

CONCERNING

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

AND

CONCERNING

a determination of the Standards Committee

BETWEEN

PA

Applicant

AND

STANDARDS COMMITTEE

Respondent

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

DECISION

Introduction

[1] Mr PA has sought a review of a decision of the Standards Committee which determined to prosecute him before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

Background

[2] Ms LD was the daughter of MP who died around 5 June 2010.

[3] At the time of his death, MP owned a residential property in [Suburb A], [City D].

[4] Mr MP's will (the Will) granted his partner HS, a lifetime right to occupation of the [City D] home. On the expiration of that right to occupy, the property or any substituted property or interest was to be treated as estate residue.

[5] Ms LD was the sole beneficiary of the estate residue.

[6] Ms LD was appointed executor and trustee under the Will.

[7] A codicil to the Will, executed on 14 April 2010, removed Ms LD as executor and trustee, and replaced her with Mr MP's nephew, SP.

[8] Mr PA was the solicitor for Mr MP's estate.

[9] The [Suburb A] property was sold in 2011 and a replacement property was purchased in [Town B]. The purchase of the [Town B] property was settled in April 2012.

[10] Mr PA acted for the estate in respect of the sale of the [Suburb A] property and the purchase of the [Town B] property.

[11] There was no house on the [Town B] property. The property comprised one and a half hectares and was consented for subdivision into five sections.

[12] The [Town B] property was registered in the name of SP personally.

[13] Around March 2011, solicitors for Ms LD commenced writing to Mr PA seeking information around the sale of the [Suburb A] property, and clarification as to the estate's assets and investments.

[14] Around November 2012, Mr SP and his partner were negotiating the purchase of a property at [Town C] (the [Town C] property). The property was to be purchased by the trustees of [Trust F], and [Trust G] (the Trusts).

[15] The trustees of [Trust F] were :

- (a) LW; and
- (b) PA Independent Trustees Limited.

[16] The trustees of [Trust G] were:

- (a) SP; and
- (b) PA Independent Trustees Limited.

[17] Mr PA was the sole director and shareholder of PA Independent Trustees Limited.

[18] Finance for the purchase of the [Town C] property was secured from [Bank X].

[19] Initially [Bank X] required security over the [Town C] property, but at the last minute requested that additional security be provided by a mortgage over the [Town B] property and a personal guarantee from Mr SP.

[20] Mr PA initially acted as solicitor for the Trusts on the purchase of the [Town C] property and for [Bank X].

[21] In instructions received from [Bank X] dated 27, 28 and 29 November 2012, request was made of Mr PA to:

- (a) Advise if he was unable to act for the bank.
- (b) Bring to the bank's attention any matter that may prejudice the mortgage or otherwise affect their ability to enforce their rights under the mortgage; and
- (c) Advise if he was aware of any specific circumstances which were likely to affect the validity or enforceability of the securities.

[22] [Bank X]'s instructions did not record that the [Town B] property was owned by the estate.

[23] Mr PA arranged for Mr SP to obtain independent advice regarding the proposal to secure a mortgage over the [Town B] property. The independent solicitor (Mr IC) cautioned Mr SP about registering the mortgage in light of concerns that the [Town B] property was the property of the estate. Mr SP instructed his solicitor to proceed.

[24] Mr IC completed an all obligations guarantee supporting the lending to the two trusts associated with Mr SP and attended to the registration of the mortgage over the [Town B] property.

[25] Mr PA provided a solicitor's certificate to [Bank X] in which he undertook that he would provide [Bank X] with valid and enforceable securities.

The complaint and the Standards Committee decision

[26] Ms LD filed a complaint against Mr PA with the New Zealand Law Society Complaints Service on 19 June 2013.

[27] She made complaint that Mr PA had:

- Failed to respond to requests from her solicitor to provide information concerning the estate for a period of approximately two years.

- Acted in situations where he had a conflict of interest.
- Had knowingly used estate assets as security for personal borrowing of the executor and his partner.
- Had failed to preserve Ms LD's interest as a residuary beneficiary and had breached his duty of care to her.
- Had been a party to transactions which he ought to have been aware were improper.
- Had been a party to transactions which resulted in the loss of Ms LD's beneficial interest in estate assets.

[28] The Standards Committee distilled the issues to be considered as follows:

- Did Mr PA have a conflict of interest in acting for the estate and the purchaser of the [Suburb A] property and later for the estate and for Mr SP's trusts?
- In continuing to act for the bank, the Trusts and the estate when he knew that [Bank X] required both a guarantee from Mr SP and a mortgage security over the estate property did Mr PA assist in an activity that was improper, a breach of trust and a fraud on the estate?

[29] In response to the complaint, Mr PA submitted that:

- Mr PA was able to continue to act for the purchasers of the [Town C] property, as Mr SP had been referred to an independent solicitor to take advice on the transaction in his capacity as an executor of the estate.
- Mr IC had attended to the execution of the guarantee and the registration of the mortgage.

[30] The Standards Committee concluded that Mr PA:

- Was seriously conflicted and his actions in referring Mr SP for independent advice did not resolve that conflict.
- Was aware that Mr SP had no right or capacity to give a mortgage over estate property.
- Assisted in a transaction that he knew was a breach of trust.

- Failed to disclose matters material to the bank's security.

[31] The Committee determined that Mr PA's conduct had breached rules 2.4 and 6.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, and directed that the complaint be referred to the Disciplinary Tribunal.

Application for Review.

[32] Mr PA filed an application to review the decision of the Standards Committee on 13 October 2014.

[33] He submits that the Committee:

- Erred in fact and law.
- Failed to consider critical facts.
- Were significantly influenced by irrelevant considerations.
- Mistakenly inferred that the registration of the [Town B] property in Mr SP's name was improper.
- Failed to place appropriate weight on the significance of Mr PA's decision to refer Mr SP to an independent solicitor.
- Paid insignificant heed to the fact that the decision to proceed with the purchase of the [Town C] property was taken by the sole executor.
- Paid insignificant heed to the fact that Mr PA was made aware at the last minute that [Bank X] required security over the [Town B] property and took steps immediately to refer the executor of the estate to an independent solicitor.
- Ignored evidence that Mr SP had deposed before the High Court that any losses incurred by the estate as a consequence of his actions were repayable by him.
- Gave insufficient consideration to the fact that there had been no loss. There have been no significant consequences for the estate and the beneficiaries.

- Were discriminatory in respect to the manner in which it handled complaint against Mr PA, in comparison to the way in which it handled complaint against Mr IC.

[34] Further, it is advanced for Mr PA that:

- If the trustee makes an error of judgement or proceeds in breach of a trustee's duties, then liability rests with the trustee.
- On an objective assessment, there is a reasonable inference to be drawn that Mr SP accepted he was responsible for any losses which may be incurred as a result of the collateral security being taken over the estate property.
- He had received instructions from Mr SP not to respond to correspondence from Ms LD's solicitor.
- Allegation that he had potentially committed a fraud on the estate is not adequately formulated.
- There has been insufficient clarification as to what is meant by "fraud on the estate".
- The finding that his conduct was contrary to rule 2.4 cannot be sustained
- Whether Mr SP had the consent of the estate's beneficiaries was irrelevant. The trustee did not require consent to undertake an action for which, ultimately, the executor must take responsibility.

Role of the LCRO on application for review of a decision to prosecute

[35] 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*.¹ The Court accepted that "there is now oversight of the referral decision by the independent LCRO".²

¹ *Orlov v New Zealand Law Society* [2013] NZCA 230, [2013] 3 NZLR 562.

² At [54](d).

[36] In that decision, the Court also determined that there was no threshold test to meet before matters could be referred to the Tribunal.³

[37] An element of the Court's reasoning in arriving at conclusion that the threshold test which previously existed under the Law Practitioners Act 1982 was no longer necessary, was its conclusion as to the role that this Office plays in reviewing decisions to refer matters to the Tribunal. The Court noted that:⁴

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 prevented it from being overwhelmed by petty or trivial cases.

[38] Several decisions from this Office have emphasised the need for this Office to proceed with caution when considering whether or not to interfere with a determination by a Standards Committee to refer a matter to the Tribunal.⁵

[39] It has been noted that it will only be in exceptional cases that a decision to prosecute will be reversed on review.⁶

[40] In *FF v Wellington Standards Committee 2* the Review Officer referred to the principles which Review Officers have had regard to when considering an application for review of a decision to refer to the Tribunal.⁷

[49] [Previous LCRO [Legal Complaints Review Officer] 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

³ At [53].

⁴ At [54](d).

⁵ *AE – Decision to prosecute* LCRO 93/2013 and 338/2013.

⁶ *Poole v Yorkshire* LCRO 133/09, *EG & EH v Auckland Standards Committee 1*, LCRO 163/2011 and 164/2011 at [4]; *JR v QL* LCRO 108/2012 at [18].

⁷ *FF v Wellington Standards Committee 2* LCRO 23/2011 at [49]-[51].

decision to prosecute should be set aside if the conduct was manifestly acceptable.

[41] The grounds notably do not include a review of the evidence relating to the complaint.⁸

[42] Such an approach appears consistent with the general stance adopted in common law jurisdictions, where a very restrictive approach to the reviewability of a decision to prosecute has been emphasised since, the prosecutor's function is merely to do the preliminary screening and to present the cases.

[43] Whilst these principles are not necessarily exhaustive, they do provide guidance to this Office of the approach to be adopted when proceeding with a review of a decision to prosecute.

[44] The approach this Office has adopted in considering reviews of Standards Committee decisions accords with the cautionary approach that Her Honour Winkelmann J referred to in *Deliu v Hong* where she noted:⁹

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. (citations omitted)

[45] The Court of Appeal in *Orlov v New Zealand Law Society* observed that the decision to lay charges:¹⁰

... 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 and what the legislature saw as a more responsive regulatory regime.

[46] It is accepted, that the Court of Appeal in *Orlov* was addressing an application for a judicial review of a Standards Committee determination, but it has been noted that "... the observation that the decision is procedural in nature still holds good in respect of a review by this Office".¹¹

⁸ *OJ v PT* LCRO 168/2011 at [6].

⁹ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [41].

¹⁰ Above n 1 at [50].

¹¹ *BD and GA* LCRO 186/2013 at [52].

[47] However where a decision includes a major error, where there is a manifest flaw in the Committee's reasoning, where there has been a significant omission or a failure to comply with natural justice principles, a question necessarily arises as to whether the resulting decision can stand.

[48] I have taken all these considerations into account in formulating the decision that follows. This decision confirms the decision of the Standards Committee.

Analysis

[49] The Committee's power to refer a practitioner to the Tribunal derives from s 152(2) of the Lawyers and Conveyancers Act 2006 (the Act). The Committee may make a referral, if the Committee considers that concerns have arisen in a professional context which, if proven, could lead to a misconduct finding. All that the Committee has to be satisfied of, is whether the conduct in question (if proven) is capable of constituting misconduct. It does not fall to the Committee to determine whether the conduct in question is misconduct.

[50] The issue I am required to consider is whether there is any proper basis for interfering with the Standards Committee decision. It is not my role on review to decide whether or not the evidence is sufficient to support a finding of misconduct. It is enough that there is some evidence to support a complaint that is of sufficient gravity to warrant referral to the Disciplinary Tribunal.

[51] Counsel for Mr PA helpfully conceded at the outset, that the scope for intervention by the LCRO is limited, and focused her submissions on argument that Mr PA's case fell clearly within that narrow range of circumstances where it may be appropriate to revisit a decision to prosecute, particularly:

- Where it could be established that the decision had been significantly influenced by irrelevant considerations; and
- The decision had been exercised in a discriminatory manner.

[52] Turning firstly to submission that the Committee's determination reflected a discriminatory approach, I do not consider that it has been established that the Committee's decision could fairly be described as resulting from a process that was discriminatory in nature.

[53] That argument rests on allegation that the Committee's decision to refer Mr PA to the Tribunal, is unfair, when compared to the action taken in respect of complaint made against the independent solicitor, Mr IC.

[54] Standards Committee's decisions are private.

[55] Decisions must remain confidential, unless the Committee makes a direction under s 142(2) of the Act, or reg 31 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.

[56] I have no knowledge as to whether a complaint against Mr IC has been considered by the Complaints Service, other than counsel's indication that it has.

[57] Mr PA's counsel acknowledges that the Standards Committee decision in respect to Mr IC (if there is one) remains confidential, nevertheless it is suggested that a complaint inquiry proceeded against Mr IC resulted in a decision which reflected a less punitive outcome, than the outcome accorded to Mr PA.

[58] I am assuming (and it must be emphasised it is only assumption) that counsel may be suggesting that Mr IC's conduct was not considered of sufficient seriousness, to warrant a referral to the Disciplinary Tribunal.

[59] These conclusions are based on assumption and inference, but I am required to travel this difficult path to address argument that the Committee's handling of Mr PA's inquiry was discriminatory.

[60] There is no evidence before me to support allegation that the Committee acted in a discriminatory manner.

[61] Even if evidence was put before me to indicate that a Standards Committee had completed an inquiry into complaint against Mr IC which arose out of the same background to Mr PA's complaint, the fact that a Committee may have taken a different view on outcome, would not in itself be persuasive evidence to support contention that the Committee had acted in a discriminatory manner. Whilst there is an obvious need to ensure consistency in the imposition of disciplinary penalties, each decision is the product of its own particular facts, and penalties if imposed, are tailored to reflect the Committee's assessment as to appropriate outcome.

[62] The information provided for this review provides quite comprehensive account of the role Mr IC played in the transactions. Even without benefit of more specific elaboration as to the details of Mr IC's role, reasonable conclusion can be drawn that if

Mr IC's conduct was the subject of disciplinary inquiry, the issues to be considered by any Standards Committee charged with responsibility of proceeding that inquiry, would necessarily differ in many respects from the issues confronting the Committee that inquired into complaint against Mr PA.

[63] I do not agree that the Committee's decision was exercised in a discriminatory manner.

[64] Attention then turns to the question as to whether the Committee's decision had been significantly influenced by irrelevant considerations and in so doing address argument that the Committee erroneously attached a degree of seriousness to the conduct that was simply undeserved.

[65] Argument advanced for Mr PA in significant part focuses on submission that the Committee has amplified and overstated the conduct, and has given insufficient consideration to the consequences of Mr PA sending the bank's instructions to an independent solicitor.

[66] Mr PA acknowledges an error of judgement on his part in failing to send the securities back to Mr IC with request that he deal with the bank, and concedes with the benefit of hindsight that he should have insisted that the independent lawyer complete the instructions. But it is argued that the Committee has taken an overzealous approach, particularly in concluding that Mr PA had acted contrary to rule 2.4 which sanctions against a practitioner engaging in activity that the practitioner knows to be fraudulent or criminal or knowingly assisting in the concealment of a fraud or crime. To describe the offending conduct in those terms is, says Mr PA's counsel, overzealous and inaccurate in its description of the conduct.

[67] Whilst I am mindful that it is not the role of this Office to determine the sufficiency of the evidence or the strength of the complaint, which are properly matters for the Tribunal,¹² it is unquestionably self evident that the Committee considered the conduct to be at the serious level, when it concluded that the offending conduct constituted a breach of rule 2.4.

[68] There are three elements to the rule. Firstly a lawyer must not advise a client to engage in conduct that the lawyer knows to be fraudulent or criminal. That would require evidence of Mr PA specifically advising Mr SP to complete the transaction, and an acceptance that it was within Mr PA's knowledge that the transaction was either

¹² Above n 1 at [71].

fraudulent or criminal. The transaction raises serious concerns as to whether the trustee was acting in breach of trust, but it is wrong submits Mr PA's counsel, to conclude that Mr PA had engaged in conduct that he knew to be fraudulent or criminal.

[69] Turning to the second limb of rule 2.4, it is further advanced for Mr PA, that it is highly contestable as to whether the evidence could support conclusion that Mr PA had assisted another party in engaging in activity that Mr PA knew to be fraudulent or criminal.

[70] The third limb of rule 2.4, which engages the practitioner knowingly assisting in the concealing of a crime has no application.

[71] In my view, it is appropriate that it be left to the Tribunal to determine the gravity of the conduct, and whether the Committee has overstated its case in elevating the conduct to the degree of seriousness reflected in submission that the offending conduct constitutes a breach of rule 2.4.

[72] Mr PA will have opportunity at the Tribunal hearing, to give evidence in response to elements of the conduct complaint which inevitably will traverse and engage consideration of Mr PA's understanding of the nature of the transactions, his intentions and his state of knowledge.

[73] The Committee's decision does not focus solely on contention that there has been a breach of rule 2.4. A significant component of the decision addresses concerns that Mr PA was seriously conflicted.

[74] That approach is reflected in the charges laid. The introduction to the charges, framed in the alternative, alleges that Mr PA's conduct constituted misconduct, or unsatisfactory conduct, or that he was negligent or incompetent in his professional capacity.

[75] It is charged that Mr PA breached his fundamental obligations under s 4 of the Act, which relevantly impose obligations on practitioners to be independent in providing regulated services, and the obligation to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients.

[76] Underpinning these issues is concern that Mr PA was manifestly conflicted.

[77] It is argued for Mr PA that insufficient consideration was paid to the fact that Mr PA had advised Mr SP not to proceed with the transaction, and had referred Mr SP to

another lawyer. Those actions it is argued, significantly ameliorate argument that Mr PA was placed in a position of conflict.

[78] Whilst it is apparent that Mr PA became disconcerted when the bank at the last minute sought further security over the [Town B] property, the issue as to whether the steps that Mr PA took to manage potential conflict were adequate, are in my view, matters which are properly left for the consideration of the Tribunal, and not issues which should, in the review of a prosecutorial discretion, fall for the LCRO to determine.

[79] Mr PA had a close involvement in the transactions. He acted for the estate on the purchase of the [Town B] property. He was acting for the purchasers on the [Town C] transaction, and a trustee company, of which he was sole director and shareholder, was a trustee of both trusts that were involved in the purchase of the [Town C] property. Mr PA was responsible for executing the bank certificate, and argument that another solicitor should have done so, does not detract from the consequences of that decision, which included obligations to bring to the bank's attention any matters that may have prejudiced the ability of the bank to enforce any of its rights under the mortgage.

[80] In this case it is arguable that the conduct complained of fell short of professional standards and accordingly it would be inappropriate to interfere with the decision to refer to the Tribunal.

[81] It cannot, in my view, be reasonably argued that the decision to prosecute has been significantly influenced by irrelevant considerations.

[82] I have given careful consideration to all the material on the Standards Committee file, the extensive documentation filed in support of the charges, the submissions filed, and the helpful and focused submissions advanced by Mr PA's counsel at the review hearing. I see no reason to interfere with the decision of the Standards Committee to lay charges before the Lawyers and Conveyancers Disciplinary Tribunal.

Costs

[83] In light of the fact that Mr PA has been unsuccessful in his application for review it is appropriate that he contribute to the costs of the conduct of this review.

[84] Taking into account the Costs Guidelines of this Office, the practitioner is ordered to contribute the sum of \$1,200 to the costs of the review, that sum to be paid to the New Zealand Law Society within 30 days of the date of this decision.

[85] The order for costs is made pursuant to s 210(1) of the Lawyers and Conveyancers Act 2006.

Decision

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

DATED this 30th day of June 2015

R Maidment
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:

PA as the Applicant
Ms TB QC as the Representative for the Applicant
Standards Committee
The New Zealand Law Society