

CONCERNING

An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of the [North Island] Standards Committee

BETWEEN

LY
Applicant

AND

[North Island] Standards Committee
Respondent

DECISION

[1] On 9 September 2011, the North Island Standards Committee resolved that a complaint against LY (the Practitioner) should be referred under section 152 of the Lawyers and Conveyancers Act 2006 (the Act) to the Disciplinary Tribunal.

[2] The Practitioner sought a review of that decision. She was assisted by LZ (Counsel) who accompanied LY to a review hearing held on 22 March 2012, and whose helpful submissions offered much clarity into the basis of the review application.

Background

[3] The Practitioner had been visited by the NZLS Inspectorate in January 2011, and over the following months he had sought further information from LY in relation to LY's trust account. The Practitioner failed to respond to some of these enquiries and receiving no response from the Practitioner the Inspectorate eventually wrote to the Complaints Service in June 2011 about outstanding matters of concerns in respect of which the Practitioner had not responded.

[4] At the end of June the Standards Committee notified the Practitioner of its own-motion investigation, and requested to respond. A further letter sent to the Practitioner

in mid-July noted that the Committee had received no response, and when still no response came from the Practitioner, the Standards Committee sent LY a notice, pursuant to section 141 (c) of the Act, requesting that specified information be provided by LY to the Committee.

[5] The Practitioner's failure to respond to the notice led to the Standards Committee decision to refer the matter to the Disciplinary Tribunal.

Grounds for Review

[6] There were two main grounds raised in support of the review. The Practitioner submitted that the Standards Committee process was flawed by errors of law in the Committee's decision.

[7] First, reference was made to the Standards Committee decision which stated:

"The complaint alleges that [the Practitioner] has failed to respond to the complaint after being required to do so by a notice pursuant to section 141(c)."

[8] Read literally, the complaint is stated to allege that the Practitioner had failed to respond to a complaint having been required to do so by a notice pursuant to section 141(c).

[9] However, the 'complaint' that was under investigation by the Committee was the Practitioner's failure to have responded to questions put to LY by the Inspectorate. This is supported by all of the correspondence on the Standards Committee file, and acknowledged in the following submissions of Counsel:-

"The Committee had consistently indicated that the nature of the complaint before it was related to issues arising from an investigation by the New Zealand Law Society Audit Inspectorate. However, the determination of the Committee to refer the matter to the Disciplinary Tribunal was based on a completely different premise, namely that [the Practitioner] did not provide the information the Committee sought after it gave a notice under section 141(c)."

[10] I accept that in terms described in the Committee's decision, the 'complaint' is stated as the Practitioner's failure to have responded to a section 141(c) request for information. If this was indeed the Committee's concern, Counsel was right to have pointed out that the Practitioner had not been notified of it as a disciplinary issue.

[11] In this light Counsel raised a second ground of review, namely that the failure of a lawyer to respond to a section 141(c) notice sent by a Standards Committee could not under any circumstances amount to conduct that could lead to any adverse disciplinary outcome for a Practitioner. Counsel's analysis of section 141(c) noted that a Standards

Committee may, by written notice served on the person complained against, ‘*request that specified information be supplied to the Standards Committee in writing*’.

[12] Counsel submitted that a ‘request’ for information did not give rise to an obligation on the person served to provide the information, and that a lawyer’s failure to respond to a section 141 notice could therefore not amount to a breach of the Act or of any of the Rules imposed on lawyers by the Rules of Conduct and Client Care.

Considerations

[13] The power of review of a Standards Committee decision to prosecute is limited, but may include whether the Committee’s decision was significantly influenced by irrelevant considerations, exercised for collateral purposes, or exercised in a discriminatory or capricious manner. These are not necessarily exhaustive. Clearly where a decision includes a major error, or where there has been a significant omission to comply with natural justice, a question necessarily arises as to whether the resulting decision can stand.

[14] There can be little doubt from the Standards Committee file that the issue under investigation by the Committee (and notified to the Practitioner) concerned information provided by the Inspectorate about the Practitioner’s failure to have responded to his questions. This had led to the Committee’s ‘own-motion’ investigation.

[15] Although Standards Committee may have intended its decision to prosecute to relate to its own-motion complaint (and indeed the remainder of its decision suggests that this is the case), the fact that its decision referred to a different ‘complaint’ (i.e the Practitioner’s failure to respond to a section 141(c) notice) is an error of some significance when it appears in a decision to prosecute. It is not the function of the Legal Complaints Review Officer to second guess the Committee on this matter.

[16] If the referral to the Tribunal was intended to relate to the complaint about the Practitioner’s alleged failure to have responded to the Inspectorate’s questions, this ought to have been correctly identified in the decision. Alternatively, if the referral was indeed intended to related to the Practitioner’s failure to respond to a section 141(c) Notice, this is a complaint that ought to have been notified to LY, and that it was not necessarily constituted a failure of natural justice.

[17] In summary I accept that the Committee erred in its decision, and in this cannot be considered a minor error in a decision to prosecute. In these circumstances the decision must be vacated.

Further submissions

[18] It was submitted that if the Committee's decision was vacated on review, then this office should consider dealing with the substantive issues arising in the complaint. Counsel submitted that all of the concerns raised by the Inspectorate have now been fully addressed. He further submitted that there was no complainant and no victim, and that it was in the public interest that the matter simply be concluded at this point, and that no further action was required. Counsel invited me to conclude the matter on the basis of requiring no further action.

[19] I have considered, but decline to follow, this submission. The role of the New Zealand Law Society in monitoring compliance with the Trust Account Regulations is a significant part of its role to ensure compliance with the way clients' money is handled. Lawyers who operate a trust account are required to co-operate with the Inspectorate, whose audit function ensures that lawyers deal with their client's money in a manner that complies with the obligations as set out in the Lawyers and Conveyancers Act (Trust Account Regulations) 2008. That this is a significant aspect of the Lawyers and Conveyancers Act 2006 is clear from the consumer protection purpose of the Act.

[20] Whether disciplinary issues arise for a lawyer in relation to this obligation is a matter for determination by a Standards Committee in the first instance, being a first stage decision making body. The role of the LCRO is to review decisions made by the Standards Committee; in this case no decision has yet been made on the substantive complaint.

[21] This complaint involves an important professional obligation and it is appropriate that the investigation should run its course. The decision of the Standards Committee will be vacated and returned to the Standards Committee for further consideration.

Refer back to a different Standards Committee?

[22] I have given consideration to whether a recommendation should be made that the matter be considered by a different Standards Committee. The reason is that the Standards Committee that issued the decision has come under some criticism from the Practitioner in having failed to make sufficient enquiry about the reasons for the Practitioner's non-response.

[23] The Practitioner explained the reasons for their failure to have responded to enquires by the Inspectorate and the Standards Committee with reference to very

difficult personal circumstances LY endured by the death of their partner, and then suffering a major health issue which landed LY in hospital.

[24] It was submitted that there was sufficient local knowledge about the Practitioner's personal circumstances such that it would have been known to at least some of the Committee members the reasons why she had not responded to its enquiry. The Committee came under criticism for proceeding to a serious decision to prosecute the Practitioner in these overall circumstances.

[25] There was some evidence that the Practitioner's situation was known to, or had been brought to the attention of, the Standards Committee, prior to its issuing the decision. I understood that the Practitioner had been a local practitioner for a number of years in the region, and there was some suggestion that at least some members who were part of, or associated with, the Committee were aware of circumstances which might have affected the Practitioner receipt of, or ability to respond to, the investigation.

[26] There was also evidence that the Practitioner had become aware, almost a week before, that the Committee would reconvene on 9 September (having vacated an earlier August date). On 24 August 2011 LY had been sent a formal notice of hearing; on 29 August a friend of the Practitioner had made contact and informed the Committee (via Mr R) about the Practitioner's personal situation, explaining the reasons why LY's participation was so difficult at that time. The Committee agreed to adjourn the matter to enable a Mr R. to try and contact the Practitioner in order to resolve matters, but this proved unsuccessful. However, the Practitioner wrote to Mr R. directly, in terms that the Committee considered was not a satisfactory response to its enquiry. The Committee decided to reconvene on 9 September.

[27] In LY's letter to Mr R (dated 4 September) the Practitioner had written that she would be available to meet with the Executive of the Standards Committee, she outlined certain requirements as to that meeting, which included a list of the names of the Executive of the local District Law Society as at August/September 2007, as well as a list of members of the local branch of the New Zealand Law Society subsequent to 2007. She added she had a number of matters to address with the Executive as a precursor to dealing with the unsubstantiated allegations of impropriety.

[28] This suggests that the Practitioner was fully aware of the nature of the matters under investigation before the Committee made a decision, and knew that the Committee was waiting for Ly's response to these matters.

[29] There is nothing to suppose that the Committee would have not agreed to a request for further time to respond, had such a request been made. But instead the Practitioner elected, a week or so prior to the Committee's meeting, to send a letter with certain demands of LY's own. The Practitioner's letter might be considered as being perhaps less conciliatory than might have been expected in all of the circumstances. In the light of this response the Committee proceeded to make a decision. In these circumstances I can find no proper basis for criticism of the Committee for proceeding to do so.

[30] The matter is to be referred back to the Standards Committee and I have considered all of the surrounding circumstances in deciding whether procedural fairness lies in favour of a fresh view of the matters by a different Standards Committee. Weighing up all of the factors it seems to me that and that justice would be well served in this case if another Standards Committee were to resume responsibility for investigating the complaint. In stating this view I make no criticism of the Committee which had the duty to progress the matter with some expediency.

[31] The Practitioner should be given a further opportunity to respond to the substantive issues arising in the complaint, and forward submissions on any other matters that she seeks to have considered by the Standards Committee.

[32] I do not accept Counsel's submission that the Standards Committee's decision to not participate in this review, and not opposing it, should be read as some sort of admission of wrong-doing by the Committee. The non-participation of Standards Committees in a prosecutorial decision under review is standard practice, and an appropriate position for any Standards Committee to take. I draw no inferences from the non-participation of the Committee.

Outcome

- (a) The decision of the Standards Committee dated 9 September 2011 is vacated.
- (b) The matter is to be returned to the Standards Committee for further consideration.
- (c) A recommendation is made for the file to be transferred to another Standards Committee.
- (d) Pursuant to section 209 of the Lawyers and Conveyancers Act 2006 the Standards Committee assuming responsibility for the investigation is directed to review steps taken thus far in the enquiry, and to allow the Practitioner such

time frame as the Committee considers reasonable to respond to the issues under enquiry and forward LY's submissions, before reaching a decision.

DATED this 1st day of June 2012

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:

LY as the Applicant
LZ as Representative for the Applicant
North Island Standards Committee as the Respondent
The New Zealand Law Society