	LCRO 175/09 and LCRO 176/09
CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	An inquiry and hearing of the Wellington Standards Committee 2 of the New Zealand Law Society
BETWEEN	**D HALESOWEN** Applicant **T KELSO** Respondent

HEARD ON 16 NOVEMBER 2009

Mr Dudley and D Scolloway for the applicant

DECISION

Background

[1] Ms Halesowen applies for the review of certain conduct of the Wellington Standards Committee 2 in respect of two related matters. Those matters are firstly an inquiry that the Committee is conducting on its own motion in response to a report to the Law Society by Mr XX, a law practitioner, and secondly a complaint by Mr Kelso. They are matters LCRO 175/09 and LCRO 176/09 respectively. While they have been dealt with separately by the Law Society and are the subject of separate applications for review they relate to substantially the same facts and transactions. Ms Halesowen made a single consolidated submission to the Standards Committee in this matter and the submissions at the hearing of this review were similarly consolidated. It was accepted that it was appropriate to issue a single decision in respect of both applications for review.

[2] The matters under consideration by the Committee relate to whether or not Ms Halesowen conducted herself appropriately when she acted for two trusts where one trust was acquiring land and the other trust was lending money to facilitate that purchase. The trusts were Mäori Land Trusts. The details of the complaint and inquiry are not relevant to this decision. Underlying aspects of the application for review was the assertion that allegations made against Ms Halesowen were serious. For the purposes of this review this is accepted. Ms Halesowen's application for review relates to alleged flaws in the procedure of the Committee in addressing the matters it is considering.

[3] On receiving information from Mr XX in February 2009 the Committee resolved on 4 June 2009 to investigate the matter. That letter was headed "Complaint by Wellington Standards Committee 2" and stated that the motion of the Committee was:

> [that] the Wellington Standards Committee 2 has reasonable cause to suspect that D Halesowen, Lawyer, has been guilty of conduct specified in s 130(c) of the Lawyers and Conveyancers Act 2006 and hereby causes an investigation to be made into this matter.

[4] The material supplied by Mr Jensen was supplied to Ms Halesowen and she was requested to respond. As noted above, she provided a response which covered these matters and matters raised by Mr Kelso together. The response was received by the Committee on 3 July 2009.

[5] On 24 September 2009 the Committee considered the material before it and resolved that it would conduct a hearing on the matter on 26 November 2009. A notice of hearing was issued to Ms Halesowen and to Mr XX.

[6] A complaint was made by Mr Kelso on 14 May 2009. On 25 May 2009 the complaint and associated material was forwarded to Ms Halesowen for a response. After some delays that response was provided (consolidated with the response to the inquiry triggered by Mr XX's report) on 3 July 2009. On 4 August 2009 Ms Halesowen was informed that the Committee had decided (at a meeting on 23 July 2009) to inquire into the issues raised by Mr Kelso's complaint. On 5 October 2009 Ms Halesowen and Mr Kelso were informed that the Committee had resolved to conduct a hearing of the matter on 26 November 2009 and notices of hearing were provided.

[7] I observe that the objections of Ms Halesowen were mainly aimed at the procedure adopted in respect of the consideration of the inquiry triggered by the report of Mr XX and not to the treatment of the complaint by Mr Kelso. However, it was argued that the two matters are closely related and a flaw in the process in respect of

the inquiry by the Standards Committee of its own motion in effect "infected" the consideration of the Kelso complaint. I am prepared to proceed on this basis.

The Application for Review

[8] The application for review sought a review of the decisions of the Standards Committee to conduct a hearing in these matters for various reasons which can be broadly reduced to two grounds. The first ground was that the matters in issue were currently before the Mäori Appellate Court and sub judice. The second ground was that the Standards Committee had "passed a prematurely condemnatory resolution" and also identified itself as the "complainant" and therefore was no longer able to consider the matter impartially. Ms Halesowen sought a reversal of the Standards Committee's decision to conduct a hearing, a decision that no further action should be taken in the matters, and an order of costs. Objection was also raised to the fact that Ms Halesowen had not been informed of the possibility that she could seek to be heard in person.

[9] I observe that Ms Halesowen was put on notice that there is a preliminary point as to whether or not the decision of the Standards Committee that is objected to is reviewable. Two decisions of this office which had previously considered whether certain preliminary actions of a Standards Committee were reviewable were provided to Ms Halesowen.

[10] In particular in the decision of *Lydd v Maryport* LCRO 164/2009 the issue arose as to whether a decision of a Committee to appoint an investigator was reviewable. It was held that it was not because that was not a "determination, requirement, or order made, or direction given, by a Standards Committee" in terms of s 194(1) of the Lawyers and Conveyancers Act 2006 (which confers the power of review). I observe that a review of an inquiry on the Committee's own motion is dealt with by s 195 of the Act on materially identical terms.

[11] In *Lydd v Maryport* after analysing the provisions of the Act and the use of the words determination, requirement, order, and direction it was stated:

> 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.
>
> 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.

[12] Ms Halesowen's counsel directed his submissions to the wider question of whether decisions of the nature objected to ought to be reviewable. He argued that the consequences of the decision may be significant, that there is no absolute bar to a review of "interlocutory" matters, that a right of review was consistent with natural justice.

[13] It was suggested for Ms Halesowen that in this case the resolution to conduct a hearing in this matter was a determination in terms of s 194 and 195 (relating to the complaint and inquiry respectively).

[14] This is not the case. The word "determination" is used in a specific way in the Act and it relates to the resolution of the Committee which finally disposes of the complaint or matter pursuant to s 152 of the Act. This is not such a resolution. In fact once the Committee has resolved to inquire into a complaint it is presumptively obliged to conduct a hearing of the matter (although it may resolve to take no further action on a complaint pursuant to s 138 at any time, see s 152(3)).

[15] I have also considered whether the resolution to hear this matter was a "requirement", "order" or "direction" in terms of s 194 and 195 of the Act. Those words are used in a specific way in the Act. I conclude that the decisions that the Committee has taken in this matter are not reviewable requirements, orders, or directions.

[16] I conclude that I have no jurisdiction to review a decision of a Standards Committee to conduct a hearing in respect of a complaint or in respect of an inquiry of its own motion. I therefore have no jurisdiction to review the decisions of the Standards Committee in the matters before me.

[17] I observe that if there are flaws in the procedures adopted by the Committee in the treatment of these matters then that could form the basis of an application for review once a determination on the matter is made. The alleged flaws in the procedure have been fully traversed in the applications for review and in the hearing of those applications. It is therefore appropriate that I make some comments about the procedure adopted by the Committee.

Status of Mr XX

[18] In the first instance I observe that there has been some confusion over the status of Mr XX in this matter. I observe that he is not properly considered as a complainant. He provided certain information to the Committee and on considering that information the Committee resolved to conduct an inquiry (and later a hearing). The Committee is

entitled to make such enquiries and receive such evidence as it thinks fit and was therefore entitled to make further enquires of Mr XX (which it did). However, Mr XX is not a party to the enquiry and does not have a right to be heard. That right is restricted to the person to whom the inquiry relates, any related entities or its directors, and the New Zealand Law Society (s 153(4)). Accordingly it would be inappropriate for the Committee to receive any submissions in this matter from Mr Jensen. This is of course not the case in respect of Mr Kelso who made a complaint in respect of the conduct of Ms Halesowen and is entitled to be heard pursuant to s 153(3)(a).

Predetermination / impartiality

[19] It was suggested that there was an element of predetermination by the Committee. In particular objection was taken to the way in which the Committee framed its resolution to inquire into the matters raised by Mr XX. The words to which exception were taken were that the "Wellington Standards Committee 2 has *reasonable cause to suspect that D Halesowen, Lawyer, has been guilty of conduct specified in s 130(c)"*. It was suggested that this showed that the Committee had formed a view on the guilt of Ms Halesowen. It was pointed out for Ms Halesowen that s 130(c) does not require the Committee to have reasonable cause to suspect guilt. Rather it requires only to be satisfied that the conduct "appears to indicate that there has been misconduct or unsatisfactory conduct on the part of a practitioner".

[20] I do not consider that the words used by the Standards Committee show any predetermination or lack or impartiality. Particularly when taken in the context of the resolution to inquire into the matter it can be seen that the Committee is saying no more than that matters have been raised which require further information to determine whether there has been misconduct or unsatisfactory conduct. If left unanswered the allegations were serious. The information was provided by another practitioner and supported by comments from a judicial officer. In stating that it had reasonable cause to suspect that Ms Halesowen had been guilty of conduct specified in s 130(c) it was stating that the necessary threshold which warranted further steps being taken had been passed.

[21] Objection was also taken on behalf of Ms Halesowen to the heading of the letter to her from the Law Society dated 4 June 2009 in relation to the inquiry of the Committee. That letter informed her of the resolution of the Committee to inquire into the matter and is headed "Complaint by Wellington Standards Committee 2". It was argued that this heading showed that the Committee considered itself to be the complainant in the matter and therefore a party to the proceedings. It was suggested that it was inappropriate for the Committee to now hear and determine a matter in

which it considered itself to be the complainant. It was observed that a Standards Committee has distinct functions of inquiry, hearing, determination, and prosecution. It was argued that they may occur only in that order and that in this case the Committee was acting in essence as prosecutor and adjudicator.

[22] This objection proceeds on the tenuous basis of a single word in the heading of a single letter authored by a member of the Complaints Service of the Law Society. Clearly, the Standards Committee is not the complainant in this matter. The heading of the letter might have read "Inquiry by Wellington Standards Committee 2" without objection. Other than the single objectionable word in the heading of the letter of 4 June 2009 there is no evidence that the Standards Committee has acted inappropriately or actually considered itself a party to the matter. I consider this to be no more than a slip by the secretariat of the Committee which has no bearing on the proper adherence to the principles of natural justice of the Committee.

[23] I observe that some reliance was also placed on the fact that the Standards Committee sought the advice of independent counsel in respect of this matter. The suggestion on behalf of Ms Halesowen was that the Committee was seeking advice on potential prosecution proceedings and that this was inconsistent with the Committee's duty of impartiality. The legal advice obtained by the Committee is privileged to the Committee. The submissions on behalf of Ms Halesowen in this regard are speculative. I have had the entire file of the Standards Committee made available to me including the opinion referred to. There is nothing in the file or in the opinion which suggests that this concern of the applicant is well founded.

Relevance of Mäori Land Court decision

[24] There was also a suggestion in the application for review that it was inappropriate for the Committee to take into account comments of the Judge in the Mäori Land Court decision which were critical of Ms Halesowen. That decision forms part of a protracted dispute involving disputes about the conduct and governance of certain Mäori Land Trusts. Aspects of that dispute relating to the appointment of trustees are now before the Mäori Appellate Court. However, this does not affect the conduct of this matter before the Standards Committee. The comments of the judge in relation to Ms Halesowen are not under appeal (and are now well over a year old). Those comments were supported by concerns raised by Mr XX. It was entirely appropriate for the Committee to act on the basis of those comments in commencing an inquiry.

[25] It was also suggested that it was inappropriate to take action on the basis of the adverse comments of the judge because Ms Halesowen had not had an opportunity to

be heard by the Court in respect of those matters. I observe that the decision of the Court records Ms Halesowen as being counsel (with Mr BB) in the matter and was presumably able to address any concerns of the Court at that time. In any event there is nothing objectionable about the Committee acting on the observations of the Court in commencing its own inquiry. It is clear that the Committee considered the comments as part of the background which justified this course of action. The Committee is, however, conducting its own inquiry and will reach its own conclusions on the facts that are before it.

Opportunity to be heard

[26] A suggestion was made in the application and in the course of the hearing of this review that Ms Halesowen ought to have been informed by the Standards Committee that it was empowered to hear her (or her counsel) in person and she was entitled to seek to be heard in that manner. While the point was not pursued with particular force it is appropriate that I address the issue. Underlying the submission was the assertion that the allegations against Ms Halesowen were serious and that given the possible consequences of an adverse finding it was necessary to provide her with an opportunity to be heard in person.

[27] I observe that a Standards Committee may not make a finding of misconduct against a practitioner. That is a finding that only the Disciplinary Tribunal may make. Any practitioner who is the subject of proceedings before the Tribunal has a right to be heard in person (s 237(1)). A Standards Committee may make an adverse finding against a practitioner in the form of a determination that there has been unsatisfactory conduct. Orders of some significance may follow from such a finding. However, such a finding is clearly contemplated by the legislation to be less serious than a finding of misconduct in most cases (though a finding of unsatisfactory conduct at the upper end may be more serious and incur a greater penalty than a finding of misconduct at the lower end).

[28] There is therefore a strong presumption that matters before a Standards Committee be heard on the papers and not in person. This is consistent with the summary nature of proceedings before Standards Committees and the need for an expeditious disposal of complaints and inquiries. There may, of course, be cases where it is appropriate that a right to appear in person be given. Where there are disputed areas of fact and the Committee considers it appropriate to examine the practitioner to establish credibility it may be that the discretion to conduct a hearing in person would be exercised by the Committee

[29] In the present case the Committee could have conducted a hearing in person, however it is not a matter in which there is any obvious benefit to be gained. All of the points to be made for Ms Halesowen could effectively be made in writing. I also observe that given the presumption that these matters are to be heard on the papers there can be no requirement to inform the parties that the Committee may hear the matter in person. Such a requirement would simply invite unnecessary applications to be heard in person and clog the proceedings of the Committee.

Costs

[30] I have not upheld this application for review. I observe that the application failed on a jurisdictional point in respect of which Ms Halesowen was on notice of prior to the filing of this application. Ms Halesowen's counsel was supplied with two decisions of this office; one of which strongly indicated that no right to review existed in this case. Those decisions were provided prior to the application being made. In particular there were no substantive submissions suggesting that the approach in *Lydd v Maryport* LCRO 164/2009 was in error. The approach in that decision has been followed in this case. The submissions focussed on the alleged breaches of natural justice and the factual matrix of the complaint. While the submissions addressed the issue of whether I had jurisdiction to consider an interim step of the Committee, it did not address the fact that the interim step which was sought to be reviewed did not fall within those matters identified as reviewable by *Lydd v Maryport.*

[31] I take account of the Costs Order Guidelines of this office. I observe that this matter was interlocutory in nature and no adverse finding has been made against Ms Halesowen. However, in light of the fact that the application was unsuccessful I consider that costs should follow in the normal way. I observe that considerable material and submissions were supplied in this matter and it could be considered to be of average complexity. In all of the circumstances I consider it appropriate to exercise my discretion pursuant to s 210 of the Act and order that Ms Halesowen pay costs to the New Zealand Law Society in respect of the costs and expenses incidental to this review in the sum of $1200.

Notification of Mr XX

[32] To date Mr XX has been dealt with as if he were a complainant in this matter, including being involved in the progress of this review. I have observed that he is not in fact a complainant. However, Mr XX does have an interest in the progress of this matter and it is appropriate that this decision be provided to him. I am permitted to

publish decisions to the extent that is necessary or desirable in the public interest by s 206(4) of the Act.

Decision

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

Order

[34] Ms Halesowen is to pay $1200.00 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 18th 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:

D Halesowen as Applicant
Mr Kelso as Respondent
Wellington Standards Committee 2
The New Zealand Law Society