

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of the Wellington Standards Committee 2

**BETWEEN**

**FF**  
of Wellington  
Applicant

**AND**

**WELLINGTON STANDARDS  
COMMITTEE 2**

Respondent

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

**Background**

[1] The Applicant acted for VC, the complainant's mother, having previously acted for her and her late husband.

[2] FG, a staff solicitor in the Applicant's firm, serviced its North Island Office. In early 2008 she met with VC to discuss amendments to her will. She made handwritten notes on a copy of an earlier will made by VC in 2001 to record those instructions. She also prepared a draft will pursuant to those instructions.

[3] By her existing will dated 18 March 2002, VC bequeathed half of her estate to the complainant, and the other half to his brother, VB. VC had a third son, VA, for whom no provision was made.

[4] The amendments discussed with FG, provided that the half share of her estate which was to go to VB, was instead to be divided between the complainant's children and VB's son equally.

[5] Having been advised of the proposed amendments, the Applicant resumed control of the file. He prepared a further draft of the new will following the instructions recorded by FG and the draft prepared by her.

[6] VC left the employ of the firm shortly thereafter, and it appears that there may have been some degree of unpleasantness between her and the Applicant.

[7] The Applicant's father was a resident in the same retirement village as VC, and the Applicant met her on a number of occasions when visiting his father.

[8] The Applicant did not at any time ask VC whether or not she wished to proceed with the amendments to her will, and VC did not at any time mention the matter to him. Consequently, the instructions recorded by FG were not fulfilled.

[9] Comments made by the Applicant at the review hearing did not give any indication that he had any reservations as to VC's capacity to make a new will.

[10] VC died on 28 August 2009 and the complainant contacted the Applicant's firm to advise of this.

[11] The Applicant advises that he telephoned the complainant and left a message on his answer phone on 27 September 2009. This was followed up by a subsequent letter on 12 November 2009. The complainant finally made an appointment for 17 November 2009 to discuss his mother's estate.

[12] At their first meeting, the Applicant advised the complainant that his mother's last will was the will made by her in 2002. The complainant queried the whereabouts of the will which he was aware his mother had instructed FG to prepare in 2008 and the Applicant advised that he would investigate the matter.

[13] The complainant advises that the Applicant did not volunteer the fact that there was a draft of a will for VC on his file until the complainant advised the Applicant's office that he had obtained a copy of it (which he had not). At that time a copy of the draft was provided to the complainant by the Applicant.

[14] The complainant sought comment from FG, who provided a note of her recollections relating to the matter, which included the fact that she had prepared a comprehensive memo for the file when she left the firm. The Applicant advises that no such memo has been located on the firm's file and that he has never seen it.

[15] The complainant consulted an independent solicitor, and after some correspondence between the Applicant and the complainant's solicitor, it was agreed that the complainant and his brother, VB, would apply for Probate of the 2002 will. That was done, and at the complainant's request, another firm of solicitors was instructed to act on behalf of the Estate.

[16] Subsequently, a Deed of Family Arrangement was entered into with VA in settlement of a potential claim by him. The provisions of the proposed 2008 will were not incorporated into that Deed and the complainant lodged a complaint with the Complaints Service of the New Zealand Law Society. He advises that he considered the Applicant had caused tensions between him and his brother VB, and had also been responsible for the fact that his children and his nephew referred to in the proposed 2008 will, did not receive their proposed inheritance.

[17] The Standards Committee conducted a hearing 'on the papers' and determined pursuant to section 152(2)(a) of the Lawyers and Conveyancers Act 2006, that the complaint be considered by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal, as the Applicant's alleged failure to act on instructions regarding changes to the late VC's will and his alleged conduct relating to Probate of the earlier will was of sufficient gravity, if proven, to meet the threshold test for misconduct as defined by section 7(1)(b)(ii) of the Act.

### **Review**

[18] The Applicant has applied for a review of that decision.

[19] Upon being provided with a copy of the review application, the Standards Committee advised that the reference in its decision to section 7(1)(b)(ii) was a typographical error and should have simply read "section 7 of the Act".

[20] The review proceeded by way of an Applicant-only hearing in Wellington on 8 September 2011, at which the Applicant was represented by FH. The Applicant himself also attended.

[21] FH did not provide any written submissions to the hearing, but had previously provided submissions to this Office in conjunction with the review application.

[22] Following completion of her oral submissions, I invited her to provide a written record of these following the hearing and these were subsequently received.

[23] In addition, the Applicant provided details of the background to the matter and a summary of the events which unfolded.

[24] The written submissions provided by FH were in response to the decision of the Committee referring to section 7(1)(b)(ii) of the Act.

[25] That section applies to conduct of a lawyer unconnected with the provision of regulated services, which the Committee subsequently acknowledged was a typographical error. That will be corrected in this review.

[26] Because a finding of misconduct pursuant to section 7(1)(b)(ii) is a finding that the lawyer is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer, FH's written submissions were directed towards that.

[27] Nevertheless, she contended that the amended decision to lay charges was still wrong for the following reasons:-

- (i) the notice of hearing provided by the Committee was not precise enough to enable the Applicant to ascertain what it was he was being required to answer.
- (ii) the Applicant's conduct does not reach the threshold test required for a determination of misconduct as defined in section 7.
- (iii) the notice of determination as amended does not provide a reasoned basis for the Committee's conclusion.
- (iv) all aspects of "the complaint" are not included in the two aspects referred to in the Committee's decision and the Committee has not therefore addressed all of the matters raised in the complaint.

[28] As a result of these shortcomings, FH submits that the decision to lay charges should be reversed.

### **The Notice of Hearing**

[29] The Standards Committee conducted a hearing 'on the papers' pursuant to section 152(1) of the Lawyers and Conveyancers Act.

[30] Notice of the hearing was provided to the Applicant on 24 August 2010, in which the Committee invited submissions in respect of the following matters:

- (a) the nature of the alleged conduct itself;
- (b) the possibility that the Standards Committee may make a determination that the complaint or the matter, or any issue involved in the complaint or matter, be considered by the Disciplinary Tribunal;

- (c) if the complaint is upheld the appropriate orders that the Standards Committee may make;
- (d) if the complaint is upheld the possibility of publication.

[31] At the review hearing, FH submitted that the Notice of Hearing was deficient as it referred only to “the alleged conduct” and did not provide the Applicant with sufficient particulars of the matters to be addressed by the Applicant.

[32] Section 141 of the Lawyers and Conveyancers Act provides as follows:-

**141 Notice to person to whom complaint or inquiry relates**

The Standards Committee –

- (a) must send particulars of the complaint or matter to the person to whom the complaint or inquiry relates, and invite that person to make a written explanation in relation to the complaint or matter;
- (b) may require the person complained against to appear before it to make an explanation in relation to the complaint or matter;
- (c) may, by written notice served on the person complained against, request that specified information be supplied to the Standards Committee in writing.

[33] In addition, Regulation 9 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service Standard Committees) Regulations 2008, provides:-

- (1) When a complaint is received, the Complaints Service must –
  - (a) must acknowledge receipt of that complaint in writing; and
  - (b) as soon as is reasonably practicable, refer the complaint to a Standards Committee;
  - (c) notify the firm to which, or the person or persons to whom, the complaint relates; and
  - (d) provide a copy of the complaint to that firm, that person, or those persons.

[34] There is no challenge to the fact that the Complaints Service complied with the provisions of Regulation 9. In addition, the Complaints Service provided the Applicant with copies of all correspondence received from the complainant during the course of its investigation.

[35] The question to be determined is whether it was necessary for the Notice of Hearing to include more detailed particulars of the complaint other than to refer in general terms to “the alleged complaint”.

[36] This question was addressed in *Auckland District Law Society v The New Zealand Law Practitioners Disciplinary Tribunal and O HC Auckland*, HC 237/94 and in 84/94, 27 April 1995, which considered the similar requirements of section 101(3)(a) of the Law Practitioners Act 1982.

[37] In its decision, the Court criticised the Law Practitioners Disciplinary Tribunal for paraphrasing words used in the Act. In its decision, the Tribunal had cited a passage from *H (a law practitioner) v Auckland District Law Society* [1985] 1NZLR 8 at 21 as follows:

In our view, the Legislature clearly intended that persons who ultimately found themselves charged before the Tribunal should first have been notified by their District Law Society of the charge against them (meaning full particulars of the charge) and give them an opportunity to reply before the District Law Society took the first step in the disciplinary process; that is, to lay the charges at all and, if so, whether locally or nationally.

[38] The Court made the following comment at page 8 of the decision:-

The words in round brackets are not part of the citation. It appears that the Tribunal inserted them to explain what it considered to be the meaning of the expression "charge against them".

[39] The Court observed that section 101(3)(a) required the District Law Society to send particulars of "the complaint" not "the charge" as is recorded in *H*, and agreed with "the observations made by the full Court in *Wihapi v Hamilton District Law Society* [1992] 3NZLR 367 at 373 that the requirements of section 101(3)(a) should be observed and a failure to observe the direction is very likely to result in any decision and the consequences of any decision being set aside".

[40] The Court went on to say (at page 9):

It will be a question of fact in every case whether the particulars of the complaint have been sent to the person complained against. In some cases sending a copy of the letter of complaint will be sufficient. In other cases the Council or the committee will be required separately to identify the particulars of the complaint intended to be considered in a manner that will enable the practitioner to give an explanation in answer to the identified complaints.

[41] In the present case the complaints made against the Applicant were readily identifiable from the letter of complaint and subsequent correspondence provided by the Committee. The complaint involved two core issues:

- (i) that the Applicant had failed to act on instructions regarding changes to VC's will; and

- (ii) the Applicant's conduct with regard to the investigation (or lack thereof) of the circumstances giving rise to that failure, and information (or lack thereof) provided to the complainant.

All other issues were encapsulated in these two issues.

[42] All matters raised by the complainant were addressed by the Applicant in his responses to the Committee, and I cannot find any indication that he has been disadvantaged in any way by the generalised wording of the formal Notice of Hearing.

[43] I do not therefore accept FH's submission that the Notice of Hearing was not sufficiently precise.

### **The threshold test**

[44] FH submits that the Committee was required to identify in some particularity which part of the definition in section 7 applied to the Applicant's conduct. She also submitted that the Applicant's conduct did not meet the threshold test of any definition of misconduct in that section.

[45] The reference to a "threshold test" by the Committee is provided by it as the reason for referring the complaint to the Tribunal. In other words, the members of the Committee hold the view that the Applicant's conduct (if proven) is capable of constituting misconduct as defined in section 7 of the Act.

[46] While section 158 of the Act provides that reasons for a determination pursuant to section 152(2)(b) or (c) must be provided, there is no specific requirement to provide reasons if the Committee determines pursuant to section 152(2)(a) to lay charges before the Tribunal.

[47] While this Office accepts that there is general acceptance that reasons are to be given for decisions made by judicial and quasi-judicial bodies, the reasons provided by the Committee (that the conduct of the Applicant, if proven, was of sufficient gravity, to meet the threshold test for misconduct) is sufficient to satisfy this requirement. The Committee must be careful not to provide any further expression of its views as to do so, would potentially prejudice the hearing before the Tribunal.

[48] Prior to the review hearing, I referred FH to previous decisions of this Office, in one of which it was noted "that the general position in common law jurisdictions is to take a very restrictive stance in respect of the reviewability of a decision to prosecute,

observing that the prosecutor's function is merely to do the preliminary screening and to present the case". (*Mr Rugby v Auckland Standards Committee LCRO 67/2010.*)

[49] Those 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:

- (a) significantly influenced by irrelevant 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.

[50] 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".

[51] 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.

[52] In this regard, the Applicant's "conduct relating to Probate of the earlier will" could be considered to be unimpeachable, as the complainant had agreed, through his lawyer, that Probate of the earlier will should be applied for.

[53] There are, however, a number of allegations relating to the Applicant's conduct when responding to queries about the new will and matters raised by FG. I am prepared to accept that, when referring to the Applicant's "conduct relating to Probate of the earlier will", the Committee had these issues in mind, and in that regard there are matters which I consider, if proven, are sufficient to give rise to a consideration of a finding of misconduct. That is all that is required, and it is for the Tribunal to determine the question of whether the charges are proven once the matter is argued and the evidence is produced before it.

[54] FH argues that the statutory intention of section 154 of the Lawyers and Conveyancers Act appears to be that the charges and the notice of determination should be delivered to the practitioner at the same time. She notes that in practice, the Committee does not frame charges until the 30 day review period expires or any review is complete. This, she argues, is an inefficient use of the Committee's, the Tribunal's and the practitioner's resources, and unfair to the practitioner.



[55] If the proper use of resources were a relevant factor, then it could be argued that by not framing and laying charges until the 30 day review period has expired, or the review is completed, Committee and Tribunal resources are in fact being conserved. However, efficient use of resources, while important from a practical viewpoint, is not a reason for which a decision to lay charges should be set aside.

[56] I do however, agree that section 154 of the Act could be interpreted as requiring that the delivery of the charges and the written notice of the determination should take place at the same time.

[57] Section 154 provides as follows:-

If a Standards Committee makes a determination that the complaint or matter be determined by the Disciplinary Tribunal, the Standards Committee must –

- (a) frame an appropriate charge and lay it before the Disciplinary Tribunal by submitting it in writing to the chairperson of the Disciplinary Tribunal; and
- (b) give written notice of that determination and a copy of the charge to the person to whom the charge relates; and
- (c) if the determination relates to a complaint, give both written notice of that determination and a copy of the charge to the complainant.

The sequence of events envisaged by the section by reference to the order in which they are laid out, is that the charges are framed and submitted to the Tribunal, and written notice of the determination and a copy of the charges are delivered to the person to whom the charges relate.

[58] While section 158 provides that notice of a determination by a Standards Committee of the kind referred to in section 152(2)(b) or (c) must be given **forthwith**, there is no similar indication of any timeframe provided in section 154. If it were to be considered that the charges should be provided at the same time as the notice of the determination, then this would delay delivery of the notice of determination as it takes time to prepare a case for the Tribunal, and to formulate the charges. This would in itself be unfair to a practitioner, and be unworkable, given the present requirement that any application for review be lodged within 30 working days after the determination is made.

[59] In the circumstances, the practical solution is for matters to be dealt with as they are at present, namely by the immediate delivery of the notice of determination, followed in due course by delivery of the charges after expiry of the review period, or completion of any review.

[60] The effect of a breach of natural justice on a decision to prosecute was addressed in *Polynesian Spa Limited v Osborne* [2005] NZAR 408 where Randerson J noted that “consistent with the general approach of the Courts to the review of prosecutorial discretion, failure to comply with any residual fairness obligation is most unlikely to result in a successful application for a judicial review, given the availability of the subsequent trial process and the Court’s jurisdiction to prevent abuse of process”. The same principles can be applied to charges laid by a Standards Committee before the Lawyers and Conveyancers Disciplinary Tribunal.

[61] For these reasons, I do not consider that any lack of particularity in either the Notice of Hearing or the determination, or the failure to provide the charges at the same time as the determination, provide any reason to reverse the decision to lay charges.

### **The complaint**

[62] The final submission of FH that needs to be considered is that the Standards Committee decision has not determined all of the matters complained of by the complainant.

[63] The aspects of the complaint that I have identified are:

- (i) that the Applicant had failed to act on instructions regarding changes to VC’s will; and
- (ii) the Applicant’s conduct with regard to the investigation (or lack thereof) of the circumstances giving rise to that failure, and the information (or lack thereof) provided to the complainant.

[64] In its decision the Committee has recorded its reasons for determining to lay charges with the Tribunal as –

- (a) the Applicant’s alleged failure to act on instructions regarding changes to the late VC’s will; and
- (b) his alleged conduct relating to Probate of the earlier will.

[65] Allowing some degree of latitude in interpreting the Committee’s determination, all of the matters complained of are encapsulated in the two aspects referred to in the determination. Consequently, I do not consider the Committee’s decision to be deficient in this regard.

[66] FH referred to the request by the complainant that the Applicant should reverse his fees, as being an aspect of the complaint not dealt with by the Committee. That is an outcome sought by the complainant, and the Committee will need to address that in whatever penalties it seeks before the Tribunal. In that regard, the issue with regard to fees is not a complaint in itself, but an outcome sought, and does not therefore require to be separately considered by the Committee in its determination.

[67] In all of the circumstances I do not consider that there is any reason to interfere with the determination of the Standards Committee, other than to correct the typographical error referred to.

### **Decision**

[68] Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is modified by replacing the reference to section 7(1)(b)(ii) of the Lawyers and Conveyancers Act 2006 in its determination with reference to section 7 of the Act. In all other respects the decision of the Standards Committee is confirmed.

### **Costs**

[69] In accordance with the Costs Orders Guidelines published by this Office, where an adverse finding is upheld against a practitioner, the practitioner will be expected to bear approximately half of the costs of the review. In terms of the Guidelines that sum in this instance is \$1,200 and accordingly, pursuant to section 210 of the Lawyers and Conveyancers Act 2006, the Applicant is to pay the sum of \$1,200 to the New Zealand Law Society within 30 days of the date of this decision.

**DATED** this 27<sup>th</sup> day of September 2011

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Owen 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:

FF as the Applicant  
FH as the Applicant's Counsel

UZ as the Original Complainant  
The Wellington Standards Committee 2  
The New Zealand Law Society