LCRO 273/2013
LCRO 343/2013
LCRO 040/2014

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Standards Committee of the New Zealand Law Society
BETWEEN	**XX** Applicant
AND	**BA** Respondent

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

DECISION

Introduction

[1] Mr XX has applied for a review of three related decisions by the Standards Committee dated 22 August 2013, 18 October 2013 and 22 January 2014.

[2] In the first decision, the Committee made a finding of unsatisfactory conduct against Mr XX pursuant to s 152(2)(b) of the Lawyers and Conveyancers Act 2006 (the Act). Under s 156(1) of the Act, the Committee censured Mr XX, ordered him to rectify his failure to provide a client file to Ms BA, and to pay a fine and costs to the New Zealand Law Society (NZLS). The second decision ordered Mr XX to pay compensation to Ms BA's client pursuant to s 156(1)(d) of the Act. The third directed publication of details identifying him after the NZLS Board had approved publication, pursuant to s 142(2) of the Act.

Background

[3] Mr XX acted for Mr LW. Mr LW then changed lawyers and instructed Ms BA. Ms BA asked Mr XX to forward Mr LW's file, and to account for funds he held in his trust account. She provided an authority signed by Mr LW.

[4] Ms BA says Mr XX did not respond appropriately or in a timely way to her request, and on behalf of Mr LW, she laid a complaint to NZLS. The Standards Committee determined the complaint pursuant to s 152(2)(a) of the Act on the basis that Mr XX's conduct should be considered by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (the Tribunal).

[5] Mr XX disagreed, and applied for a review of that decision.

[6] A decision issued by this Office dated 26 August 2011 concluded by confirming the Committee's decision to refer Mr XX's conduct to the Tribunal pursuant to s 211(1)(a), but also included a paragraph saying:[1]

> Having considered the Standards Committee file and having heard from the Practitioner, it is my view that the circumstances are such that the Committee's referral of the matter to the Tribunal was appropriate. Whether the Standards Committee will in fact proceed with its prosecution in the circumstances that the Practitioner is no longer practising is a matter that it will no doubt consider.
>
> (the LCRO's comment).

[7] The LCRO's decision was sent to the Committee. The Committee's decision says:

> Following the decision of the LCRO, and taking into account the fact that Mr XX had been struck off the roll, the Committee resolved to revoke its decision to refer the matter to the Disciplinary Tribunal and to set the matter down for a hearing on the papers.

[8] The Committee then purported to determine Ms BA's complaint afresh on the basis of the matters it had referred to in the notice of hearing it had issued before it determined the complaint on the basis that the Tribunal would consider all matters.

Review Application

[9] In his review application Mr XX objects to the Committee having resumed jurisdiction over the complaint, opposes the finding of unsatisfactory conduct and says the penalties are excessive.

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[1] LCRO 184/2010 at [24].

Role of LCRO on Review

[10] The role of the Legal Complaints Review Officer (LCRO) on review is to reach her own view of the evidence before her. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting her own judgement for that of the Standards Committee, without good reason.

Scope of Review

[11] The LCRO has broad powers to conduct her own investigations, including the power to exercise for that purpose all the powers of a standards committee or an investigator, and seek and receive evidence. The statutory power of review is much broader than an appeal, and gives the LCRO discretion as to the approach to be taken on any particular review and the extent of the investigations necessary to conduct that review.

Review hearing

[12] Mr XX attended a review hearing in [City] on 6 July 2015. Ms BA was not required to attend and the hearing proceeded in her absence.

Analysis

Consideration by the Tribunal – s 152(2)(a)

[13] Section 152 sets out the statutory power of committees to determine complaints or matters, including by reference to the Tribunal under s 152(2)(a) which says:

> The determinations that the Standards Committee may make are as follows:
>
> (a) a determination that the complaint or matter, or any issue involved in the complaint or matter, be considered by the Disciplinary Tribunal...

[14] Based on the LCRO's comment, the Committee formed the view that if it did not take steps to prosecute, the Tribunal was not going to consider the complaint, the Committee could resume jurisdiction over the complaint and determine it.

[15] The way in which the Act provides for a committee to resume jurisdiction over a complaint is by a direction of the LCRO under s 209(1)(a) of the Act. That subsection provides for an LCRO to direct a committee to "reconsider and determine" complaints, matters and decisions in whole or part. No such direction was made in this case.

[16] The Committee exhausted its statutory jurisdiction to make a final determination in relation to the complaint under s 130(e) of the Act in its determination that the complaint be considered by the Tribunal pursuant to s 152(2)(a) of the Act. The LCRO confirmed the determination, but that did not determine the outcome of the complaint, only "which body should be seized of it",[2] namely the Tribunal.

[17] The LCRO's comment related to the Committee laying and prosecuting charges before the Tribunal in the exercise of its functions under s 130(f). The LCRO's comment was made in circumstances where the public was protected by Mr XX having been struck off the roll after the Committee had exhausted its jurisdiction over the complaint, but before the LCRO had confirmed the determination. In the circumstances, the LCRO's comment could have been no more than an observation that, in the circumstances, it was open to the Committee not to exercise its functions under s 130(f).

[18] In circumstances where the Committee had exhausted its statutory jurisdiction, it lacked the statutory power to revoke its determination. It therefore erred by making the decision pursuant to s 152(2)(b) that Mr XX's conduct was unsatisfactory.

[19] That decision is therefore reversed.

Orders – s 156(1)

[20] As orders under s 156(1) can only be made if a committee makes a determination under s 152(2)(b) that a lawyer's conduct has been unsatisfactory, the orders under s 156(1) fall away. The orders under s 156(1) are reversed pursuant to s 211(1)(a).

Direction to Publish – s 142(2)

[21] The Committee also made a direction under s 142(2) to publish the decisions it had made under s 152 and 156. As the decisions made under ss 152 and 156 have been reversed on review, the direction to publish is invalid on the statutory grounds set out in s 142(2). The direction under s 142(2) is reversed on review.

Further inquiry on review - s 205

[22] Mr XX is no longer in practice. He has no entitlement as a lawyer to hold files or money in trust for clients. This review process is not the appropriate process through which to address any residual concerns Ms BA or her client may have in those respects.

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[2] *Orlov v NZLS* [2013] NZCA 230, [2013] 3 NZLR 562 at [50].

[23] If any further disciplinary inquiry is to be undertaken, that will be a matter for the Disciplinary Tribunal if the Committee exercises its prosecutorial function under s 130(f) on the basis of its decision, confirmed by the LCRO in LCRO 184/2010.

[24] For those reasons I decline to make any further inquiry or investigation into the complaint pursuant to s 205 of the Act.

Recusal application – Breach of Natural Justice - Fairness

[25] The present matter was one of three review hearings set down for 6 July 2015 involving Mr XX. Mr XX objected to me conducting a review of any matter involving him on the basis of fairness. Mr XX alleges bias because while I was in practice in [City] I:

(a) acted for Ms BA's firm;

(b) in court proceedings to which he was a party, acted as counsel for an opposing party;

(c) was the subject of adverse media comment in relation to matters involving Mr XX; and

(d) was involved in Law Society matters.

[26] The type of unfairness Mr XX implies relates to:[3]

> a predisposition to decide a cause or an issue in a certain way which does not leave one's mind properly open to persuasion. It results in an inability to exercise one's functions impartially in a particular case. The predisposition may stem from...personal relationship, ideology and inclination...

[27] In *Denbighshire v Galashiels,*[4] noting that an LCRO is not a judge, the LCRO considered and applied the test for apparent bias set out by the Supreme Court in *Saxmere v Wool Board Disestablishment Company Limited*:[5]

> ...if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.... That principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal…be independent and impartial. Unless the judicial system is seen as independent and impartial the public will not have confidence in it and the judiciary who serve in it.

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[3] GDS Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, LexisNexis, Wellington, 2014) at 521-522.
[4] *Denbighshire v Galashiels* LCRO 218/2009 at [25]-[49].
[5] *Saxmere v Wool Board Disestablishment Company Limited* [2009] NZSC 72, [2010] 1 NZLR 35 at [3].

[28] The Supreme Court said that two steps are required:[6]

(a) First, the identification of what it is said might lead a judge to decide a case other than on its legal and factual merits; and

(b) Secondly, there must be "an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits".

[29] The Court listed a range of qualities to be attributed to the "fair-minded lay observer" including intelligence, objectivity, and a balance between undue sensitivity, suspicion and complacency about what may influence the judge's decision. The person is presumed to be reasonably informed about the workings of the judicial system, the nature of the issues in the case and about the facts pertaining to the situation which is said to give rise to an appearance or apprehension of bias. The minimum knowledge assumed includes a basic understanding of the professional capacity in which lawyers act for their clients, and that accepting a brief to act for clients in a particular case does not mean the lawyer becomes part of or identified with the client.[7]

[30] Bearing those comments in mind, I deal with each of Mr XX's objections in turn. As I am not aware of ever having acted for Ms BA's firm, Mr XX's first objection cannot be sustained. His second and third objections conflate the role of lawyer instructed by clients with the client itself, and do not provide a proper foundation for an allegation of bias. There is no relevant link between any Law Society matter in which I have been involved, and this complaint against Mr XX. In particular, I did not sit on the Standards Committee that dealt with the complaint that is the subject of this review application.

[31] I indicated to Mr XX that, in preparing for the hearing, I had formed a preliminary view of his review application. I understand that, as mentioned by the LCRO in *Denbighshire*, "the holding of a preliminary view is a natural consequence of having read the material submitted by the parties and is unobjectionable".[8] My preliminary view, subject to anything he may have wished to add at the review hearing, or any further enquiry I might make that might alter that view, was that Mr XX's challenge to the Committee's decision stood a reasonably good chance of succeeding.

[32] There has been no predetermination in respect of this review, and I do not recuse myself on that basis.

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[6] At [4].
[7] At [5]-[7].
[8] *Riverside Casino Limited v Moxon* [2001] 2 NZLR 78 (CA).

[33] I note the reference in *Denbighshire* to "what personal relationships with litigants would be a proper basis for recusal", with reference to the decision in *Locabail (UK) Limited v Bayfield Properties Limited,* where it was said: [9]

> a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case...

[34] I am acquainted with Mr XX only through having been instructed as counsel in matters in which he has been involved as a party, and through his applications to this Office on review. I have no animosity towards him, and no personal acquaintance with him.

[35] I also note, adopting the LCRO's approach in *Denbighshire*, that I must be very cautious of allowing Mr XX by his own behaviour to manufacture circumstances which would found a successful application for bias and enable him to engineer which judicial officer hears his application. In particular I do not consider the focus should be on the allegations that Mr XX has made against me. If that were the focus any litigant could manufacture effective recusal application by making unfounded allegations or bringing review applications whether or not they have merit. The fact that Mr XX may strongly and honestly believe I am biased is not a relevant consideration. The test for bias is an objective one to be applied by the tribunal before which any issue of bias actual or perceived, is to be determined.

[36] The focus of the enquiry must be on what relationships I have, or conduct I can be shown to have engaged in which demonstrates that a fair-minded lay observer might reasonably apprehend that I might not bring an impartial mind to the matter. Mere allegations are not enough.

[37] I have no relationships which are relevant to this matter. My previous practice as a lawyer does not amount to bias or show bias. The key question is "whether a reasonable observer might think that in light of the behaviour and allegations of Mr XX I might be biased against him". I also "take account of the fact that I must not be unduly timid", and that "there is an inherent reluctance on the part of any decision maker to make a finding that he or she is (even only apparently) biased". I have also taken into account that it is necessary to "ensure that any decision of this office is sufficiently robust to be accepted by the parties and therefore give finality to the matter".[10]

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[9] *Locabail (UK) Limited v Bayfield Properties Limited* [2000] QB 451, (CA) at 480.
[10] Above n 4 at [49].

[38] Taking those matters into account, I consider that a reasonable and informed lay onlooker would consider that I am able to impartially consider Mr XX's application for review. Accordingly I have considered and decided it.

Publication of LCRO decisions – s 206(4)

[39] This Office publishes decisions if the LCRO considers publication is necessary or desirable in the public interest. Pursuant to s 206(1) of the Act, every review must be conducted in private. If I shared the view of the NZLS Board and Standards Committee on publication in this matter I would need to be satisfied that there is some element of public protection to warrant identifying Mr XX as the practitioner concerned, or some other reason that publication of details identifying him is necessary or desirable in the public interest.

[40] As a matter of public record, Mr XX is no longer in practice. There is no need for me to publish a decision that repeats that. If a prosecution were to proceed to the Tribunal, that too would be a matter of public record unless an order for name suppression were granted.

[41] As the complaint and review process in this matter is subject to the privacy provisions of the Act, I can see no purpose in publishing a decision that identifies Mr XX as the practitioner who was the subject of the complaint and review application.

[42] However, the jurisdictional point discussed may be of interest more broadly. A direction is therefore made pursuant to s 206(4) that this decision be published without details that may identify Mr XX, the Standards Committee or any other individual involved.

Conclusion

[43] In the absence of an order under s 209(1) of the Act, the Committee's jurisdiction over Ms BA's complaint came to an end when the Committee determined it pursuant to s 152(2)(a). It had no power to revoke its earlier determination to revive its jurisdiction over the complaint. Nor could it make orders under s 156(1) or direct publication under s 142.

Orders

Pursuant to s 211(1)(a) of the Lawyers and Conveyances Act 2006 the Standards Committee's decision, orders under s 156(1) and direction under s 142(2) are reversed.

DATED this 15th day of July 2015

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D Thresher
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 XX as the Applicant
Ms BA as the Respondent
Standards Committee
New Zealand Law Society