

LCRO 15/2010
23/2010
38/2010

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 of the New Zealand Law Society

BETWEEN

MR RETFORD

of Auckland

Applicant

AND

**AUCKLAND STANDARDS
COMMITTEE**

Respondent

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

Decision

[1] Mr Retford (the Practitioner) sought a review of three decisions made by Auckland Standards Committee which determined to prosecute him before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal. The matters giving rise to the decisions arose from complaints made by AA., BB. and CC. Each of the complaints had arisen in relation to different circumstances but each involved the allegation that the Practitioner had provided regulated services to individuals outside of the limited practising certificate that he held, which allowed him to act as in-house counsel for a named company. The Standards Committee investigated the complaints and by two decisions dated 15 December 2009 and a third decision dated 15 February 2010, determined pursuant to section 152(2)(a) of the Lawyers and Conveyancers Act 2006

that the complaints should be considered by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

[2] A hearing in person was conducted 11 May 2010 in relation to all three review applications, with only the Practitioner appearing. The Standards Committee was informed of the hearing and elected to take no part. The original complainants were also informed of the review application and that as the applications concerned a Standards Committee decision to prosecute, their involvement was not required.

Jurisdiction

[3] The jurisdiction of this office to review a determination of a Standards Committee to prosecute was previously considered by this office in LCRO 133/09, where it was observed that it would be unusual for a statutory power to exist to review the exercise of a prosecutorial discretion. An analysis was undertaken of the various provisions in the Lawyers and Conveyancers Act to discern the legislative intent in relation to this matter. In the course of analysing the relevant legislative provisions in the Act an ambiguity was noted between section 194 which taken with s 152 suggests that a right to review a Standards Committee's decision to prosecute exists on the one hand, and on the other hand that s 158 of the Act did not provide for a practitioner to be notified of the existence of a right to review, the absence of such notification suggests that it was not intended that there should be a right of review.

[4] Common law principles were also considered, and it was noted that the general position in common law jurisdictions is to take a very restrictive stance in respect of the reviewability of a decision to prosecute, observing that the prosecutor's function is merely to do the preliminary screening and to present the case. However, it was also recognised that this presumption against the reviewability of decisions to prosecute has been eroded. Reference was made to the comments of Richardson J in *Kumar v Immigration Department* [1978] NZLR 553, 558 (CA). More recent decisions that considered this issue are *Polynesian Spa Ltd v Osborne* [2005] NZAR 408 and *Down v Van der Wetering* [1999] 2 NZLR 631; [1999] NZAR 307.

[5] Care must be taken to construe the Act in a way which is most consistent with the rights of a person who is subject to the disciplinary process, and an ambiguity should be construed in favour of a right to review. It was concluded in the light of all of the above

considerations that this office has the power to review a Standards Committee decision to prosecute.

[6] Notwithstanding the above, 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.

[7] The Committee made no substantive findings on the complaints against the Practitioner and it was appropriate that no determination was made in relation to a complaint about conduct that was to be put before the Tribunal. In such case it must be for the Tribunal to determine whether professional standards have been breached. Therefore, the only question for the review is whether the Standards Committee determinations should stand.

[8] 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.

Background

[9] In February 2009 the Practitioner was issued with a practising certificate in his capacity as in-house counsel for a company which employed him. Such a practising certificate authorised Mr Retford to act only for his named employer.

[10] The New Zealand Law Society subsequently received complaints against the Practitioner from three different complainants, each which raised concerns, inter alia, that the Practitioner was acting for individual clients other than his purported employer.

[11] CC's complaint alleged that the Practitioner had held himself out as a solicitor and barrister in 2008, and that he had provided advice to CC's companies. The complaints also gave rise to the possibility that Mr Retford may have dealt with trust money in contravention of the requirements of the Lawyers Trust Account Regulations, and whether Mr Retford's actions had breached Rule 2 of the Conduct and Client Care Rules.

[12] AA's complaints alleged that Mr Retford purported to act for individuals other than his employer in contravention of the Lawyers and Conveyancers Act, that he had interfered unlawfully in contractual relationships and used a document to obtain a pecuniary advantage, and that he had received trust monies in contravention of the Lawyers and Conveyancers Act and the Lawyers Trust Account regulations.

[13] BB's complaints alleged that Mr Retford acted as a solicitor for an individual other than his employer, that he had sought to remedy the matter by adding the name of another lawyer and referring to himself as "counsel acting", and that he instructed, or was instrumental in arranging, the service of documents on her in an intimidating manner.

[14] The Practitioner was notified of these complaints and provided responses to the Standards Committee in respect of each. The Standards Committee determined that all of the matters arising in the complaints should be referred to the Disciplinary Tribunal.

Review

[15] In relation to each of the three review applications, Mr Retford's reasons for seeking the review was based on information he had provided to the Standards Committee, and explanations about his actions. His submissions focussed on defending his conduct and seeking to put his actions in a context which justified his actions.

[16] 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 record that the Practitioner did not raise any issues concerning the procedures that had been adopted by the Standards Committee, but rather, relied on his explanations of the conduct to support the overall submission that he had not breached the Lawyers and Conveyancers Act or any regulations under that Act. Having heard from the Practitioner and examined the file I do not consider that his review application can succeed on any of the above grounds. He 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.

Costs

[17] The Practitioner 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. I take into account that all reviews were heard at the same time and that this should be reflected in a costs order. In all of the circumstances I consider that an order of costs of \$1,200 is appropriate.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act the decisions of the Standards Committee are confirmed.

Order

The following order is made:

- The Practitioner is to pay \$1,200 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 7th day of July 2010

Hanneke Bouchier

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 Retford as the Applicant
Auckland Standards Committee as the Respondent
AA as an interested party
BB as an interested party
CC as in interested party
The New Zealand Law Society