

CONCERNING

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of the Standards Committee

BETWEEN

LD

Applicant

AND

**AN APPLICATION FOR REVIEW
OF A PROSECUTORIAL
DECISION**

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

DECISION

Introduction

[1] Mr LD has applied for a review of a determination (the determination) by the Standards Committee made pursuant to s 152(2)(a) of the Lawyers and Conveyancers Act 2006 (the Act) “that the matter and any and all issues involved in the matter be considered by the Lawyers and Conveyancers Disciplinary Tribunal” (the Tribunal).

[2] A confidential report was made to the New Zealand Law Society (NZLS) pursuant to rule 2.8 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the rules). The Committee considered the report appeared to indicate that there may have been misconduct or unsatisfactory conduct on Mr LD’s part, and commenced an investigation of its own motion pursuant to s 130(c) of the Act. The investigation concluded with the determination, which contains no discussion or reasons, that the Tribunal consider all matters.

Background

[3] Mr LD is a lawyer. Between 15 February and 4 September 2013 he was also a director of [Company X].¹

[4] Mr LD was Mr WH's lawyer.² Mr WH was a director of [Company X] until 18 February 2013.³ Mr WH was declared bankrupt 26 February 2013.⁴

[5] In 2010 Mrs OE, Mr WH's mother, sold a property at [Address A]. She is said to have signed an authority addressed to Mr LD's firm dated 8 December 2010 (the authority). The authority allowed Mr WH to deal with the proceeds of sale in various ways, including allocating funds left over after specified amounts were paid in the manner Mr WH deemed appropriate.⁵

[6] It appears Mrs OE lent money to Mr WH, with the money being channelled into companies he was involved in. In particular, Mr LD says the sale of [Company X]'s assets was contingent on Mrs OE releasing a general security agreement between her and [Company X] dated 11 April 2012 (the GSA).

[7] Mr LD says that he agreed to become a director of [Company X] in February 2013 because he wanted to conclude the sale of [Company X]'s assets under an agreement dated 31 October 2012.⁶ Mr LD says that Mr WH had described to him how the sale of [Company X]'s assets would affect the level of Mr WH's debt to Mrs OE.

[8] Mr LD also describes himself as Mrs OE's lawyer until around 22 April 2013.⁷ By April 2013 Mr WH believed Mrs OE had advanced dementia, and was unable to manage her own affairs. Mr LD then acted for Mr WH in an application to appoint an independent temporary property manager to manage specific property belonging to Mrs OE.⁸

[9] On or about 22 April 2013 Mr WH applied for the appointment of Public Trust as independent temporary property manager for Mrs OE, and Mr LD swore an affidavit in support of Mr WH's application. Part of Mr LD's affidavit says:

5. I have read the affidavit of WH sworn 29th April 2013, and as far as it relates to [Company X] and the factual background relating to the need for the release of the GSA held by [Mrs OE], I confirm that the contents of the affidavit are true and correct. From my perspective, as [Mrs OE's] solicitor up until these proceedings, the following two factors are determinative as to why [Mrs OE's] GSA needs to be released:

¹ Companies Office Register.

² Letter LD to NZLS (15 August 2014).

³ Above n 1.

⁴ Insolvency and Trustee Register Search.

⁵ Authority Mrs OE to Mr WH (12 December 2010).

⁶ Letter LD to NZLS (15 August 2014) at [11].

⁷ Affidavit of LD (April 2013) at [5].

⁸ Above n 6, at [4].

5.1 In terms of the [Company Y] loan offer dated 22nd March 2012, which [Mrs OE] signed as guarantor after independent legal advice had been given by SI of [Law Firm], a specific condition precedent to the loan advance, clause 5.1, was that the debt to [Bank] as first chargeholder over [Company X] be reduced by the amount of the sale proceeds of the Management Rights of the [Company X]. [Mrs OE] agreed to this provision. The sale to [Hotel A] of the [Hotel X] cannot proceed without the release of [Mrs OE's] GSA, so that if it is not provided, the proceeds will be lost.

5.2 Assuming that the settlement of the sale of the [Hotel X] Management Rights to [Hotel A] proceeds, the proceeds will effectively reduce the amount of the [Bank] mortgage over the [Area] property owned by [Company Z] by the quantum of the sale proceeds. [Company Y] holds a second mortgage over the [Area] property and [Mrs OE] holds a third mortgage over the property. The positions of [Company Y] and [Mrs OE] are effectively improved by the amount of the sale proceeds, if the [Bank] debt over the [Area] property is reduced by the amount of the proceeds of sale of the Hotel. That is to say that the equity in the [Area] property will be increased by \$500,000.00 thereby improving the position of [Company Y] and [Mrs OE] as mortgagees.

[10] The Family Court then appointed Mr GQ, a lawyer, to act as Mrs OE's property manager. Mr GQ signed a deed releasing the GSA. Settlement of [Company X]'s asset sale proceeded, but Mr GQ believes Mrs OE lost a considerable amount of money on the sale, and attributes her losses to Mr LD's conduct.

[11] In the course of its inquiry, the Committee considered wide ranging allegations made by Mr GQ against Mr LD in draft civil proceedings, including that he breached fiduciary obligations he owed to Mrs OE, and breached an undertaking he gave to Mrs OE/Mr GQ in his affidavit.

[12] On the basis of the information before it, without indicating what the reasons were for its decision, the Committee decided the Tribunal should determine all matters.

[13] Mr LD has applied for a review of that determination.

Standards Committee Determination – Reasons

[14] The issue of a determination referring the complaint or matter to the Tribunal which contains no discussion or reasons accords with the provisions of s 158 of the Act, and the judgment of the Court of Appeal in *Orlov v NZLS*.⁹

[15] The dilemma the absence of discussion or reasons presents on review has been referred to in other decisions from this Office,¹⁰ which is required by s 213(2) of the Act to provide reasons for its decisions.

[16] In *Deliu v Hong*¹¹ the High Court held that a Review Officer must reach his or her own view on the evidence before him or her,¹² although the High Court recognised that

⁹ *Orlov v New Zealand Law Society* [2013] NZCA 230 at [54](f).

¹⁰ *AE – An application for review of a prosecutorial decision* LCRO 93/2013 and 338/2013.

“[i]t was particularly problematic when the Standards Committee did not provide full reason for its decision, so that the Review Officer had to attempt to deduce those reasons”.¹³

NZLS Charges to the Tribunal

[17] In the course of this review I have seen the charges the Committee has laid in the Disciplinary Tribunal. Those generally confirm that the Committee was uneasy about the role Mr LD had played in Mrs OE’s affairs over the time he had acted for her and for Mr WH and whether he lacked independence and acted in a conflict.

Review Application

[18] The nub of Mr LD’s application for review is that he met his fiduciary obligations, and did not give an undertaking or anything resembling one. He does not consider that the conduct alleged against him is capable of being held to be misconduct, and says that his conduct was not intentional, wilful or reckless. Mr LD’s view is that the determination should be reversed, and the Committee should be directed to reconsider and determine the matter.

Review Hearing

[19] Mr LD and his lawyer Ms RT attended a review hearing in [City] on 26 May 2015. The Standards Committee did not wish to participate, and the hearing proceeded in its absence.

Role of Legal Complaints Review Officer

[20] The role of the Legal Complaints Review Officer (LCRO) on review is to reach her own view of the evidence before her. Where the evidence 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.¹⁴

[21] When reviewing the exercise of a prosecutorial discretion by a standards committee, it falls to this Office to determine whether there are sufficient grounds to justify the matter being referred to the Disciplinary Tribunal,¹⁵ bearing in mind “a decision under

¹¹ *Deliu v Hong* [2012] NZHC 158 at [43].

¹² At [41].

¹³ At [42].

¹⁴ At [41].

¹⁵ *RB v [Area] Standards Committee X* LCRO 92/2014.

s 152(2)(a) does not determine the outcome of the complaint. It only determines which body should be seized of it”.¹⁶

[22] Reviews by this Office are to be “conducted with as little formality and technicality and as much expedition as is consistent with the requirements of the Act, proper consideration of the review and the rules of natural justice”.¹⁷

[23] 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 Tribunal. Previous decisions from this Office have discussed the principles to which a Review Officer has regard when reviewing decisions to prosecute, and consideration has been given to principles in various court decisions where a decision to prosecute might be revisited. These include situations in which a decision to prosecute was:¹⁸

- (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.

[24] The Court of Appeal has expressed the view that:¹⁹

having regard to the legislative purposes of consumer protection and the maintenance of public confidence in the provision of legal services, it is... important that the Tribunal be able to determine some complaints even though the likely sanction will not involve striking for suspension. The complaints may for example involve complex issues of fact or law be likely to result in a significant precedent.

[25] Although there is no threshold test to be met before a matter can be referred to the Tribunal,²⁰ logically, if the conduct in question was manifestly acceptable, a decision to prosecute should be set aside. Part of the Court’s reasoning in *Orlov* was that the threshold test which previously existed under the Law Practitioners Act 1982 was no longer necessary as it was now met by other means. One aspect of the “other means” referred to is the role that this Office plays in reviewing decisions to refer matters to the Tribunal. The Court said that:²¹

The protection to the practitioner once afforded by the threshold test [in the Law Practitioners Act] is thus now met by other means. 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.

¹⁶ Above n 9 at [50].

¹⁷ At [23].

¹⁸ Above n 10, at [31].

¹⁹ Above n 9, at [54](h).

²⁰ At [53]–[54].

²¹ At [54](d).

[26] Sufficiency and strength are matters for the Tribunal,²² once it is apparent that there is some evidence of questionable conduct as the basis for a referral. From this I take it that it is acceptable to approach the question of referral by considering conduct against a continuum that ranges from “manifestly acceptable” and “petty or trivial” through to conduct that, if proven, may fall within the definition of misconduct under s 7 of the Act. Somewhere between those two extremes, lies conduct that falls within the definition of unsatisfactory conduct under s 12. That, too, can properly be the subject of consideration by the Tribunal.

[27] The Court of Appeal considered it “unlikely that Parliament intended only the cases that might warrant strike off or suspension should come before it”.²³ The Court recognised the importance of the Tribunal getting “the big picture”,²⁴ and the “unfortunate practical consequence of fragmenting the disciplinary process in cases involving multiple complaints of varying degrees of seriousness against the same practitioner”.²⁵

[28] The LCRO in *RB v [Area] Standards Committee X* said that consideration of decisions to prosecute should not be:²⁶

...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 judgement to each case.

[29] Comparing standards committees and the Tribunal, the Court of Appeal said:²⁷

unlike a Standards Committee, the Tribunal must hold its hearings in public and parties are entitled to be heard in person or through counsel. Also unlike a Standards Committee, the Tribunal may make a finding of misconduct as well as a finding of unsatisfactory conduct. The Standards Committees’ jurisdiction does not extend to making findings of misconduct. The Tribunal also has a wider range of sanctions available to it in the event of a finding of misconduct or unsatisfactory conduct, including the powers of suspension and strike off.

[30] It is also relevant to consider the interests of the lawyer at the centre of the enquiry. Protection of a lawyer from unwarranted prosecution before the Tribunal was inherent in the comments of Panckhurst J in *M v Wellington Standards Committee (No 2)* where he noted that:²⁸

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.

²² At [71].

²³ At [54](g).

²⁴ At [54](h).

²⁵ At [54](i).

²⁶ Above n 15, at [27].

²⁷ Above n 9, at [20].

²⁸ *M v Wellington Standards Committee (No 2)* [2013] NZHC 1037 at [12].

[31] In formulating this decision, I have taken the foregoing into account, together with all of the information available on review, including the evidence and submissions at and after the review hearing.

[32] I have independently formed the view that there are good grounds for Mr LD's conduct to be considered by the Tribunal.

[33] This decision confirms the Standards Committee's decision for the following reasons.

Evidence

[34] I have borne in mind the need for particular caution and good reason before substituting my own judgement for that of the Standards Committee.

[35] I consider there are sufficient grounds to justify the matter being referred to the Disciplinary Tribunal based on Mr LD's acceptance that he acted "as [Mrs OE's] solicitor up until" Mr WH commenced proceedings to have another person appointed to manage her property, specifically, to obtain a release of her GSA.

[36] Mr LD was a director of the company that stood to benefit from the release of the GSA.

[37] By acting for Mr WH in his application to relieve Mrs OE of her capacity to manage her own property, and then engaging in negotiations for the release of the GSA, Mr LD has put himself at risk of adverse disciplinary consequences. Those appear to me to be the nub of the most serious disciplinary issues that arise from the Committee's own motion enquiry.

[38] Mrs OE was elderly, vulnerable and was owed substantial sums of money by her son, Mr LD's client.

[39] The purposes of the Act include maintaining public confidence in the provision of legal services, and protecting consumers of legal services. If Mr LD has failed to act in accordance with the fiduciary duties he owes to Mrs OE as a former client, or has failed to protect her interests, those are matters that are related to the objectives of the Act, and that can be considered by the Tribunal.

[40] There is no evidence to support a finding that the decision to prosecute was:²⁹
(a) significantly influenced by irrelevant considerations;

²⁹ Above n 10.

- (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.

[41] I have given careful consideration to whether the conduct in question was manifestly acceptable. Mr LD says he did nothing wrong. He may be correct. If proven against him, however, the conduct alleged could not be described as manifestly acceptable, petty or trivial.

[42] Although this Office is not in a position to determine the sufficiency of the evidence or the strength of the complaint, there is evidence of questionable conduct. The Tribunal process affords an opportunity to be heard in person or through counsel. The charges the Committee has laid relate to allegations that Mr LD did not act in accordance with his fiduciary duties to Mrs OE as a former client, failed to protect her interests, and acted in a conflict of interest. Those are not petty or trivial matters. It is appropriate that a wide range of sanctions be available if the charges are proven.

[43] I have taken into account all of the information available on review, including the information and submissions presented by Mr LD and his lawyer at the review hearing. There are very minimal opportunities for this Office to overturn a Committee's referral to the Tribunal. There is a need for particular caution before doing so, and good reason is a prerequisite to me substituting my own judgement for that of the Standards Committee.

[44] In all the circumstances the determination is confirmed.

Costs

[45] The LCRO has discretion to order costs on review pursuant to s 210 of the Act and the LCRO's Costs Orders Guidelines.

[46] Mr LD's review application was unsuccessful. He requested a hearing in person. It is appropriate that he contribute to the costs of this review, which would otherwise be defrayed across all New Zealand lawyers.

[47] The Guideline amount for a straight forward review, with a hearing in person is \$1,200. Mr LD is ordered to pay \$1,200 pursuant to s 210 of the Act.

Decision

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

[2] Pursuant to s 210 of the Lawyers and Conveyancers Act 2006 the Mr LD is ordered to pay costs on review of \$1,200 by 15 July 2015.

DATED this 15th day of June 2015

D 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 LD as the Applicant
Ms RT as the Applicant's Representative
Mr VV as a Related Person under s 213
Standards Committee
The New Zealand Law Society