

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

BETWEEN

FB

Of [North Island]

Applicant

AND

**WAIKATO-BAY OF PLENTY
STANDARDS COMMITTEE 2**

Respondent

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

DECISION

[1] The review Applicant is FB (the Practitioner) who sought a review of a Standards Committee decision which determined to prosecute him before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal. The matter that gave rise to that decision arose from a complaint by M who had been a client of the Practitioner. M had complained that the Practitioner refused to release funds held on his behalf and had also refused to release some files to his new solicitors as requested. Soon after the initial complaint the balance of funds were released by the Practitioner but without sufficient information to clarify whether or not the amount assessed was correct. The files were not released to M's new lawyer. M also claimed to have suffered inconvenience and extra costs due to the Practitioner having withheld his files.

[2] In the course of its investigation the Standards Committee required the Practitioner to attend its meeting with the files. The Practitioner attended the meeting but refused to hand files over to the Committee as requested. The Practitioner claimed

that he did not have the authority from all relevant parties to release the files and that there had been no undertaking given to him to meet the reasonable photocopying costs.

[3] The Committee resolved to have the matter considered by the Disciplinary Tribunal pursuant to section 152(2)(a) of the Lawyers and Conveyancers Act 2006.

[4] The Practitioner sought a review of that decision alleging that the investigation had been partly undertaken by a member of the Committee against whom the Practitioner had filed a complaint. The Practitioner noted that this individual had stood down for part of the investigation, but he maintained the view that the ultimate decision was tainted by bias.

[5] The Practitioner further contended that the Committee's findings were incorrect, reiterating that the files he held involved at least three parties who had not provided authority to release the new information. He considered that the referral to the Disciplinary Tribunal was an unjust outcome, and that there was no certainty about what the charges were to be. He considered that no misconduct had been identified despite requests from him as to what rule had been broken.

Review

[6] The Practitioner sought to be heard on his review application and an Applicant-Only hearing was arranged for 6 July 2011. This may be a first step in an LCRO review to ascertain whether any further enquiry is needed in order to complete the review. This does not preclude the Respondent from attending but that attendance is not required.

[7] As this is a review of a prosecutorial decision by the Standards Committee, the Respondent is perceived to be the Committee who elected to not participate. The original complainant was informed of the review application.

[8] At the review hearing the Practitioner essentially reiterated the explanations that he had given to the Standards Committee. He reiterated his right, and indeed his obligation, to have withheld the files involving third parties from whom no consent had been given.

[9] Having heard from the Practitioner and considered the information in the file, I did not consider that any further enquiry was needed in order to complete my review.

Considerations

[10] In undertaking this review I am aware that the Practitioner was struck off the Roll of Solicitors and Barristers on [date] in relation to another matter. The Practitioner's appeal of that decision was unsuccessful. The decision now under review preceded the above decision. However, as at the time of the review the Practitioner was no longer practising as a lawyer.

[11] However, this is not a factor that should affect this review application since former solicitors fall within the disciplinary reach of the Lawyers and Conveyancers Act 2006. The sole question is whether the prosecutorial decision should stand. If it should not, then the proper course is to vacate that decision and redirect the matter back to the Standards Committee for further consideration of the substantive issues.

[12] Previous decisions by this office have confirmed that it will only be in exceptional cases that a decision to prosecute will be reversed on review. It is not necessary to canvass again the legal analysis that has led to the LCRO taking this position. However, the circumstances in which such a case may arise include the following:

- [a] Where the decision was significantly influenced by the relevant 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.

[13] The Practitioner alleged bias on the part of an individual member of the Committee against whom he said he had filed a complaint. When he attended the Standards Committee hearing he raised an objection to this individual's presence and it appears that this individual indeed recused himself from the meeting.

[14] The Practitioner was provided with a copy of the transcript (excluding that part of the meeting which was closed) and invited to comment. In his response he raised again the matter of the involvement of that Committee member. The Complaints and Standards Officer replied that the Committee did not feel obliged to exclude him (the individual concerned) from the Standards Committee "*merely because you have expressed some concerns that are being investigated and adjudicated elsewhere.*"

[15] The issue of bias, or perceived bias, is difficult to establish and there is seldom clear evidence available to support such an allegation. It is also the case that Standards Committee is comprised of a number of lawyers and also a lay person, and this is intended to ensure that a fair and balanced approach is taken. If a decision

made by the Committee is not adequately or reasonably supported by the evidence on the file, this may be evidence of some improper motives. My approach in this case has been to consider whether the Standards Committee's decision was properly supported on the basis of uncontested information.

[16] The complaint by M had concerned money and files being withheld by the Practitioner after M had changed lawyers. The money was eventually paid over, but without sufficient information to have allowed the new lawyer to have checked whether there had been a full accounting. The Practitioner did not release the files. This was a complaint that was within the powers of the Standards Committee to determine.

[17] However, in the course of the Committee's enquiry the Practitioner had been required, pursuant to section 141(b) of the Lawyers and Conveyancers Act, to attend the Standards Committee meeting in order to clarify issues. The Practitioner was also required to provide to the Standards Committee his full file relating to the complaint. This request was made pursuant to section 147(2) of the Act, by which a Standards Committee may require a Practitioner to produce for inspection any books, documents, papers, accounts or records which are in the possession or under the control of the Practitioner and which are reasonably necessary for the purpose of the inquiry or the investigation.

[18] The Practitioner attended the Committee's meeting but refused to hand over the files to the Standards Committee. As the Practitioner declined to provide the information the Committee was unable to complete its investigation of M's complaint. In these circumstances the Standards Committee referred the matter to the Disciplinary Tribunal.

[19] Part 7 of the Lawyers and Conveyancers Act deals with complaints and discipline of lawyers; the statutory provisions are central to achieving the purposes of the Act. Section 262 of the Lawyers and Conveyancers Act provides that every person commits an offence who wilfully obstructs, hinders, resists, or deceives any Standards Committee, investigator or other person in the execution of any powers conferred on that Standards Committee, investigator, or other person by sections 147, 164, 169, 170, 172 or 173.

[20] In this case the Practitioner had been required to co-operate with the Standards Committee pursuant to section 147, and his failure to produce the records meant that the Standards Committee was unable to complete its investigation. The Committee's request clearly fell within the scope of section 147.

[21] The above circumstances show that there is at least a prima facie basis for a finding that there has been a breach of section 262, and therefore an adverse disciplinary finding against the Practitioner on that ground.

[22] The fact that wilful obstruction on the part of a lawyer is made an offence under the Act indicates the seriousness of the obligation to co-operate with a disciplinary enquiry. A finding that there has been a breach of section 262 could be a proper basis for a finding of misconduct. Such a finding cannot be made by a Standards Committee, or by this office on review, and can be made only by the Lawyers and Conveyancers Disciplinary Tribunal.

[23] Whether or not such a finding should be made in this case is yet to be determined. The Practitioner has maintained throughout that he has a professional obligation to withhold the documents that had been requested by the Standards Committee in the absence of authorities of the clients. This defence was reiterated at the review hearing.

[24] Having considered the Standards Committee file and having heard from the Practitioner, it is my view that the circumstances are such that the Committee's referral of the matter to the Tribunal was appropriate. Whether the Standards Committee will in fact proceed with its prosecution in the circumstances that the Practitioner is no longer practising is a matter that it will no doubt consider.

Decision

Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

DATED this 26th day of August 2011

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:

FB as the Applicant
The Waikato Bay of Plenty Standards Committee 2 as the Respondent
FC as counsel for M as an interested party
The New Zealand Law Society