and largely rejected Mr NT's. He also recorded his view that her submission that the defendants "should not have

¹ [Case name removed].

² At [9].

³ At [33], [35], [41], [45], [46], [65].

⁴ [Case name removed].

⁵ At [11] – [20].

⁶ At [21].

costs shows a blindness to the reality of the Court's judgment"⁷ and that her submissions, "however unrealistic, had to be answered by the defendants and addressed by the Court, mirroring the pattern of the substantive proceeding".⁸ He also described the complainants' claim for damages of \$100,000 as "totally unrealistic",⁹ yet "complex, both legally and evidentially".¹⁰

[9] The defendants' claims for indemnity costs were based on the grounds that the complainants had acted vexatiously, frivolously, improperly or unnecessarily in commencing, continuing, or defending the proceedings.¹¹ The Judge agreed with the defendant's complaints about the lack of merit in the complainants claims, referring to an almost complete lack of evidential foundation for parts of the claim.¹² He also noted the absence of expert evidence called in support of the complainants' claims, and observed that they could have been raised in the Disputes Tribunal, rather than in a two-day hearing in the District Court.

[10] With reference to the complainants' claim for damages as compensation for alleged harassment by the defendants, the Judge observed that there seemed to have been:¹³

little or no consideration given to the legal basis for it, either before it was made or at any time up until the hearing, despite what I am satisfied were several prior challenges by the defendants. It is fair to say that part of the reason for this was the fact that this must have been one of the first claims under the 2009 Rules which permit claims to be filed without a full and proper articulation of their legal foundation.

[11] He described the claims as lacking legal or substantive merit, or being lodged out of time.¹⁴

[12] He then said that:¹⁵

[t]he whole conduct of the litigation on behalf of the [complainants] has been seriously ill-judged, lacking in proper legal analysis and commercial commonsense. It is disturbing that what should have been a dispute about the amount owing under a loan contract (not exceeding \$12,000), which could have been satisfactorily resolved in the Disputes Tribunal without legal fees, has been escalated into a two day hearing in the District Court, necessitating a 107 paragraph judgment which has cost the successful parties a total of over \$75,000 in legal fees and disbursements and leaves the [complainants] now facing judgment, not just for the

⁷ At [29].

⁸ At [29].

⁹ At [30].

¹⁰ At [31].

¹¹ At [34].

¹² At [36].

¹³ At [38].

¹⁴ At [39].

¹⁵ At [40].

balance of the loan contract, but for far greater sums in costs, apart altogether from their own legal costs – all this despite some clear warnings from the defendants.

[13] When considering the allegation that the complainants had acted “vexatiously, frivolously or improperly” the Judge did not order the complainants to pay indemnity costs, because he was:¹⁶

...satisfied, despite the criticisms I have made, that they and their counsel were acting in good faith. Nor do I think that bringing a proceeding which lacks merit should be equated with commencing or continuing a proceeding “unnecessarily” in terms of the Rules.

(emphasis added)

[14] He did, however, consider that increased costs were justified for both defendants because the complainants had not acted reasonably in the conduct of the litigation, pursued many arguments that lacked merit, and failed to accept legal arguments made by the defendants without reasonable justification.¹⁷

[15] Finally, His Honour said:¹⁸

..., as to the [complainants'] lack of financial resources, I have little doubt that they do not have the cash resources to meet a costs award of the order in which it is made in this ruling. The subject matter of the litigation shows that. I have great sympathy for them because I do not think they ever understood the legal weakness of their case or the great financial risk to them in taking the matter to trial.

[16] The Judge did not speculate as to the reasons for their lack of understanding. The complainants took some time trying to engage Mr NT in discussions after they had digested the reserved judgment and Ruling on Quantum and Costs. Having received no response they considered satisfactory they laid a complaint to the New Zealand Law Society.

The complaint

[17] The complaint is dated 15 August 2013, and alleges negligent advice, representation, including reliance on the wrong law, the wrong jurisdiction, and inadequate preparation of evidence in support of the complainants' claims. The complainants say Mr NT also provided no advice on a settlement offer made to them of \$6678.13.

[18] The complainants say that the Court case resulted in them being ordered to pay costs to the other parties of \$45,000, as well as Mr NT's claim for fees of \$30,740.48.

¹⁶ At [41].

¹⁷ At [44].

¹⁸ At [49].

They say that their house has been subject to a mortgagee sale, and they are facing bankruptcy. They say that Mr NT did not tell them that they could lose their home or be declared bankrupt.

[19] The complainants say Mr NT is incompetent, and rely on the comments of Judge Tuohy in his reserved judgment in support of their complaint.

[20] The Committee considered the material before it including the Judge's reserved judgment and the Ruling on Quantum and Costs, and issued a notice of hearing dated 4 February 2014. The notice of hearing said that the nature of the alleged conduct the Committee intended to consider included:

(i) whether the advice and representation Mr NT provided to [the complainants] was:

- inconsistent with her duty to exercise reasonable care
- fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; and/or
- was negligent or incompetent to such a degree that it reflects on her fitness to practice and tends to bring the legal profession into disrepute;

(ii) when having regard to:

- her apparent failure to properly advise [the complainants] in relation to the merits and risks of commencing the District Court proceedings including the likelihood of the claims succeeding and the potential financial consequences associated with such proceedings;
- her apparent failure to properly advise [the complainants] in relation to the reasonable settlement offers that were advanced, including the reasonableness of the offers and the merits and risks they faced should they fail to accept them;
- her apparent failure to properly advise [the complainants] in relation to the amount of damages that they would be likely to achieve in relation to the claim that was lodged, including the circumstances in which it was decided that \$100,000 should be sought for emotional stress and anxiety;

- the errors contained in the pleadings that were submitted, including the arguments that were advanced pursuant to the Credit Contracts and Consumer Finance Act 2003, the Crimes Act 1961 and the Fair Trading Act 1986;
 - the views expressed by Judge Tuohy and his categorisation of the conduct of the litigation as having been seriously ill-judged, lacking in proper legal analysis and commercial commonsense;
 - the significant financial consequences suffered by [the complainants], which could have been largely avoided had they attempted to resolve the matter through the Disputes Tribunal; and
- (iii) whether the fees rendered by Mr NT were fair and reasonable in accordance with Rule 9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[18] The notice of hearing also referred to the possibility that the Committee may determine that the complaint or matter, or any issue involved in the complaint or matter, be considered by the Disciplinary Tribunal.

[19] At the hearing the Committee determined under s 152(1)(a) that the complaints and any and all issues involved in the complaint should be considered by the Tribunal pursuant to section 152(2)(a) of the Lawyers and Conveyancers Act 2006.

[20] MR NT was dissatisfied with that outcome and applied for a review.

Application for review

[21] In the review application counsel for Mr NT submits that a referral to the Disciplinary Tribunal in the circumstances of the complaint is an inappropriate and disproportionate response. Counsel submits that:

- (a) circumstances are not so grave as to warrant consideration by the Disciplinary Tribunal and that the allegations are not of misconduct but, are at worst negligence or incompetence to a lesser degree;
- (b) Standards Committee had sufficient information and the capability to determine the complaint itself, and was well placed to do so;

- (c) Referral to the Disciplinary Tribunal creates unnecessary cost and delay in determining the complaint, and is inconsistent with the purposes of Part 7 of the Act.

[22] With respect to Mr NT's fees, counsel says that not all of the fees can be considered because the complaint was raised more than two years after the date of several of the invoices. That criticism relates to the application of Regulation 29 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, which precludes Standards Committees from considering a complaint about the amount of bill of costs which was rendered more than two years prior to the date of the complaint, unless a Standards Committee determines that there are special circumstances that would justify the Committee dealing with the complaint.

Role of the Legal Complaints Review Officer on review

[23] The role of the LCRO on review is to reach her own view on the evidence before her.¹⁹ Where, as here, 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.

[24] The decision by the Standards Committee to issue a determination that the complaint be determined by the Disciplinary Tribunal did not include reasons for that decision. It is not required to do so, but by section 213(2) of the Act, this Office is required to provide reasons for its decisions.²⁰

[25] It falls to this Office to determine whether there are sufficient grounds to justify the Committee's decision to refer the matter to the Disciplinary Tribunal.

[26] The role of this Office, when considering a review of a decision to lay charges against a practitioner before the Disciplinary Tribunal was the subject of comment by the Court of Appeal in *Orlov v New Zealand Law Society*²¹ where it observed that "[t]here is now oversight of the referral decision by the Independent LCRO".²²

[27] The Court also found there was no threshold test to meet before matters could be referred to the Tribunal, in part because the threshold test which had previously existed under the Law Practitioners Act 1982 was no longer necessary because it was now

¹⁹ *Deliu v Hong* [2012] NZHC 158 at [41].

²⁰ Lawyers and Conveyancers Act 2006, s 158.

²¹ *Orlov v New Zealand Law Society* [2013] NZCA 230.

²² At [54].

met by other means, which included the role this Office plays in reviewing decisions to refer matters to the Disciplinary Tribunal.²³ The Court of Appeal also noted that:²⁴

...The oversight of the LCRO should also assist in protecting the resources of the Tribunal and prevent it from being overwhelmed by petty or trivial cases.

[28] Panckhurst J in *M v Standards Committee (No 2)*²⁵ noted competing arguments for and against referrals to the Disciplinary Tribunal, including that:²⁶

Professional disciplinary bodies exercise jurisdiction in areas where they have particular expertise. Unsurprisingly, the Courts have accorded special weight to the opinions of such bodies. It is highly desirable that charges are heard and determined expeditiously. On the other hand, it must be recognised that the decision to lay charges, as opposed to utilising the internal disciplinary powers of the committee, impacts upon the practitioner concerned in terms of time, expense and the potential outcome.

[29] It was relevant to his Honour in that decision that the Committee had isolated the essence of the complaint and determined that the "...real question' was such as to require the attention of the Tribunal",²⁷ although he also noted that "standards committee are not required to make a merits based determination".²⁸

[30] In a recent LCRO decision²⁹ the LCRO provided the following helpful summary of recent case law relating to the approach of this Office when reviewing standards committees' decisions to prosecute:³⁰

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 Disciplinary Tribunal. In *FF v Wellington Standards Committee (2)*, this Office addressed the principles which Review Officers have regard to when addressing this question:

[previous LCRO cases] have identified the principles set forth in the various Court decisions where a decision to prosecute might be revisited. These include situations in which 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);
- (c) exercised in a discriminatory manner;
- (d) exercised capriciously, in bad faith, or with malice.

²³ *Orlov* at [53].

²⁴ At [54].

²⁵ *M v Wellington Standards Committee (No 2)* [2013] NZHC 1037.

²⁶ At [12].

²⁷ At [57].

²⁸ At [58].

²⁹ *RB v [Area] Standards Committee X* LCRO 92/2014.

³⁰ At [25]-[28].

In addition, it was noted in *Rugby* decision that ‘if the conduct was manifestly acceptable then this might be evidence of some improper motivation in the bringing of the prosecution’.

While I do not necessarily agree that this might constitute evidence of some improper motivation in bringing of the prosecution, I do agree that the decision to prosecute should be set aside if the conduct was manifestly acceptable.

While it is acknowledged that these principles are not exhaustive, they do identify significant issues to take into account when considering the basis on how a review to the Tribunal will progress.

It is important however that a review of a Committee’s decision to refer a complaint to the Tribunal, is not 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 judgment to each case.

...

...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.

Charges that may be brought before the Disciplinary Tribunal

[31] It is helpful when considering whether there are sufficient grounds to justify a referral to the Disciplinary Tribunal to have in mind the range of charges that may be brought before the Tribunal, which are set out in s 241 of the Act:

If the Disciplinary Tribunal, after hearing any charge against a person who is a practitioner ..., is satisfied that it has been proved on the balance of probabilities that the person –

- (a) has been guilty of misconduct; or
- (b) has been guilty of unsatisfactory conduct that is not so gross, wilful, or reckless as to amount to misconduct; or
- (c) has been guilty of negligence or incompetence in his or her professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on his or her fitness to practise or as to bring his or her profession into disrepute; or
- (d) has been convicted of an offence punishable by imprisonment and the conviction reflects on his or her fitness to practise, or tends to bring his or her profession into disrepute, –

it may, if it thinks fit, make any one or more of the orders authorised by section 242.

Analysis

Issues to Consider arising from the review application

Is a Referral to the Disciplinary Tribunal Inappropriate?

(a) *Gravity – allegations are not of misconduct, but at worst relate to negligence or incompetence to a lesser degree*

[32] Counsel for Mr NT submits that a referral to the Disciplinary Tribunal is inappropriate because the substance of the complaint is not so grave as to warrant consideration by the Tribunal. He submits that the allegations, if proven, at worst could result in a finding of unsatisfactory conduct.

[33] The power to make such an unsatisfactory conduct finding falls within the jurisdiction of the Standards Committee, the LCRO, and the Disciplinary Tribunal. Counsel's submission is that it is inappropriate to consume the Tribunal's resources when the worst that could happen is that Mr NT's conduct could be found to be unsatisfactory.

[34] Counsel's submission fails for the reasons discussed in *Orlov* in which the Court of Appeal overturned the part of the judgment of Heath J in the High Court where his Honour had "discerned a clear legislative intention that the Tribunal was expected to hear and determine serious charges".³¹ The Court of Appeal concluded "that the imposition of a threshold test is an unwarranted gloss on s 152(2)(a)..."³²

[35] Although the range of conduct that warrants consideration by the Tribunal is not subject to a threshold test for gravity, or seriousness, the Tribunal's resources should also not be consumed by the "petty or trivial."³³

[36] Given the various criticisms in the judgment of Judge Tuohy relating to the legal and evidential deficiencies in the proceeding of which Mr NT had conduct, this is not a complaint that can properly be described as petty or trivial. In considering whether this matter should properly be considered by the Tribunal, it is necessary to give some consideration to the merits to decide whether the conduct was "manifestly acceptable", or, if the allegations were proven, the conduct could fall within the range of misconduct, or conduct that reflects on fitness to practise or brings the profession into disrepute.

³¹ *Orlov v New Zealand Law Society*, above n 20, at [51].

³² At [53].

³³ At [54].

[37] Although the Judge was critical of the complainants' claims, the lack of evidence, and the presentation of counsel's submissions, it is his comment that "the whole conduct of the litigation on behalf of the [complainants] has been seriously ill-judged, lacking in proper legal analysis and commercial commonsense" that underlines his concern.

[38] Good judgement is an essential quality for a lawyer. It is part of a lawyer's job to provide legal analysis, and, where necessary, to ensure clients who may lack commercial expertise have appropriate guidance. The Judge's comments suggest that Mr NT's advice and representation may have lacked those three key elements.

[39] That concern is reflected in the Notice of Hearing, which records the aspects of the complaint that were the focus of the Standards Committee's on the papers hearing.

[40] The factual dispute over the quality of Mr NT's advice and representation is between Mr NT and her clients who are members of the public, and consumers of legal services.

[41] The Court of Appeal in *Orlov* also referred to "the legislative purposes of consumer protection and the maintenance of public confidence in the provision of legal services", saying that in its view it is:³⁴

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. The imposition of a threshold test has the potential to undermine the role of the Tribunal to maintain national standards... it is important that the Tribunal 'gets the big picture'.

[42] Although the complainants' concerns that initiating the proceeding in the District Court was unnecessarily costly for them, a costs consequence following litigation is neither unusual, nor untoward. Litigation is an uncertain business. That is not to say that in appropriate circumstances consumers of legal services should not be protected by the complaints and disciplinary mechanisms provided for in the Act if the evidence supports the allegations made.

[43] In addition to the concerns expressed by Judge Tuohy about the conduct of the proceeding, it appears that either the quality of Mr NT's advice was deficient, or the complainants' understanding of her advice was deficient. Mr NT disputes that her advice was in any way deficient, and says that the complainants simply refused to take advice. On her behalf, counsel submits there was no breach of her duty of care, that

³⁴ At [54].

the evidence supports a finding that she was competent and diligent, and that the complainants received a level of service commensurate with the fees that Mr NT charged them bearing in mind her relative inexperience.

[44] When Mr NT initially came into contact with the complainants in 2009, she was working in a Community Law Centre, apparently under supervision from more senior practitioners who gave the complainants advice. The complainants also received advice from another lawyer.

[45] Subsequently, after Mr NT left her position at the Community Law Centre and went into practise on her own account, the complainants went to her for advice. Their instructions to her resulted in the hearing in the District Court in October 2011, which was followed by the reserved judgment of Judge Tuohy in early March 2012, and the Ruling on Quantum and Costs in September 2012.

[46] If it is correct that the outcome was the necessary consequence of the complainants simply refusing to take her advice, that could be for any number of reasons, or for no reason at all. If the complainants lacked a proper understanding of her advice, that may or may not relate to her ability to communicate her advice.

[47] Counsel for Mr NT says that although she is a relatively junior lawyer, her conduct did not fall below the standard expected of a reasonably competent practitioner, taking into account her experience and expertise at the time.

[48] All lawyers have different levels of experience and expertise, ranging from the newest of young graduates through to the most senior of Queens Counsel. It is open to a standards committee to consider whether conduct fits on the spectrum of reasonable competence, and if so where. It is equally open to a standards committee to refer a matter it considers appropriate to the Tribunal. Both bodies are constituted of lawyers and lay members, with a range of experience and expertise. The Disciplinary Tribunal, however, has jurisdiction over the full range of conduct by lawyers, ranging from unsatisfactory conduct through to misconduct as defined under the Act.

[49] Counsel's submissions that because the conduct is of insufficient gravity, it should not be referred to the Tribunal is not a proposition that is supported by the legal authorities.

[50] Lack of gravity is not a good reason to interfere with the Committee's exercise of its discretion to determine that the complaint should be considered by the Disciplinary Tribunal.

[51] In considering this aspect of the review application, I have been unable to identify any good reason to depart from the Committee's decision that the complaint be considered by the Tribunal.

(b) *Standards Committee had sufficient information to determine the complaint itself, was well placed to do so and had capacity*

[52] Counsel submits that the Standards Committee had sufficient information to determine the complaint itself.

[53] As there are no reasons given or required for the Committee's decision, it is not possible to speculate whether or not the Committee considered it had sufficient information to determine the complaint itself.

[54] As mentioned above, the Notice of Hearing refers to Mr NT's competence, diligence and fitness to practice. The Committee also referred to the "significant financial consequences suffered by" the complainants, and the level of Mr NT's fees.

[55] In considering this aspect of the review application, it is relevant to note that, as mentioned above, the substance of the complaint relates to the quality of the legal advice provided, and Mr NT's conduct of the proceeding.

[56] I have reviewed Mr NT's file to ascertain whether it supports the Committee's decision to refer the complaint to the Disciplinary Tribunal.

[57] I note a lack of documentary evidence supporting the advice and correspondence Mr NT says she has provided. Correspondence on her file suggests that Mr NT may misapprehend important aspects of the practice of law, for example her comment that "you need to follow that advice, rather than choose what you want to do"³⁵ and the apparent lack of any advice or analysis of the reserved judgment which she sent to her clients after the hearing.

[58] Without determining whether Mr NT's submissions to the Court were of a suitable standard, I observe that I found them difficult to follow, and circuitous. I have also reviewed the transcript, which indicates that the Court had some difficulties unravelling the causes of action pleaded by Mr NT on behalf of the complainants.

[59] I also note that Mr NT's correspondence with the complainants, and their responses of 29 and 30 October 2011, following which Mr NT continued to act, despite criticisms levelled by the complainants, and the Court in its reserved decision dated 7

³⁵ Letter NT to OL (30/10/11).

March 2012. If Mr NT was alert to her duties under the Conduct and Client Care Rules, she may have recognised the prudence of advising the complainants that they may have a cause of action against her, and suggesting that they obtain independent legal advice. I was unable to identify any evidence of her having done so.

[60] There is a significant amount of material on Mr NT's file which indicates that she gave the complainants advice, which she confirmed in writing, to the effect that she had explained the risks and costs to them of proceeding with the litigation, and which they have signed.

[61] However, being given advice is not the same as understanding it.

[62] The information provided indicates that the complainants and Mr NT communicated both in English and in [Language]. If there was a breakdown of communication, it could be accounted for in a number of ways, including the difficulty of translating legal concepts from one language to another (which may not, strictly speaking, be a professional failing), a lack of understanding by Mr NT of the legal concepts concerned (which may be problematic in a professional disciplinary sense), or for some other reason. The Disciplinary Tribunal is the most appropriate venue in which to explore what advice was given, and the nature and extent of the complainants' understanding.

[63] It is also apparent from the information provided that determining the complainants' complaints may call for assessments of the credibility of parties to the complaint. Standards Committees are not always best placed to make determinations on credibility, because of the limitations imposed by its summary process, including the inability to cross-examine witnesses. The Disciplinary Tribunal is better placed to assess the credibility of witnesses, and to meet other evidential challenges, particularly in a case such as this where the evidence is likely to be contentious.

[64] It was open to the Standards Committee to proceed to a determination in its jurisdiction, or to refer the matter to the Tribunal. A reference to the Tribunal was not unreasonable, given the scope and nature of the evidence that is available. It is not possible to speculate whether the Standards Committee considered the information it had was sufficient, but it can be inferred from the decision to refer the complaint to the Tribunal, that the Committee did not consider it was best placed to undertake the task.

- (c) *In the circumstances, does a referral to the Disciplinary Tribunal create unnecessary cost for Mr NT and delay determination of the complaint contrary to the purposes of Part 7 of the Act*

[65] Counsel for Mr NT submits that the referral to the Tribunal is inconsistent with the purposes of Part 7 of the Act because it creates unnecessary delay in having the complaint disposed of, and adds to Mr NT's costs in being represented by counsel.

[66] There is no evidence to support counsel's proposition that a determination by the Disciplinary Tribunal will cause undue delay. It is not possible to progress that aspect of the review application further.

[67] The costs associated with defending herself before the Tribunal, and in choosing to be represented by counsel, are part of the potential cost of practising law. Any added cost to Mr NT does not provide sufficient cause to interfere with the Committee's exercise of its discretion to refer the complaint to the Tribunal.

Was the conduct manifestly acceptable?

[68] Although the complainants blame their lawyer for the outcome of the District Court proceeding, that complaint alone would not be sufficient to justify a referral to the Disciplinary Tribunal. Any number of complaints of that nature routinely come before standards committees, and on review to this Office. It is primarily the concerns expressed in Judge Tuohy's judgment that the "whole conduct of the litigation on behalf of the [complainants] has been seriously ill-judged, lacking in proper legal analysis and commercial commonsense" that persuades me to confirm the Committee's determination that the Tribunal concert of the complaint.

Fees

[69] As Mr NT's fees were also the subject of complaint, and the quantum of those fees may be affected by the quality of advice, it is appropriate that they are also considered by the Disciplinary Tribunal, rather than being dealt with as a separate aspect of the complaint.

Summary

[70] My view on the evidence before me is that there are sufficient grounds to justify a referral to the Disciplinary Tribunal. I consider Judge Tuohy's comments carry particular weight. Although I do not know how the Standards Committee will frame its charges, there are grounds for closer scrutiny of Mr NT's conduct of the proceeding, her advice to the complainants and her fees.

[71] Gravity is not a bar to a referral to the Tribunal. The Judge's comments provide grounds for the view that the complaint is not petty or trivial.

[72] There is no evidence that the Standards Committee's decision to prosecute was significantly influenced by any irrelevant considerations. Nor is there any evidence to suggest the discretion to prosecute was exercised for collateral purposes, in a discriminatory manner, capriciously, in bad faith, or with malice. Bearing in mind the Judge's comments, Mr NT's conduct of the proceeding does not appear to have been "manifestly acceptable".

[73] In concluding that the decision of the Standards Committee is confirmed, I have considered all matters relevant to the complaint afresh and exercised my judgment independently.

Costs

[74] Pursuant to s 210 of the Act, and the LCRO's Cost's Orders Guidelines, Mr NT is ordered to pay \$900 costs on review, for a straightforward review on the papers.

Decision

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

DATED this 21st day of November 2014

Dorothy 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 NT as the Applicant
Mr MK as the Applicants' Representative
[City] Standards Committee as the Respondent
The New Zealand Law Society