LCRO 186/2013

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of [Area] Standards Committee
BETWEEN	**MR BD AND MR GA** Applicants
AND	**AN APPLICATION FOR REVIEW OF A PROSECUTORIAL DECISION**

Introduction

[1] On 20 May 2013 [Area] Standards Committee issued a determination to lay charges against Messrs GA and BD before the Lawyers and Conveyancers Disciplinary Tribunal (LCDT) in relation to the administration of the firm's nominee company (GA Solicitors Nominee Company Ltd). Messrs GA and BD applied for a review of that determination and a review hearing was held at [area] on 4 April 2014. The practitioners were represented by Mr Z QC, and Mr A provided written submissions on behalf of the Standards Committee.

[2] At the review hearing Mr BD acknowledged he was the partner who was largely responsible for the administration of the nominee company, with Mr GA's role being limited to his involvement as the solicitor acting in the administration of the estate of the complainant's mother (who had funds invested with the nominee company), and also as a director of the nominee company.

[3] One of the submissions made by Mr Z was that the Standards Committee determination was affected by bias on the part of the convenor of the Committee. Mr A responded to that and also provided a written statement from the convenor. Further material was put forward by Mr Z at the hearing. As requested, Mr Z has provided a written summary of this material which was then forwarded to Mr A who responded on 17 April 2014. Mr Z provided a supplementary memorandum on 28 April 2014.

[4] I have taken all of this material into account in completing this review.

Background

[5] Messrs GA and BD are partners in the law firm of GA & Partners, and are two of the directors of the nominee company.

[6] In December 2006 Mrs ZW, the complainant's mother, lodged the sum of $530,000 with the nominee company for investment.

[7] Mrs ZW died on 8 August 2009 and probate was granted to her brother and Mr X, a third partner in the firm. Mr GA acted in the administration of the estate.

[8] At the time of Mrs ZW's death, there were three investments outstanding with a total principal sum of $313,000. Defaults had occurred on each loan. The three investments were:

(a) $50,000 in an advance of $410,000 secured by a lifestyle block in [area A] (the A advance).

(b) $50,000 in an advance of $174,271 secured by an apartment and a carpark in [S] Street, [area] (the S Street advance).

(c) $213,000 in an advance of $600,000 secured by a self storage development at [area E] (the E advance).

[9] The complainant is Ms W, one of Mrs ZW's two daughters and a beneficiary and trustee of the [name] Family Trust, which is the residual beneficiary of the estate. In August 2010 she lodged a complaint with the Lawyers' Complaints Service which was summarised by the Standards Committee in its determination[1] as follows:

1) The Nominee Company did not follow proper procedures in dealing with investments.
2) Reinvestments were made without proper authority and without new valuations.
3) Notice of defaults were not provided, or were late.
4) Financial statements were not provided or were late.
5) That important information was not given to Mrs ZW regarding the progress and failure of various investments.
6) That the type of investments made were wholly unsuitable for Mrs ZW who was known to be seriously ill.
7) Mrs ZW was offered an investment that concentrated the majority of her money in a single mortgage ([E] Storage).

[1] Standards Committee determination dated 20 May 2013 at [1].

8) There was a conflict of interest by GA and Partners in their multiple roles as solicitors, executors of Mrs ZW' estate, trustee of the family trust and directors of the Nominee Company. Ms W believed that because of this potential conflict of interest Mrs ZW should have been told to seek independent legal advice.

9) There was a further conflict of interest because the Nominee Company lent money to existing clients of GA & Partners, who then defaulted on their loans. Ms W alleged there was a lack of rigor in ensuring the defaulted loans were repaid, and too much freedom was allowed to the borrowers to restructure the loans, rather than forcing repayment.

[10] Ms W' complaints were treated as a complaint about Mr GA,[2] but the Standards Committee subsequently commenced an own motion investigation into Mr BD's conduct in administering the nominee company. The determination that issued was in respect of both the complaint and the own motion investigation.

[11] The outcome sought by Ms W was repayment of the three advances together with all outstanding interest.

The Standards Committee investigation and determination

[12] Following its preliminary investigations, the Standards Committee resolved to set both the complaint and the own motion investigation down for a hearing on the papers. The Notices of Hearing were both issued on 16 December 2011 and required the practitioners to address specific and detailed questions relating to the investments.

[13] The Standards Committee then made further detailed inquiries with regard to the [A] and [S] Street advances and received a comprehensive response from Mr Z on behalf of the practitioners. He also requested an oral hearing.

[14] At a meeting on 12 July 2012, the Committee resolved to appoint an investigator because of the increasing complexity of the matters and the number of potential issues. Mr H was appointed as the investigator on 7 September 2012.

[15] On 3 December 2012 Mr H presented a detailed report in which he recorded his view of the alleged breaches of the Solicitors Nominee Company Rules 1996 (SNCR) and the Lawyers Nominee Company Rules 2008 (LNCR). Mr Z provided his response to this report on 8 February 2013 and commentary from an expert for the practitioners (Mr J) was also provided.

[2] Ms W's complaint was a complaint about GA Solicitors Nominee Company Limited.

[16] The Standards Committee considered Mr H's report and reached the view that it identified "apparent breaches of trust accounting regulations and lawyers professional conduct rules".[3] The Committee went on to record that it was "very concerned about the seriousness of these breaches in the event the conduct referred to is proven".[4]

[17] At [19] and [20] of its determination the Committee stated:

> The Committee looked at the totality of the conduct complained of, and those matters which came to light during the investigation. The Committee was worried about the number of alleged breaches identified by Mr H which if proven could show a cavalier approach by Mr GA and/or Mr BD to the relevant Nominee Company Rules. Although some of the breaches identified may be "technical" the Committee held the view that the relevant Rules are put in place to protect investors and manage the nominee company transactions. They need to be strictly complied with.
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> The Committee considered each of the issues/conduct in the notice of hearing separately and decided that, if proven, each of them would separately amount to misconduct. In the event that the Committee was wrong, it considered that they were so closely interwoven that cumulatively the matters amounted to misconduct. Misconduct is a finding which only the New Zealand Lawyers and Conveyancers Disciplinary Tribunal ("the Disciplinary Tribunal") has jurisdiction to make. In addition, the Committee considered that the alleged conduct, if proven could involve a real risk that the practitioner might be suspended or struck off. If however the Committee was wrong about that, the Committee nevertheless considered the conduct as being very serious.

[18] It accordingly came to the view that a referral to the LCDT was appropriate in the circumstances and "**determined** pursuant to s 152(2)(a) of the Lawyers and Conveyancers Act 2006 that the alleged conduct of Mr GA and Mr BD be considered by the Disciplinary Tribunal".[5]

[19] Mr Z took issue with some of the statements made by the Standards Committee, but as he rightly observed, those statements do not, and should not, bind or influence the Legal Complaints Review Officer (LCRO) on review. I have not been influenced by these, and the observations made by Mr Z are noted, but have no bearing on the outcome of this review.

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[3] Above n 1 at [18].
[4] Above n 1 at [18].
[5] Above n 1 at [21].

[20] In addition, the practitioners appeared in person at the review hearing and were able to address me on the various issues that arose during the course of the hearing. That opportunity cures the criticism that Mr Z has levelled at the Standards Committee for not conducting a hearing in person.

The application for review

[21] Mr Z lodged an application for review of the Standards Committee determination on behalf of the practitioners. His reasons included:

i) [The Standards Committee] failed to pay any or any proper or sufficient regard to other circumstances including:

- The unexpected and uncontained impact of the 2008 financial crises, the fall in property values and the impact on borrowers and ability to realise securities.
- Reasonable expectations of lenders in the circumstances.
- Responsible action by or on behalf of the lenders to a default and managing the default.
- No action or lack of action by the applicants has been causative of any loss to ZW or other investors.

ii) [The Standards Committee] failed to acknowledge that in all the circumstances the investor ZW lost very little by way of interest and the lawyers had offered to make good.

iii) [The Standards Committee] failed to acknowledge that none of the lawyers were culpable in that they did not deliberately, recklessly or capriciously act in breach of any regulator provisions relating to nominee mortgages.

iv) [The Standards Committee] failed, in relation to GA, to acknowledge that his involvement with the nominee company was peripheral in that he was not the partner responsible for the nominee company or for the particular investments in issue.

v) [The Standards Committee] failed to grant the extension of time requested by the complainant W to allow the complainant and the lawyers to negotiate a resolution.

[22] Mr Z has raised numerous issues on review:

- The scope of a review by this Office of a decision to lay charges before the LCDT.
- Bias on the part of the convenor of the Committee.
- "Unusual" and "surprising" comments by the Standards Committee in its determination.
- The lack of reasons provided by the Committee.
- The different considerations to apply in respect of Mr GA.
- An alleged failure by the Committee to consider the J report and/or to take note of the reference to "technical" breaches in the H report.
- The reference in the Notice of Hearing issued by this Office to a review "of a prosecutorial decision".
- The conduct of the practitioners in their efforts to achieve a good outcome for the investors, both in the options pursued to maximise the return from the securities held and by way of the settlement offers put to Ms W.

The thrust of Mr Z's core submission, and the comments by the practitioners, is that whilst they acknowledge the breaches and shortcomings described in the H report (implicitly accepting many of the allegations by Ms W) they are not of sufficient seriousness that they should be the subject of charges before the Tribunal. Whatever principles are to be applied, this review must therefore commence with a consideration of the facts and the alleged breaches of the rules. In this regard, it would seem to be accepted by the parties that the H report fairly identifies these.

The findings of the H report

[23] In this section of the decision I record the findings and opinions as set out by Mr H in his report. The repetition and recording of these findings and opinions do not represent endorsement by me of these.

- The authority for investment in the E advance recorded the borrower as T, whereas the borrower was E Storage Limited. The loan was guaranteed by two parties, one of whom was Ms T.

- The principal sum of the loan to E Storage Ltd was increased by $87,000 on 15 September 2008. This did not include any of Mrs ZW' funds. GAs[6] wrote to Mrs ZW on 16 September 2008 seeking her consent to the increase. She

[6] Throughout his report Mr H refers to the firm as "GAs" and I have continued with that in this decision.

indicated her consent by signing and returning a copy of that letter, which necessarily was after the further advance had been made.

- There is an argument that a new authority was required when there is a material change to the term of the investment. This did not occur.

- The [A] advance was made to KD on 30 June 2006. The loan was guaranteed by a Mr Y. In February 2008 the property was transferred to a company owned by Mr Y (OPSHNZ). Mr Y remained as guarantor. Mrs ZW was advised of this on 21 May 2008 and a new authority was signed by her on 8 June 2008. This is a breach of Rule 6 of the SNCR.

- No new valuation was provided when the repayment and new advance referred to in the preceding paragraph was effected in February 2008. This is a breach of Rule 7 of the SNCR.

- The valuation provided for the [A] advance recommended a first mortgage advance of $350,000. The principal sum advanced was $410,000.

- The valuation did not contain a statement of independence by the valuer as required by clause 2 of Appendix G of the SNCR, nor a consent to distribution as required by clause 14(b) of Appendix G of the SNCR. In fact, it contained a prohibition against distribution. The valuation did not contain all of the information required by Appendix G of the SNCR which represents a breach of Rule 7 of the SNCR.

- The valuation was subject to confirmation of lease details in respect of the farm park operation being carried out on the whole property of which the security formed part. It is not clear if the lease details were sighted and confirmed.

- On 15 September 2008 the principal sum of the mortgage in which Mrs ZW' funds were invested in the E Storage advance was increased from $513,000 to $600,000. A new valuation dated 11 August 2008 had been obtained which contained a special condition that the leases and tenancies of the property be formalised at no less than the rentals and terms noted in the valuation. It is not clear whether the leases and tenancies were formalised.

- The valuation of the [S] Street property was deficient in that it did not contain a statement of independence or a consent to distribution to investors as required by Appendix G of the SNCR.

- The valuations of two other securities for advances to KD in which Mrs ZW's' funds were invested (but which have since been repaid and are not in default) were defective in the following ways:

    (a) Valuations of five car-parks in the [C] building in [area] by Prendos Valuers were addressed to the borrower. Only two of those were readdressed to GAs. The advance was made therefore on the basis of a representative valuation.

    (b) The valuation of a property in [F area] did not include a first mortgage recommendation, a statement of independence or consent to distribution, and was not addressed to GAs. It did not comply with Appendix G of the SNCR.

    (c) The [F area] valuation was dated 8 September 2005. Ms ZW' funds were invested in this advance on 15 December 2006 by which time the valuation was more than twelve months old.

  These valuations did not comply with Appendix G of the SNCR.

- Ms ZW invested a total of $530,000 through the nominee company. Guideline 12.7 of the Solicitors Trust Account Guidelines (STAG) recommends that no more than 20% of an investor's funds should be advanced to one borrower or related groups of borrowers. $213,000 of Ms ZWs' funds were invested in the E advance, being more than 20% of her funds.

- There is no evidence of any formal due diligence being carried out in respect of the borrowers. Mr H states he has not seen any statements of assets and liabilities or financial statements for the borrower of the [A] advance. No information was requested from the borrower of the E advance as they were existing clients who had always met their financial obligations. Mr H has not sighted evidence that guidelines 12.5, 12.6, 12.9 and 12.10 have been followed.

- Mr H detailed how the various purchases were funded and comments: [7]

> Given the level of borrowings in relation to purchase price, particularly as regards the E mortgage and the KD [area] mortgage, I would have expected to see evidence of very thorough due diligence being carried out, and very favourable statements of financial position of the borrowers being provided

[7] H report at p 14.

> in order to support these borrowings. Despite having asked for evidence of whatever due diligence GAs carried out, nothing further has been provided.
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> While there are no rules or regulations as such regarding "due diligence" I believe some of these factors should have caused concern if due regard had been given to the guidance afforded by the relevant parts of STAG."

- Mr H describes in detail the action taken by GAs in respect of the defaults which occurred and concluded that there were breaches of various parts of Rule 12 of the SNCR and Rule 13 of the LNCR:

  (a) Written notice of the various defaults was not given to investors.
  (b) Ongoing information as to the progress and results of their action was not given to investors.
  (c) GAs did not take into account advice or instructions from Mrs ZW in determining what action to take in respect of the defaults.

- Mr H then examines in detail the steps taken by GAs in respect of each default and realisation of securities. In the course of this examination Mr H has identified breaches of Rules 5, 9 and 12 of the SNCR, and Rules 6, 10 and 13 of the LNCR, as well as a misapplication of funds in reduction of a second mortgage when the first mortgage had not been completely repaid.

- The monthly certificates provided to NZLS by GAs did not report any non compliance with the practice rules relating to nominee companies. This was incorrect as various breaches had occurred.

[24] Throughout his report Mr H has included comments such as describing particular breaches as being "technical" or whether any loss was sustained as a result of the breaches or irregularities. I have intentionally removed all such comment from my summary recorded above.

Should these breaches be the subject of charges before the LCDT?

[25] The Standards Committee viewed the conduct identified in the H report as serious breaches and I refer to the comments noted in [16] above. It referred to the conduct of the lawyers as being "cavalier" and acknowledged that whilst some of the breaches may be regarded as "technical", it held the view that the relevant rules were

put in place to protect investors and manage nominee company transactions and need to be "strictly complied with".[8]

[26] Prior to the review hearing I referred counsel to a recent LCRO decision, *AP v ZG*[9] in which I made comments similar to those expressed by the Standards Committee. In that case, the NZLS inspector had included various comments about breaches of the nominee company rules, noting that (in some instances) they were "excusable" and not "causative of loss". At [63] and [64] I commented:

> [63] I do not question [NZLS Inspector's] expertise. What I do question is whether this is the right approach to breaches of the Nominee Company Rules, whether major or minor, and whether causative of loss or otherwise. If, as Mr T [Counsel for the lawyer] contends, there is little or no duty of care by a lawyer to contributors to a firm's nominee company, then there is no room to excuse errors or lapses in compliance with the Rules however minor.
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> [64] I consider that Standards Committees should insist on strict compliance with the Rules. The history of lawyers' nominee companies has been troubled and the Rules have been developed in a prescriptive manner to protect contributors as much as possible. I do not consider that there is any room for the exercise of a discretion in determining whether or not the Rules have been breached. A discretion can clearly be exercised when determining penalty, but breaches should otherwise result in a finding of unsatisfactory conduct (in the present regime) in the majority of cases.

[27] I also came to the view that the respondent lawyer had a duty of care towards the contributors which had not been met. This is particularly relevant with regard to the level of due diligence that Mr H refers to and was identified as an issue to be addressed by the Standards Committee in the Notice of Hearing. A consideration of the duty of care that a lawyer has to the investors in a nominee company advance changes the focus from a strict examination of alleged breaches of the Nominee Company Rules and, as noted by the Committee, requires a consideration of "the totality of the conduct complained of".[10]

[28] Mr Z seizes on the various comments made by Mr H which reduce the severity of the breaches to support his contention that the practitioners' conduct should not be referred to the LCDT. He also makes frequent reference to the views of Mr J, who brings his considerable experience and expertise to bear in examining the conduct of

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[8] Above n 1 at [19].
[9] *AP v ZG* LCRO 278/2012.
[10] Above n 1 at [19].

the practitioners. I have some reluctance however to accept the overall thrust of Mr J's' comments which have the effect of permitting significant discretion on the part of a lawyer in complying with rules and other duties owed to investors, and have taken a different view from this in *AP v ZG*.

[29] Mr Js' comment in particular, that "it can be counter-productive to alarm a contributor without being able to reassure the contributor that appropriate restructuring or if necessary, recovery action, has been formulated and is in hand",[11] cannot be put forward as a reason for not complying with the rules.

[30] The fact that (as he states) contributors always accepted what he and his partners proposed with regard to defaults is an indication of the value that contributors placed on their advice, but cannot be promoted as an excuse for a lawyer to disregard the requirement to consult.

[31] In general terms, it is the Standards Committees, this Office, and the LCDT, which are charged with reaching a view as to the degree of compliance expected of practitioners. The Committee came to the view that strict compliance was required and on this basis viewed the breaches as serious. Merely because the Committee reached a view that differed from the opinions expressed by Mr J, and to a lesser extent by Mr H, does not mean that the Committee had no regard to those views.

[32] There is no requirement to adopt either of the experts' evidence and the reason for doing so is that both the Standards Committee and myself consider that strict compliance with the rules and obligations is required. That is not to say that the views of the experts have been ignored, and they would certainly be relevant in determining penalty in the event that the LCDT finds against the practitioners.

[33] The practitioners acknowledged that there had been shortcomings on their part, but submit that a finding of unsatisfactory conduct is the appropriate professional standards response. Mr Z submitted that a censure and fine would be the appropriate orders to follow, as well as an implementation of the settlement proposal that has been put forward by the practitioners. Much has been made by Mr Z, Mr J and the practitioners of those proposals in support of their submission that referral to the LCDT is not warranted. Mr J commented that the practitioners had adopted an "honourable" course of action in the proposals which they have put forward.[12] However, I note that a condition of the original proposal was that the complaints be withdrawn. I do not accept that a proposal put forward by "honourable" practitioners should be linked in any

[11] Letter Js to BD (13 February 2013) at para [16].

way to the outcome of the complaints process, and the practitioners could have continued their negotiations with Ms W independently of the outcome of this review. In this regard, I note Ms W's advice that she has heard nothing from the practitioners since May 2013 with regard to the settlement proposals.[13]

[34] Overall, I do not consider that the fact that settlement proposals were put forward should affect the determination of the Standards Committee or the outcome of this review.

[35] The question arises as to whether the conduct of the practitioners is sufficiently more egregious than the conduct of the practitioner in *AP v ZG.* In that case, there was a single advance and there was also some measure of consultation by the practitioner. In this case there are multiple alleged breaches of the rules, an apparent lack of any due diligence when assessing the loan applications and minimal consultation or communication in relation to the defaults. I consider that such conduct could be regarded as misconduct as defined in s 7(1)(a) of the Lawyers and Conveyancers Act 2006 (the Act) (conduct that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable), or s 7(1)(ii) wilful or reckless contravention of any regulations or practice rules. Alternatively, if the conduct is considered to be negligence (as it was in *Complaints Committee of the Canterbury District Law Society v W* [2009] 1 NZLR 514) such negligence could form the basis of a charge pursuant to s 241(c) of the Act.[14]

[36] Although the Standards Committee has made its determination on the basis that the conduct under consideration could constitute misconduct,[15] it must not be forgotten that a charge of unsatisfactory conduct (either as a separate charge or in the alternative) may be brought against the practitioners before the LCDT which has a range of penalties other than strike off or suspension that can be considered and which differ in some respects from the penalties that can be imposed by a Standards Committee or this Office. Different principles also apply in respect of publication.

[37] In considering this matter, I have had regard to the fact that some of the conduct under consideration took place prior to the commencement of the Act on 1 August 2008. However, having formed the view that charges should be laid against the

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[12] Letter J to BD (13 February 2013) paras [21] and [22].
[13] Letter W to LCRO (14 December 2013).
[14] Negligence which is of such a degree or so frequent as to reflect on a practitioner's fitness to practice or as to bring the profession into disrepute.
[15] The Standards Committee determination records that such conduct 'would' amount to, or 'amounted to', misconduct. The Standards Committee cannot make findings of misconduct and

practitioners before the LCDT, the requirements of s 351(1) of the Act (that the conduct complained of was such that proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982) have been satisfied.

[38] Taking all of the matters referred to above into account, I have reached the view that the issues raised by the complaint and the own motion investigation are properly matters to be put before the LCDT.

Should Mr GA be the subject of charges?

[39] All partners of a law firm are required to be directors of a firm's nominee company. Mr BD has acknowledged that it was he who was responsible for administering the firm's nominee company and Mr Z argues that Mr GA's liability, which arises by reason of his occupying the office of director, is different from that of Mr BD, and attracts less responsibility to ensure that the rules are complied with, or, more precisely, is deserving of a lesser professional standards response.

[40] If it were the intention of the drafters of the rules that partners who played no part in the administration of a nominee company had a lesser responsibility, then some indication of this would have been expected. Indeed, the reverse is the case – by drawing no distinction between those actively involved in the nominee company and those who are not, the drafters of the rules provided that all partners are obliged to take an interest in how a nominee company is being administered. In addressing Mr GA's position, regard should be had to the guidelines issued by the New Zealand Law Society for the guidance of lawyers involved in the administration of nominee companies, and in particular, guideline 12, which provides recommendations as to the lending policies to be implemented by the directors of a nominee company.

[41] I acknowledge that the guidelines are not rules, but if Mr GA has allowed the firm's nominee company to be administered in such a way that the guidelines have been ignored, then his role in this regard should be subjected to scrutiny.

[42] Mr GA is a director of the firm's nominee company and has the same responsibilities as Mr BD (and other directors). The consequences of a breach of those responsibilities needs to be determined, and again, this is an issue which should be put before the LCDT.

[43] It is also desirable that all issues relating to this complaint and the own motion investigation be considered in the same forum, and for these reasons I consider that

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the terminology used is incorrect. This does not however influence myself, nor will the LCDT be

the charges against Mr GA should also be put before the LCDT. I am conscious of the fact that there was a third director of the nominee company who is not part of this complaint but that is not a matter which is within the ambit of this review.

[44] Mr Z has argued that Mr GA was not providing regulated services when acting as a director of the nominee company and that therefore he could not be the subject of charges before the LCDT. I have already noted that the charges before the Tribunal could include a charge of unsatisfactory conduct, and s 12(c) of the Act defines unsatisfactory conduct as being conduct "consisting of a contravention of...regulations...made under [the] Act". That does not require a practitioner to necessarily have been providing regulated services. It could also be considered that Mr GA's role as a director of the nominee company was such as would constitute work 'incidental' to legal work as defined in s 6 of the Act. On this basis, Mr GA would be considered to be providing regulated services and allow for a charge of misconduct to be brought. Those are matters which the Standards Committee will need to address when framing the charges and addressing the evidence. They are not reasons for reversing the decision as far as Mr GA is concerned.

The scope of this review

[45] The role of this Office, when considering a review of a decision to lay charges against a practitioner before the Lawyers and Conveyancers Disciplinary Tribunal, was the subject of comment by the Court of Appeal in *Orlov v New Zealand Law Society*, where the Court held that there was no threshold test to meet before matters could be referred to the LCDT.[16]

[46] Part of the Court's reasoning 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. Part of the "other means" referred to is the role that this Office plays in reviewing decisions to refer matters to the LCDT. The Court said that:[17]

> 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.

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influenced by the use of such terminology.

[16] *Orlov v New Zealand Law Society* [2013] NZCA 230 at [53].

[17] Above n 16 at [54].

[47] Protection of a lawyer from unwarranted prosecution before the LCDT was inherent in the comments of Panckhurst J in *M v Wellington Standards Committee (No 2)* where he noted that: [18]

> 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.

[48] In fulfilling the role required of it, this Office has proceeded with caution when considering whether or not to interfere with a determination by a Standards Committee to refer a matter to the LCDT. In *FF v WSC2* I referred to the principles which review officers have had regard to when addressing this question: [19]

> [Previous LCRO cases] have identified the principles set forth in the various Court decisions where a decision to prosecute might be revisited. These include situations in which the decision to prosecute was:
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> (a) significantly influenced by irrelevant considerations;
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> (b) exercised for collateral purposes unrelated to the objectives of the statute in question (and therefore an abuse of process);
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> (c) exercised in a discriminatory manner;
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> (d) exercised capriciously, in bad faith, or with malice.
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> In addition, it was noted in the *Rugby* decision that "if the conduct was manifestly acceptable then this might be evidence of some improper motivation in the bringing of the prosecution".
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> While I do not necessarily agree that this might constitute evidence of some improper motivation in the bringing of the prosecution, I do agree that the decision to prosecute should be set aside if the conduct was manifestly acceptable.

[49] Whilst it is acknowledged that these principles are not necessarily exhaustive, they have formed the basis on which a review of a determination to refer a matter to the LCDT will proceed.

[50] Mr Z argues that whilst these limitations apply "in the ordinary case involving a prosecution by a conventional prosecuting body, that is not necessarily correct in the case of disciplinary proceedings".[20] He submits that the Court of Appeal in *Orlov* did not see fit to suggest that there was any limitation on the review of a determination to lay charges before the LCDT.

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[18] *M v Wellington Standards Committee (No 2)* [2013] NZHC 1037 at [12].
[19] *FF v WSC 2* LCRO 023/2011 at [49-51].

[51] The parameters that this Office has followed in previous decisions relating to reviews of a decision to lay charges are largely nothing more than an expression of the caution that Her Honour Winkelman J referred to in *Deliu v Hong* where she noted: [21]

> In my view the power of review is much broader than an appeal. It gives the review officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the review officer reaching his or her own view on the evidence before her. Nevertheless, as the guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[52] In addition, the Court of Appeal in *Orlov* did note that the decision to lay charges:[22]

> does not determine the outcome of the complaint. It only determines which body should be seized of it. The decision is procedural in nature and occurs at a very preliminary stage of what is a comprehensive statutory process involving several checks and balances in what the legislature saw as a more responsive regulatory regime.

I acknowledge that the Court of Appeal in *Orlov* was considering an application for judicial review of a determination by a Standards Committee, but the observation that the decision is procedural in nature still holds good in respect of a review by this Office.

[53] Mr Z' submission that a review by this Office must be wider than the limitations imposed on judicial review, which is limited to matters of process and procedure, has some merit. However, the observation by Winkleman J in *Deliu v Hong*, that the LCRO should act with caution when considering a decision which involves the exercise of a discretion by a Standards Committee, must also be acknowledged.

[54] Mr Z' submissions are directed towards establishing authority for me to conduct an unlimited review of the matters considered by the Standards Committee. In the previous sections of this decision I have done that, and (without reaching a final view on Mr Z' submissions) have independently come to the same view as the Committee. It is therefore not necessary for me to reach a final view on the submissions developed by Mr Z on this point.

The allegations of bias

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[20] Submissions by Z for review hearing.
[21] *Deliu v Hong* [2012] NZHC 158 at [41].
[22] Above n 16 at [50].

[55] Mr Z submits that bias on the part of Mr Q, the convenor of the Standards Committee, [23] has:[24]

> 'Infected' the decision of the entire Standards Committee regardless of whether or not Mr Q recused himself at any particular point in time and regardless of whether or not the Standards Committee composition was in excess of the numbers required to constitute a quorum.

[56] The allegations of bias are:

(a) One of Mr Q's partners is acting for clients who have brought a claim against GA & Partners

(b) Other complaints against Mr GA and Mr X are, or have been, before the same Standards Committee with Mr Q as convenor.

[57] Mr Q has advised that he did not become aware that his partner was acting for clients who have a claim against GA & Partners until after the meeting at which the decision to lay charges was made by the Committee on 14 March 2013. He also advises that he has recused himself from the other matters being considered by the Committee.

[58] I have independently considered the issues addressed by the Standards Committee and come to the view that the determination should be confirmed. The allegations of bias against Mr Q do not have any relevance with regard to the decision which I have reached unless Mr Z intends to take the point that I am unable to confirm a determination of the Standards Committee which he says is 'infected.'

[59] In his supplementary submissions of 10 April 2013, Mr Z argues that where there is a risk of perceived or apparent bias "the consequence is automatic – recusal, disqualification, and quashing of the decision of the entire body making the determination."[25] It follows therefore that if Mr Z pursues this submission and it is subsequently found that the decision of the Committee is a nullity, then my confirmation of it would also fall.

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[23] Mr Z emphasises that his clients do not contend actual bias.
[24] Z supplementary memorandum dated 28 April 2014 at [2].
[25] Z supplementary submissions (10 April 2013) at [20].

[60] The LCRO has the power pursuant to s 212 of the Act to assume direction of the prosecution before the LCDT. However, in his submission of 28 April 2014 Mr Z says:[26]

> The practitioners, Messrs GA and BD, nevertheless confirm that they are content for the LCRO to make his own decision, which he is empowered to do, and in accordance with their original submissions as presented orally to the LCRO. No remittal back to a freshly constituted Standards Committee is sought, or it would appear, necessary.

[61] Mr Z's clients therefore appear to accept that if I come to the same view as the Standards Committee, then they accept that decision, albeit that the decision is effected by way of confirming the decision of the Standards Committee. That is the position that I have reached.

[62] In any event, I do not accept that the allegations of bias are such that the decision of the Standards Committee is so 'infected' as to render it nugatory. I come to this view largely because the Committee is not the body which is to determine the outcome of this matter. Hammond J begins the introduction to his text on judicial recusal with this sentence: [27]

> The doctrine of judicial recusal enables, and may require, a judge who has been appointed to hear and determine a case to stand down from that case and leave the disposition of it to another colleague or colleagues.

The Standards Committee is not in the position of a "judge who has been appointed to hear and determine a case". It has merely made the procedural decision that the matters should be put before the Tribunal. Allegations of bias have no relevance to the decision which the Committee has reached.

[63] Finally, I do not accept that the matters put forward by Mr Z are such that would support an allegation of bias. Mr Q was not aware of the involvement of his partner with a claim against GA & Partners until after the decision was taken to lay charges against Messrs GA and BD, and, notwithstanding Mr Z' suggestions to the contrary, the decision of the Committee was made on 14 March 2013 and Mr Q was in no position thereafter to alter the determination of the Committee made at that meeting.

[64] The other allegation that the Committee was affected by bias on the part of Mr Q with regard to other complaints involving members of the firm is sufficiently tenuous

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[26] Above n 25 at [16].
[27] R G Hammond *Judicial Recusal: Principles, Process and Problems* (Hart Publishing Ltd, Oxford 2009) at p 3.

such that I do not consider that a fair minded person, fully appraised of the facts, would consider that the Standards Committee had been unable to make an impartial decision in connection with this matter.

Conclusion

[65] As is evident from the foregoing comments, I have reached the view that the issues which have been raised by Ms W and in the Committee's own motion investigation should properly be the subject of charges against both Messrs BD and GA before the Lawyers and Conveyancers Disciplinary Tribunal.

Decision

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

Costs

In accordance with the Costs Orders Guidelines issued by this Office, and pursuant to s 210(1) of the Lawyers and Conveyancers Act 2006, Messrs BD and GA are (collectively) to pay the sum of $1,600 to the New Zealand Law Society by way of costs by no later than 2 June 2014.

DATED this 5th day of May 2014

O W J Vaughan
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 GA and Mr BD as the Applicants
Mr J Z as Counsel for the Applicants
The [Area] Standards Committee
Mr M A as a Representative for the [Area] Standards Committee
Mr X as a related person or entity
The New Zealand Law Society