

LCRO 197/2015

CONCERNING

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of a Standards Committee

BETWEEN

THE OFFICIAL ASSIGNEE

Applicant

AND

IL

Respondent

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

Introduction

[1] The Official Assignee has applied for a review of the determination by a Standards Committee to take no further action in respect of the Assignee's complaints about Mr IL.

[2] This application is notable in that it involves conduct of a lawyer which primarily took place after the lawyer had been struck off.¹ The Lawyers Complaints Service did not apparently make any note of, or take any action in respect of, this fact, notwithstanding the provisions of ss 21 – 24 (and others) of the Lawyers and Conveyancers Act 2006.

[3] This decision is also notable in that the Official Assignee alleges offences by Mr IL against the Insolvency Act² which clearly should be pursued elsewhere than through the Lawyers Complaints Service. Mr CR³ considers that "the beneficial

¹ The Standards Committee determination records at [2] that Mr IL was struck off on [date] [Month] 2013 and that his subsequent appeal was dismissed. In his reply to the complaint (email Mr IL to the Lawyers Complaints Service (2 February 2015)) Mr IL says he was suspended in [Month] 2013 and struck off following an unsuccessful appeal. Reference to the reserved decision of the Lawyers and Conveyancers Disciplinary Tribunal issued on [Date] [Month] 2013 confirms Mr IL was struck off the role of barristers and solicitors by the Tribunal on that date.

² The Official Assignee alleges overt obstruction of the Official Assignee by Mr IL.

³ Mr CR is a [manager] in the Office of the Official Assignee.

outcome that could arise out of continuing with this review would be guidance to the Standards Committee and the legal profession as to the standard of conduct that can be expected of a solicitor advising a bankrupt".⁴ He seeks a decision from this Office on the law relating to bankrupts in respect of which he and Mr IL disagree, which Mr CR sees as obstructing the work of the Official Assignee, and which Mr IL sees as being a reasonable interpretation of the Insolvency Act 2006.

[4] The extraordinary situation that seems to have gone unremarked on by the Standards Committee is that Mr IL seemingly continued to act as a lawyer notwithstanding that he had been struck off. Mr IL had lodged an appeal against the strike off, but his appeal was dismissed in March 2014.

Background

[5] Mr IL was instructed by a bankrupt, Mr SA, who had been named in his late mother's will as an executor and a beneficiary. The conduct that the Official Assignee complains of relates to advice provided to Mr SA as to his ability as a bankrupt to act as executor in the estate, and advice relating to Mr SA renouncing his beneficial interest in the estate.

[6] The Official Assignee also complains about Mr IL's conduct when requested by the Assignee to provide his files and other documentation relating to Mr SA.

Review

[7] This review has been completed on the basis of the material before me with the consent of the parties.

Was Mr IL acting as a lawyer?

[8] Mr IL was struck from the Roll of barristers and solicitors on [Date] [Month] 2013. The Standards Committee determined that much of the conduct complained about took place after this date and therefore declined jurisdiction to consider that conduct because Mr IL was not acting as a lawyer. This included a decision to decline to consider bills of cost rendered after the date Mr IL was struck off.

[9] The Committee had Mr IL's file before it. A brief review of this file reveals the following conduct, all after the date Mr IL was struck off:

⁴ Letter CR to LCRO (21 January 2016).

- The firm [IL's Law Firm] continued in existence. In response to an inquiry from Mr SA, Mr EF, an associate of the firm, responds "business as usual".⁵
- Correspondence was signed by XY as locum for Mr IL.
- Correspondence was signed by VZ as attorney for Mr IL.
- The firm's letterhead did not include the names of any partners but letters were signed by "Mr EF, Associate".
- Correspondence from WW (email 20 June 2014) is directed to Mr IL referring to payment of "your account" indicating that Mr IL was the person directing matters.

[10] Some of the conduct complained about by Mr CR relates to advice and work that would be expected to be carried out by a lawyer or a law firm, but the Committee declined jurisdiction because Mr IL was not carrying out work as a lawyer. Sections 21 – 24 of the Lawyers and Conveyancers Act include restrictions on the provision of legal services by persons who are not lawyers. A lawyer is defined in s 6 of the Act as a "person who holds a current practicing certificate as a barrister or as a barrister and solicitor". Mr IL was not a lawyer as defined in s 6 of the Act.

[11] These matters were not part of Mr CR's complaints and therefore Mr IL has not had the issue put to him for a response. It is important that my comments here are not seen as anything other than this issue requires to be investigated. If the LCRO considers that matters which presented themselves from information before the Committee were not inquired into, the authority exists in s 209(1) of the Act to direct the Standards Committee to consider those matters and take such actions (or not) as the Committee deems necessary or appropriate.

[12] I am conscious of the judgment of the High Court in *C v LCRO* where Dobson J found there had been a breach of natural justice by the LCRO in not providing the applicant lawyer with warning that the LCRO was contemplating returning an issue to the Standards Committee for consideration.⁶ However, this seems to me to be in conflict with a later judgment of the Court of Appeal in *Q v LCRO* where the Court held that if the LCRO identifies a mistake by a Standards Committee, the LCRO should not

⁵ Email EF to SA (20 December 2013).

⁶ *C v LCRO* [2012] NZHC 3528, [2013] NZAR 398.

interfere with the finding of the Standards Committee and substitute her own views. Instead, the Court said:⁷

it is arguable that the proper course of action was for the Complaints Officer to have referred the matter back to the Standards Committee for reconsideration, or to have at least turned her mind to that possibility, her failure to do so amounting to a failure to take into account a relevant factor.

[13] Section 209(1) of the Act provides an express statutory authority to return a matter or a decision to the Standards Committee to reconsider either generally or in respect of a specified matter. In the present instance, it seems to me that the Standards Committee has not considered the question as to whether or not Mr IL could be in breach of the Act by acting as a lawyer. I do not consider there can be a breach of natural justice in not putting this to Mr IL before referring the matter back. In the first instance, the Committee can consider the matter and determine whether or not the issue requires to be investigated. If the matter is investigated further, Mr IL will have the opportunity to respond to any issue put before him to answer. Any investigation into that issue may not be an investigation conducted by the Lawyers Complaints Service as offences under the Act are subject to charges by the New Zealand Law Society and I have given no consideration to the jurisdiction of the Complaints Service to carry out any such investigation. That is an issue to be addressed by the Complaints Service and the New Zealand Law Society.

[14] I have not advised Mr IL first that I intend to refer this matter back to the Standards Committee. I direct the Committee to consider this issue and to take such action as it thinks fit. This may be nothing more than to refer the matter to the New Zealand Law Society.

Jurisdiction

[15] A Standards Committee has jurisdiction to consider complaints about practitioners or former practitioners or an employee or former employee of a practitioner.⁸ Section 6 of the Act defines a “practitioner” as a lawyer or conveyancing practitioner. A “lawyer” is defined as being a “person who holds a current practising certificate as a barrister or barrister and solicitor”.

[16] Mr IL was struck off the Roll of barristers and solicitors on [Date] [Month] 2013 and his appeal was dismissed on [Date] [Month] 2014. Section 255(3) of the Act provides that a strike off order operates as a suspension if the lawyer appeals against

⁷ *Q v LCRO* [2013] NZCA 570, [2014] NZAR 134 at [53].

⁸ Lawyers and Conveyancers Act, s 132(1)(a).

the strike off order, and continues as a suspension until the appeal is determined. Consequently, Mr IL was suspended from practice from [Date] [Month] 2013 and then confirmed as being struck off the Roll as at [Date] [Month] 2014. As either a suspended or struck off lawyer, Mr IL could not hold a practising certificate. Consequently, he was not a lawyer as defined in the Act at any time after [Date] [Month] 2013.

[17] The Standards Committee's logic that it lacked jurisdiction to consider the complaints about Mr IL's conduct after [Date] [Month] 2013 is irrefutable unless any subsequent investigation following my referral back reveals that Mr IL was employed by a lawyer or an incorporated firm at the time the conduct took place. In that case, the Committee will have jurisdiction to consider the conduct in question and the referral back direction at the end of this decision reflects that possibility.

Pre December 2013 advice

[18] The only legal work seemingly carried out by Mr IL prior to [Date] [Month] 2013 was advice to Mr SA insofar as it related to the effect of Mr SA's bankruptcy on him acting as executor of his mother's estate, and his ability to renounce his beneficial interest in the estate. There were also other reasons for Mr SA to renounce executorship of the will due to possible conflicts with other beneficiaries.

[19] Mr IL and Mr CR (and other officers in the Official Assignee's Office) disagreed over the interpretation of the Insolvency Act. Neither a Standards Committee or this Office has jurisdiction to make rulings on matters of law and although the Committee considered that it "appear[ed] as though Mr IL gave incorrect advice"⁹ it did not consider that:¹⁰

... such errors would amount to unsatisfactory conduct or conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer in way that should attract the disciplinary sanctions of the Law Society.

[20] The test of unsatisfactory conduct in s 12(a) of the Act is "a standard of competence or diligence that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer". That is expressed differently from the "peer based" standard that applied prior to the Lawyers and Conveyancers Act coming into force on 1 August 2008, but as observed by Duncan Webb in an article posted on the website of this Office "the two tests will

⁹ Standards Committee determination (24 August 2015) at [28].

¹⁰ Above n 10.

often converge". Mr CR and officers of the Official Assignee's Office will have a clear view as to the interpretation of the Insolvency Act but just because Mr IL did not agree with that view does not mean, *ipso facto*, that the advice provided was so incompetent that a member of the public would not expect it of a reasonably competent lawyer. An example of advice which I consider meets the test established by s 12(a) was where a lawyer was not aware of the amendments to the Construction Contracts Act 2002 such that she did not advise the client that his ability to dispute a payment claim was lost if a payment schedule was not served on the contractor within 20 working days of receipt of the claim.¹¹ Mr IL's conduct concerned a disputed interpretation of the Insolvency Act and Mr CR's view no doubt reflected established law. However, established law can sometimes be successfully challenged, and it is the role of a lawyer to conduct that challenge on behalf of clients.

[21] I agree with the Standards Committee that Mr IL's conduct did not constitute unsatisfactory conduct as defined in s 12(a) of the Act.

[22] In addition, Mr CR's complaints concern the competency of Mr IL's advice to Mr SA. It does not appear from the Standards Committee file that Mr SA participated in or actively supported the Official Assignee's complaints. Section 138(1)(d) of the Act provides that a Standards Committee may exercise a discretion to take no further action in respect of a complaint if "the person alleged to be aggrieved does not desire that action be taken ...". This presents as further reason to confirm the Committee's determination to take no further action in respect of Mr CR's complaints.

The outcome sought by the Official Assignee

[23] The outcome of this review sought by Mr CR is "guidance to the Standards Committee and the legal profession as to the standard of conduct that can be expected of a solicitor advising a bankrupt".¹² I discern from this and other correspondence from the Official Assignee's office, that they seek some direction from this Office as to a lawyer's duty to cooperate with the Official Assignee in providing files and other information to that Office and, it would seem, to ensure that advice to clients coincides with the Official Assignee's views of a person's obligations.

[24] The Insolvency Act sets out the powers of the Official Assignee and the obligations of persons from whom the Assignee seeks documents and/or information. If a person fails to comply with lawful directions of the Official Assignee then it is for the Assignee to take whatever action is considered necessary to enforce compliance.

¹¹ *DC & DE v EJLCRO* 218/2011 and 219/2011.

¹² Above n 4.

[25] Section 4(a) of the Lawyers and Conveyancers Act requires a lawyer to “uphold the rule of law”. To make a finding against Mr IL based on a breach of this obligation would require absolute certainty that Mr IL had refused to comply with lawful directions from the Assignee without any grounds at all for declining to do so. That necessarily would involve this Office in a consideration of the lawfulness of the demands made of Mr IL and a consideration of the legitimacy of his objections. That is not a matter with which a Standards Committee or this Office should become engaged. Enforcement of the powers of the Official Assignee should be carried out by the application and enforcement of, the provisions of the Insolvency Act and it would be outside the jurisdiction of this Office to purport to issue directives to lawyers as to what their obligations under that Act are. Each lawyer engaging with the Assignee’s Office must form his or her own view as to what his or her own obligations are, and face any enforcement action taken by the Office in the manner which they consider appropriate in the circumstances

[26] If, in the course of a prosecution of a lawyer by the Assignee, comments were made by the Court to the effect that the lawyer had absolutely no grounds for resisting lawful demands made by the Official Assignee, such comments could support a complaint or own motion investigation against the lawyer, following which a finding of unsatisfactory conduct could be made.

Conclusion

[27] Having considered the complaint, the Standards Committee investigation, the Standards Committee determination, and all of the material provided in the course of this review, I have reached the same view as the Standards Committee, namely, that further action is neither necessary nor appropriate in respect of Mr CR’s complaints.

Decision

[28] Pursuant to s 209(1) of the Lawyers and Conveyancers Act 2006 I direct the Standards Committee to consider the issues referred to in [8] - [11] above and to take such action as it shall determine appropriate or necessary. If, as a result of any investigation it is revealed that Mr IL was an employee of a practitioner or incorporated law firm, it will mean that the decision as to jurisdiction in [14] - [16] above will not be well founded. In that instance, I direct the Standards Committee to reconsider its decision which has been confirmed on review, that it did not have jurisdiction to consider Mr IL’s conduct after [Date] [Month] 2013 and to advise this Office if it intends to conduct a reconsideration of that conduct. In those circumstances it will be

necessary for that part of this decision to be recalled on the basis that this Office was not fully appraised of the facts, resulting in an incorrect decision.

[29] In all other respects, the determination of the Standards Committee is confirmed pursuant to s 211(1)(a) of the Act.

DATED this 24th day of May 2016

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:

The Official Assignee as the Applicant
Mr IL as the Respondent
Mr TT as Representative of the Applicant
A Standards Committee
The New Zealand Law Society