

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of the Waikato Bay of Plenty Standards Committee 2 of the New Zealand Law Society

**BETWEEN**

**Mr Poole**  
of Auckland  
Applicant

**AND**

**Mr Yorkshire**  
of Auckland  
Respondent

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

**Decision**

[1] Mr Poole seeks a review of a decision of the Waikato Bay of Plenty Standards Committee 2 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 Mr Yorkshire. In particular Mr Yorkshire complained that Mr Poole communicated with him in a way which breached standards of courtesy and respect. The Standards Committee investigated the complaint and by a decision dated 19 August 2009 determined that there had been unsatisfactory conduct and resolved to prosecute the matter before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

[2] A hearing in person on this application was conducted on 30 October. Mr Poole appeared at that hearing, as did Mr Shetland for the Committee. I observe that Mr Shetland made submissions only in respect of procedural matters and did not take part in any discussion of the substance of the complaint. Mr Yorkshire was informed of the hearing and his right to attend and be heard but elected to take no part.

[3] I observe that Mr Shetland also conceded (quite properly) that it was not appropriate for the Committee to make a determination of unsatisfactory conduct and at the same time a determination to prosecute the same conduct before the Tribunal. Although s 152 of the Lawyers and Conveyancers Act 2006 states that a Committee may make “1 or more” of the determinations” in that section, this needs to be viewed in the context of the prosecutorial process. If a particular matter is to be put before the Tribunal it must be for the Tribunal to determine whether professional standards have been breached. In respect of any particular incident of conduct the Committee may make a determination of unsatisfactory conduct or a determination to prosecute the matter before the Tribunal, but not both. I observe that s 152(2)(a) supports this in that it states that the Committee may determine to put the complaint or “any issue involved in the complaint or matter” before the Tribunal indicating that it is permissible to deal with different issues involved in the complaint differently.

[4] It is therefore not appropriate for the Committee to make a finding of unsatisfactory conduct and then to put the matter before the Tribunal for further consideration and penalty. What s 152 does permit is for the Committee to deal with distinct aspects of a complaint differently. It may for example resolve to take no further action or make a finding of unsatisfactory conduct and make orders in respect of certain conduct, and put other distinct aspects of conduct before the Tribunal. In such a case the matters placed before the Tribunal will be able to be considered independently of the other determinations of the Committee.

[5] The orders to be made on this review will amend the decision of the Standards Committee accordingly.

### **Background**

[6] Mr Yorkshire was in dispute with a neighbour (Ms M) regarding fencing issues. The merits of the dispute are of no consequence. Ms M instructed Mr Poole to assist her. It appears that Ms M and Mr Poole are friends, however, Mr Poole wrote to Mr Yorkshire in a professional capacity on 5 June 2009. That letter was intemperate and contained phrases which might reasonably be considered to be calculated to offend. Mr Yorkshire complained to the Law Society about that letter.

[7] In his response to the complaint to the Law Society Mr Poole suggested that Mr Yorkshire was unreasonable, as was the New Zealand Law Society. He also stated that “My final response to you is to give you and Mr Yorkshire the great Kiwi suggestion”. In its determination the Standards Committee considered the letter of to warrant putting the matter before the Tribunal. The Committee also considered the

comments in Mr Poole's letter in response to the complaint to be derisory and derogatory stated that this was part of its reasons for its determination.

### **Jurisdiction**

[8] This is an application to review a determination of the Standards Committee to prosecute Mr Poole. It would be unusual for a statutory power to review the exercise of a prosecutorial discretion to exist. This office signalled to Mr Poole by letter of 18 September 2009 that the question of whether jurisdiction to review the decision existed would be in issue. At the outset I invited Mr Poole to address me on this point. He did not provide substantive submission on the point stating simply that the application had been duly made and there was a statutory obligation to conduct the review. He also observed that the decision of the Standards Committee itself indicated (in its determination) that an application for review could be made.

[9] This office has only those powers of review conferred by the Lawyers and Conveyancers Act 2006. Section 193 of that Act provides that

A person who is specified in any provision of sections 194 to 197 as a person who may apply under this section for a review may apply to the Legal Complaints Review Officer for that review.

[10] The relevant section in this case is s 194 which deals with applications for review in respect of decisions made on complaints. Section 194(2) provides:

A person may apply under section 193 for a review of a determination, requirement, order, or direction to which this section applies if that person is—

(a) ...

(b) the person in respect of whom the complaint was made; or

(c) ...

[11] Mr Poole clearly qualifies as the person in respect of whom the complaint was made. However I must consider whether the application is in respect of "for a review of a determination, requirement, order, or direction" of the Standards Committee. Section 152(2)(a) provides that a Standards Committee may on considering a complaint, make:

a determination that the complaint or matter, or any issue involved in the complaint or matter, be considered by the Disciplinary Tribunal.

[12] This would suggest that the decision to prosecute the matter is a reviewable determination. This is arguably reinforced by s 152(4) which states that a decision of the Committee made under this section is final "Subject to the right of review conferred by section 193".

[13] There are, however, signals in the Act which suggest that this may not have been the legislative intent. For example s 197(2) (which deals with applications for review in “other cases”) states that “Nothing in this section authorises the review of any order of a Standards Committee that any complaint or matter be considered by the Tribunal”. On the one hand that clause could be seen as signalling that Parliament did not intend lawyers being prosecuted before the Tribunal to be entitled to review the decision to prosecute. Conversely that provision could be seen more narrowly as designed to prevent the possibility of any intermeddling by the Law Society itself in the decision of a Standards Committee to prosecute a matter.

[14] Perhaps stronger evidence of legislative intent against a right to a review of a decision to prosecute can be found in s 158. That section provides that notice of a determination may be given to “to each of the persons who may, under section 193, apply to the Legal Complaints Review Officer for a review of the determination”. However that notice must be given only where a Standards Committee makes a determination of the kind described in section s 152(2)(b) or (c). Those clauses relate to determinations that there has been unsatisfactory conduct or to take no further action, but not to determinations to prosecute (which are made under s 152(2)(a)). Accordingly there is no statutory requirement to give notice to a person who is to be charged before the Tribunal of the existence of any right to review. If there is a right to review a determination to prosecute this would result in a legislative anomaly.

[15] I observe the general stance in common law jurisdictions is to take a very restrictive stance in respect of the reviewability of a decision to prosecute since “the prosecutor’s function is merely to do the preliminary screening and to present the cases, and that the decisions that count are made on the basis of the trial” (*Sankey v. Whitlam* (1979) 53 ALJR 11, 38, 21 ALR 505 561; also *Saywell v Attorney-General* [1982] 2 NZLR 97; *Bow v Police* (1989) 5 CRNZ 276; and *Thompson v Attorney-General* [2000] NZAR 583.

[16] There is a strong pragmatic argument that the disciplinary process should not be prolonged by permitting a review of a decision to prosecute. Any arguments that the decision to prosecute is ill founded can of course be properly raised before the Tribunal itself. These considerations might properly be considered under the general rubric of the purpose of the Lawyers and Conveyancers Act to protect the consumers of legal services and conveyancing services by providing a more responsive regulatory regime (s 3). I also observe that s120 of the Act sets out the purpose of Part 7 of the Act which is titled “Complaints and Discipline”. One of the purposes outlined in s 120(2)(b) is that complaints “may be processed and resolved expeditiously...”. In undertaking this

interpretative task it is proper to look both at the text of the legislation and its purpose (s 5 Interpretation Act 1999).

[17] It should, however, also be recognised that this presumption against the reviewability of decisions to prosecute has been eroded. See for example the comments of Richardson J in *Kumar v. Immigration Department* [1978] NZLR 553, 558 (CA). More recently see *Polynesian Spa Ltd v Osborne* [2005] NZAR 408 and *Down v Van der Wetering* [1999] 2 NZLR 631; [1999] NZAR 307, also *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA).

[18] I also take notice of the fact that I must be careful to construe the Act in a way which is most consistent with the rights of a person who is subject to the disciplinary process. If the Act is ambiguous it should be construed in favour of a right to review.

[19] I consider that the legislation in this context is ambiguous. A plain English reading of section 194 taken with s 152 suggests that a right to review a Standards Committee's decision to prosecute exists. However, that is not consistent with the fact that pursuant to s 158 the Committee is not required to notify the existence of a right to review where a determination to prosecute is made and the need for speedy resolution of disciplinary matters.

[20] In light of that ambiguity I consider that I do have the jurisdiction to review the determination of a Standards Committee that a complaint or matter or any issues involved in the complaint or matter be considered by the Disciplinary Tribunal.

### **Review of decision to prosecute**

[21] It must be stated at the outset that it will only be in exceptional cases that a decision to prosecute will be reversed on review. The cases cited above indicate the kinds of basis upon which a decision to prosecute might be revisited. They 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.

[22] In his submissions Mr Poole focussed on defending his conduct and seeking to put his actions in a context which meant the words used were justifiable.

[23] In considering whether or not the decision to prosecute should be revisited it is not necessary for me to conclude whether or not the conduct complained of fell short of acceptable professional standards. If the conduct was manifestly acceptable then this might be evidence of some improper motivation in the bringing of the prosecution. However, in this case it is quite clearly arguable that the conduct complained of fell short of professional standards. Accordingly I do not consider it appropriate to consider the merits further. I also record that I do not consider Mr Poole's references to the use of inappropriate language by other members of the legal profession relevant in reaching this determination.

[24] Mr Poole suggested that I should take into account the fact that charges before the Tribunal had been laid against him in this matter even though this review was pending. He considered that this was in bad faith. I do not consider this to be relevant to the question of whether the determination to prosecute was improperly made. There is a strong public interest in expediting the disciplinary process and the laying of charges is in many ways a formal step which is not inconsistent with the possibility that the review of the decision to prosecute might be successful and the charges would have to be withdrawn. I can see nothing inappropriate in charges being laid while this review was in progress.

[25] At the hearing of the review application Mr Poole expressed his view that the decision to prosecute was motivated by ill will towards him by either the New Zealand Law Society or by members of the Standards Committee. He made reference to other dealings that he has had with the Society. On hearing from Mr Poole in this regard and on examining the file I can find no evidence of inappropriate conduct on the part of any officers of the Law Society, the Standards Committee, or its members. I do not consider that his application can succeed on this ground.

[26] Mr Poole has not established any basis upon which it would be appropriate to revisit the determination of the Standards Committee to prosecute this matter before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

[27] In light of the concession of Mr Shetland the determination of the Standards Committee will be modified and the finding of unsatisfactory conduct will be deleted. Whether there has been unsatisfactory conduct on the part of Mr Poole is a matter for the Tribunal to decide.

### **Costs**

[28] Mr Poole has been unsuccessful in his application for review. In light of this it is appropriate that an order of costs be made against him. I observe that under the scale

in the Costs Orders Guidelines of this office an order of \$1200 would be made. However, I take into account that this matter was heard alongside another matter. Accordingly in all of the circumstances I consider that an order of costs of \$900 is appropriate.

### **Decision**

[29] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act the decision of the Waikato Bay of Plenty Standards Committee is modified in the following way:

- [a] The paragraph which states "Following the completion of its investigation the Standards Committee has determined that there has been unsatisfactory conduct on the part of Mr Poole" is to be deleted and replaced with a paragraph which states "Following the completion of its investigation the Standards Committee has determined that the complaint and any issues involved in the complaint be considered by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal."
- [b] The heading "Orders" and the paragraph immediately under that heading stating "As a result of this determination, the Standards Committee determined that the complaint and any issues involved in the complaint be considered by the Disciplinary Tribunal" be deleted.

### **Order**

[30] The following order is made:

- Mr Poole is to pay \$900.00 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 11<sup>th</sup> day of November 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:

Mr Poole as Applicant  
Mr Yorkshire as Respondent  
The Waikato Bay of Plenty Standards Committee  
The New Zealand Law Society