LCRO 164/2009

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	A determination of the Otago Standards Committee No.1
BETWEEN	**MR LYDD**
	Applicant
AND	**MR AND MRS MARYPORT**
	Respondent

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

HEARD BY TELEPHONE CONFERENCE ON 14 OCTOBER 2009

APPEARANCES (if applicable)

X for the applicant
G for the Respondent
Z for the Standards Committee

DECISION

Background

[1] Mr Lydd is the subject of a complaint by Mr and Mrs Maryport. The complaint concerns the conduct of Mr Lydd in the creation of certain trust structures and subsequent dealing with trust matters. One of the allegations is that Mr Lydd improperly altered an instrument of transfer relating to trust property. The complaint was made on 27 November 2008, though the issues had been raised with Mr Lydd through Mr and Mrs Maryport's counsel in earlier exchanges of correspondence.

[2] The complaint was forwarded to Mr Lydd by the Society on 1 December and he was invited to comment on it. A response was provided on 19 December in which Mr Lydd observed that civil proceedings in respect of the subject matter of the complaint had been threatened and expressed the view that in all the

circumstances Mr and Mrs Maryport were inappropriately using the complaints procedure. Mr Lydd submitted that the Committee should summarily dismiss the complaint (as it is empowered to do by s 138 of the Lawyers and Conveyancers Act 2006).

[3] The Committee then sought clarification of the status of any proceedings in the matter. Mr Lydd informed the Committee by letter of 4 May 2009 that no proceedings had been issued by Mr and Mrs Maryport in the matter. A copy of the earlier response of Mr Lydd was provided to Mr & Mrs Maryport for comment on 12 May 2009. That response was provided on 27 May 2009. On 4 August further submissions were made to the Committee on behalf of Mr Lydd by his counsel.

[4] After considering the material provided to it by the parties the Committee resolved to appoint an investigator. On 1 September 2009 an investigator was appointed under s 144 of the Lawyers and Conveyancers Act 2006. On 10 September 2009 the Society wrote to Mr Lydd and informed him of the appointment.

[5] On 6 October 2009 this office received an application for the review of the appointment of the investigator by the Committee. I observe that the application itself sought a review of the appointment of the investigator. However, in the written submissions of the applicant in the matter and at that hearing itself this was expanded somewhat to cover objections to various steps taken by the Committee (or possibly the investigator) in this matter. It was accepted that given the relatively short time frame involved this was appropriate to ensure the matter was properly heard and considered.

[6] The general tenor of the application was that the Standards Committee failed to give due regard to the information and submissions of Mr Lydd and his counsel in reaching its decision and that the appointment of an investigator was unduly prejudicial to Mr Lydd. A second thread of the application was that the complaint was not made in good faith and the complaints process was being used inappropriately by the complainants in this matter in an effort to obtain an illegitimate advantage in the dispute that exists and in any proceedings which might eventuate.

[7] I observe that Mr Lydd was concerned that the investigation was continuing. In light of the fact that this office has only those powers conferred by the Lawyers and Conveyancers Act 2006 (the Act) and those powers do not

include the power to stay any order of a Standards Committee the hearing of this matter was expedited.

Jurisdiction

[8] The parties were asked to address the initial question of whether the powers of review conferred by the Lawyers and Conveyancers Act extended to the power to review a decision of the nature currently objected to (however characterised).

[9] It was common ground that if jurisdiction to review this matter existed it was pursuant to s 194(1) of the Act which deals with applications for review in respect of complaints. That provision provides:

> This section applies to any determination, requirement, or order made, or direction given, by a Standards Committee (or by any person on its behalf or with its authority)
>
> (a) in relation to a complaint (including a decision to take no action or no further action on a complaint); or
>
> (b) on a matter arising from a complaint.

[10] It is clear that not every step taken by a Standards Committee is reviewable. Rather the action must fall within one of the categories set out in s 194(1). Mr X submitted for Mr Lydd that jurisdiction existed because:

[a] The decision not to exercise its discretion under s 138 of the Act to take no further action on the complaint was a "determination" that is reviewable. This argument might also be expressed by the contention that the decision to investigate the complaint further was a determination (which avoids the unfortunate double negative inherent in a decision not to take no action).

[b] The decision by the Committee to appoint an investigator pursuant to s 144 was a "determination" that is reviewable.

[c] The instructions given to the investigator by the Committee pursuant to s 146 are a "requirement" that is reviewable.

[d] The investigator has indicated an intention to exercise his powers of investigation which is reviewable.

[11] In arguing that there had been a determination which was reviewable Mr X sought to make a distinction between a final determination and a determination

which is other than final. He noted the phrase “final determination” appears in s 133 (in relation to a complaint based on the failure to comply with a final determination), s 203 (scope of review of final determination), s 204 (power to request an explanation in respect of reasons of final determination). Reference was also made to s 152(4) which states that (subject to the right of review) every determination made under s 156 or 157 is final.

[12] In contradistinction, Mr X argued, the word determination is used alone in a number of other places in the Act. These include s 158 (notice of determination must be provided), s 194 (power of review in respect of complaints), s 195 (power of review in relation to inquiries), s 207 (power to receive evidence in review of a determination), s 211 (power to confirm modify or reverse determination).

[13] The argument was that any decision of a Committee (which was more than trivial or merely administrative) was a determination which was prima facie reviewable and that the legislature had distinguished between final determinations (of the merits of the complaint) and determinations more generally.

[14] Ms G for Mr and Mrs Maryport submitted that there is no power to review a decision to appoint an investigator and argued that the appointment did not amount to a “determination requirement order or direction” in terms of s 194. She argued that the application was an inappropriate attempt to review the failure of the Committee to resolve to take no further action on the complaint (although I note that Mr X would argue that this is also a determination).

[15] It was observed that the appointment of the investigator and other steps taken by the Committee are preliminary and are not of themselves determinative of any rights or liabilities of the parties. As an aside I observe that it might properly be said that the appointment is adverse to the interests of Mr Lydd in so far as he is to be subject to the investigative process. Ms G argued that in the absence of clear legislative intent such preliminary or procedural decisions should not be amenable to review.

[16] Mr Z for the Committee observed that the powers of this office are constrained by the legislation and also argued that the Committee had not taken any step which was reviewable under s 194. He observed that s 194 gives an express power to review a “requirement” of an investigator (for example to produce documents). It was suggested that had Parliament intended an

appointment of an investigator to be reviewable then it would have said so clearly.

Has there been a "determination"?

[17] I am not persuaded that the drafters of the legislation intended the subtle distinction between final determinations and determinations of another sort suggested by Mr X. I am of the view that a determination for the purposes of the power of review of this office is a determination of the merits of the complaint. I reach this conclusion on the following grounds.

[18] The Act uses the word "determination" in respect of complaints in a number of places in a quite specific way. On every occasion it is used it appears to refer to the disposal of the complaint. Nowhere is it used in a way that might suggest it refers to some preliminary or quasi-interlocutory decision of the Committee. Moreover, in relation to the power of appointment exercised by the Committee in this case there is no use of the word "determination" at all. Given the scheme of the Act and the use of the words "determination, requirement, or order made, or direction given" in particular sections of the Act it is unlikely that the legislature intended the general meaning of the word "determination" suggested by Mr X.

[19] I also observe that 194(1)(a) explicitly provides that a decision to take no action on a complaint (under s 138) is reviewable. If the legislature had intended some distinction between final determination on the merits of a complaint and other decisions of the Committee (which Mr X argued are determinations) then those additional words would be unnecessary.

[20] In the context of the consideration of a dispute or complaint the natural and ordinary meaning of the word "determination" refers to the conclusive disposition of the complaint. See for example the Oxford English Reference Dictionary which provides as a definition "the conclusion of a dispute by the decision of an arbitrator" and "a judicial decision or sentence". The natural meaning of determination relates to some final decision on the matter in hand in a way which is inconsistent with the appointment of an investigator being a "determination".

[21] An interpretation of "determination" that construes it as a final disposition of a complaint is consistent with the use of the word throughout the Act. Section 152 empowers the Standards Committee to make a number of specified "determinations" (in particular it may determine that there has been unsatisfactory conduct, that the complaint be considered by the Disciplinary Tribunal, or that the Standards Committee take no further action). Section 158 requires that notice of

that determination be given to the parties. In light of this I conclude that the power to review a "determination" conferred by s 194 is the power to review the determinations made under s 152 of the Act.

[22] In any event I observe that the appointment of an investigator does not necessarily amount to a determination even on Mr X's wider basis. It is simply an appointment and it is a somewhat awkward and redundant use of language to say that the Committee has determined to appoint an investigator.

[23] I conclude that neither the appointment of the investigator nor the decision of the Committee not to exercise its discretion to take no further action were reviewable "determinations" in this matter.

Has there been a reviewable "requirement"?

[24] It was also suggested for the applicant that the investigator had imposed a "requirement" on Mr Lydd in his letter of 14 September. That letter informs Mr Lydd of his appointment, informs him of his powers, and requests a meeting. While s 147 does empower the investigator to require of Mr Lydd various things (such as to produce documents, accounts, information, etc) that power has not yet been exercised.

[25] The investigator's power to require the production of documents etc may be exercised against a broad range of individuals and entities. Section 194 provides that a "requirement" of a Standards Committee is reviewable. It is likely that this is to ensure that third party related entities (in particular) who are required to produce information have a right to have that requirement reviewed. However, there is no limitation on that right of review and therefore it can be surmised that a person who is subject to a complaint may also seek a review of a requirement of a Standards Committee or investigator to produce information. In the present case, however, no such requirement has occurred and in this regard there is therefore no reviewable requirement.

[26] For completeness I observe that s 141 of the Act provides that the Committee may require the person complained against to appear before it and proffer an explanation. Given the fact that the person complained against may seek a review of a requirement to produce information, it would seem to follow that a requirement that he or she appear and proffer an explanation is also reviewable.

[27] It was also argued that the appointment of the investigator itself amounted to a requirement. By s 146 a Committee may "require" an investigator appointed

under s 144 to inquire into the complaint and furnish a report. The document of appointment in this case authorises the investigator to exercise the powers of investigation and states that he should report at fortnightly intervals. It does not explicitly require him to take any particular investigative steps, although arguably that is implicit in the "request and authorisation" to investigate the allegations.

[28] I am not convinced that this is a requirement that the legislature intended Mr Lydd to be able to challenge. It amounts to a challenge of the appointment of the investigator itself (as opposed to the exercise of the powers of investigation). The requirement on the investigator to undertake the investigation is not a requirement imposed on Mr Lydd. Requirements of Mr Lydd may indeed come later in the course of the investigation. Those may be subject to a separate application for review.

[29] I note that this is the only other use of the word "require" in this sense in the relevant sections of the Act dealing with complaints. However, there is a significant practical distinction from a document of appointment requiring an agent of the Committee to take certain steps and requirements on lawyers and third parties to produce information or documents or provide explanations. I conclude that the former is not a "requirement" captured by s 194, whereas the latter are.

Wider consideration

[30] I observe that the other bases upon which a review may be conducted are where an "order" has been made or a "direction" given in relation to a complaint. Section 156 of the Act sets out the orders that the Standards Committee may make and it appears to be the making of those orders that is intended to be reviewable. Directions may be given under s 143 (to the parties to negotiate) and s 142 (that a decision be published). All of the words found in s 194 which trigger the power to review are used in relation to the exercise of particular powers. In particular a right to review exists in respect of the following:

[a] A determination under s 152;

[b] A requirement under ss 141 or 147;

[c] An order made under s 156; and

[d] A direction given pursuant to ss 142 or 143.

[31] There is no general power to review steps taken by a Standards Committee. This is consistent with the scheme of the Act of ensuring a framework

within which complaints can be dealt with expeditiously (as contemplated by s 120(3)) and a statutory power of review being limited in scope.

Merits

[32] I consider it appropriate to also briefly consider whether, if I am wrong as regards the question of jurisdiction, it would be appropriate to reverse the decision of the Standards Committee to appoint an investigator. The decision of the Committee to appoint an investigator was an exercise of discretion and that the exercise of such discretion should not be lightly interfered with.

[33] Some of the allegations underlying this complaint are serious. There is obviously a strong public interest in determining whether they are well founded or not. At the present time the only information before the Committee is that proffered by the parties to the complaint and may well be incomplete.

[34] The main arguments that the investigation should not continue were that this would in some way affect the right of Mr Lydd to fairly defend himself should the matters in issue be pursued in the civil courts. The second argument was that the complaint was brought in bad faith and was part of a course of conduct to extract financial compensation from Mr Lydd by improper means.

[35] While civil proceedings have been threatened in this matter no proceedings have been filed. The suggestion that the complaints process should not proceed until hypothetical proceedings have been disposed of is not tenable. The issue of whether it is proper to continue with an investigation the subject matter of which is the subject of extant litigation may become live if proceedings are filed. However that is not the case here. The complainants have elected to make a complaint against Mr Lydd and not to file proceedings. The suggestion that they should in some way be estopped from having that complaint properly heard because litigation might later ensue is not based on sound principle.

[36] It can be noted that s 156(4) of the Act anticipates civil action following a complaints process. It provides that where the complaints process results in a compensatory order to the complainant that order "does not affect the right (if any) of that person to recover damages in respect of the same loss" in another tribunal. It further provides that the order "must be taken into account in assessing any such damages". This provision clearly contemplates that a complaints process may precede an action in the civil courts.

[37] Related to this argument was the suggestion that the complaints process is being used as a "fishing expedition" to obtain information that might be useful in

the proceedings. The argument proceeded on the assumption that Mr Lydd ought to be entitled to keep confidential documents that may assist the complainants in their litigation until compelled to disclose them in the court process.

[38] It is difficult to accept that some fundamental right to justice is being denied Mr Lydd by his being required to provide information to an investigator or the Committee in respect of the subject matter of the complaint. The argument seems to be that he should not be required to answer to the professional disciplinary process which might require him to produce documents which he would prefer not to disclose to Mr & Mrs Maryport just yet.

[39] Mr Lydd may indeed be required to divulge information to the Committee or its investigator which is prejudicial to him. I observe however that if there is good reason the report of the investigator (or part of it) may be withheld from the complainants pursuant to s 149 of the Act. However, if a finding adverse to the complainants is to be made it is well established that they must be provided with the information upon which such a finding is made. However, I do not consider this to be a breach of any natural justice right of Mr Lydd in respect of civil proceedings which may or may not eventuate.

[40] Mr X suggested that s 23 of the New Zealand Bill of Rights Act 1990 (which deals with the rights of persons detained) was relevant. It is difficult to see how that provision (or any of that Act's provisions dealing with the rights of persons arrested or charged with criminal offences) are relevant. The rights of a person subject to the complaints and discipline process is properly considered under s 27(1) of that Act. That section codifies the "right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law". There is no evidence that those rights have not been (or will not be) accorded by the Committee.

[41] Underlying the submissions for Mr Lydd was the assertion that the complaint was an abuse of process and that the complaint was made for an illegitimate and collateral purpose. I was referred to *P v H* LCRO 02/09 where this office upheld a Standards Committee decision to take no further action on a complaint it considered vexatious. That case involved a woman complaining against her ex-husband's lawyer and seeking to impugn an order of the Court. It has little in common with the present circumstances.

[42] In making the allegation of abuse of process considerable reliance was placed on a letter to Mr Lydd from the lawyers for Mr & Mrs Maryport dated 12 August 2008. In that letter the firm stated that, no response having been received to an earlier offer of settlement, they were now instructed to make a complaint to the Law Society and to the Police. It may be unwise to link the making of complaints to any proposed legal action in light of s 237 of the Crimes Act (and r 2.7 of the Rules of Conduct and Client Care). However, I do not consider that in this case the statement that certain complaints would be laid amounted to conduct which should in some way disentitle Mr & Mrs Maryport from having their complaint considered by the Standards Committee.

[43] It was open to the Committee to consider whether the complaint was made in bad faith and therefore no further action should be taken pursuant to s 138(1)(c). This matter was specifically adverted to in the submissions of Mr X of 4 August 2009 which were before the Committee (and the record of the Committee which is available to me shows that those submissions were considered). The Committee elected not to exercise its discretion to take no further action and to commence an investigation. This was a reasonable stance to take.

[44] It also appears to be suggested that in a general sense the decision of the Committee to investigate (and not to take no further action) was unreasonable in light of the information before it and the submissions of counsel. I note that in determining to appoint an investigator the Committee took into account the submissions of counsel and formed the view that given the early stage of the complaint it would be better to conduct an investigation and then consider whether the points of counsel were well made. In all of the circumstances this was a reasonable approach to take.

Decision

The application for review is declined on the basis that there is no jurisdiction to consider it.

DATED this 19th day of October 2009

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 Lydd as applicant

Mr & Mrs Maryport as respondents

The Standards Committee

The New Zealand Law Society