

CONCERNING

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

AND

CONCERNING

a determination of [North Island] Standards Committee

BETWEEN

MR CH

Applicant

AND

MRS DX

Respondent

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

Introduction

[1] In an application for received by this Office on 15 November 2012, Mr CH applied for a review of two Standards Committee determinations, one dated 8 June 2012 and a second dated 5 October 2012.

[2] The first determination contained the Committee's findings and Orders pursuant to s 156 of the Lawyers and Conveyancers Act 2006. The Committee then sought submissions from the parties as to whether or not publication of the decision and/or Mr CH's name should be ordered and in respect of the amount of interest that should be paid to Ms DX by way of compensation.

[3] In a Minute dated 24 May 2013 I recorded that there was no jurisdiction to review the determination dated 8 June 2012 as it had been lodged well beyond the time limits provided in the Act.

[4] This review is therefore confined to the Standards Committee determination dated 5 October 2012. In that determination the Standards Committee directed that Mr CH's name and the facts of the matter be published. It also ordered Mr CH to pay Mrs DX the sum of \$9,018.23 by way of compensation for loss of interest on her funds invested through the firm's Nominee Company.

Background

[5] The facts of this matter are comprehensively set out in the Standards Committee determination of 8 June 2012 and I record here only the brief facts necessary for the purposes of this decision.

[6] Using the terminology of the Nominee Company Rules¹ Mr CH was the “responsible lawyer” for the administration of [law firm] Lawyers Nominee Company Limited.

[7] In January 2009 the mortgagor of a mortgage in which Mrs DX had funds invested failed to make payment of an interest instalment, having previously sought an extension of the date for repayment of the loan, which was due for payment in October the previous year.

[8] The defaults continued and ultimately the property was sold by the Nominee Company for a sum less than the amount advanced by it. Consequently all investors in the mortgage suffered a loss of principal.

[9] In its June determination, the Standards Committee determined that:²

...there has been unsatisfactory conduct on the part of [Mr CH] pursuant to s 152(2)(b)(i) of the [Lawyers and Conveyancers Act 2006] on the basis that [Mr CH] has shown disregard for the 1996 Rules and the 2008 Rules, and his conduct amounted to:

(a) Misconduct under the [Law Practitioners Act 1982] for the conduct prior to 1 August 2008; and

(b) Unsatisfactory conduct under the [Lawyers and Conveyancers Act 2006] for the conduct post 1 August 2008.³

[10] The Committee made various Orders and then sought submissions on the matter of publication and the amount to be paid to Mrs DX by way of compensation for lost interest.

¹ Lawyers and Conveyancers Act (Lawyers: Nominee Company) Rules 2008.

² Standards Committee Determination (8 June 2012) at [116].

³ A finding of misconduct is not a finding that a Standards Committee can make, but it is accepted that the Standards Committee intended to convey the fact that Mr CH's conduct was such that disciplinary proceedings could have been commenced under the Law Practitioners Act 1982, thereby enabling the Standards Committee to consider the complaint in terms of the transitional provisions in s 351(1) of the Lawyers and Conveyancers Act.

[11] Having received submissions from Mr CH's Counsel and Mrs DX, the Standards Committee directed pursuant to s 142(2) of the Act, that Mr CH's name and the facts of the matter be published by the New Zealand Law Society in LawTalk and in its electronic bulletins, and ordered pursuant to s 156(d) of the Act that he pay the sum of \$9,018.23 by way of compensation for loss of interest to Mrs DX.

[12] It is this direction and Order which is the subject matter of this review.

The review

[13] An Applicant only review hearing attended by Mr CH was held in [town] on 23 September 2013. Mrs DX did not attend.

[14] Prior to the hearing I had sought advice from the Standards Committee as to whether or not the Committee had obtained the approval of the Executive Board of the New Zealand Law Society for publication of Mr CH's name as required by Regulation 30 of the Complaints Service and Standards Committee Regulations.⁴ Following the hearing this Office was advised verbally that it was the intention of the Standards Committee to seek the approval of the Board before proceeding to implement its publication direction.

[15] Regulation 30 of the Rules provides:⁵

- (1) If a Standards Committee makes a censure order pursuant to section 156(1)(b) of the Act, the Committee may, with the prior approval of the Board, direct publication...

[16] At the hearing I indicated to Mr CH that there was no evidence on the Standards Committee file that Board approval had been sought and that at the very least, the matter would be referred back to the Committee to correct this procedural error.

[17] Mr CH submitted that this should not occur and that having erred procedurally, the Standards Committee determination as to publication should be quashed, with no opportunity for the matter to be rectified.

[18] In other reviews where this issue has been raised, submissions have been made that a Standards Committee can only make a publication Order if Board approval has been obtained *prior* to the Committee making its direction, and that the proposed action

⁴ Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.

⁵ Above n4.

of the Committee to seek Board approval *after* issuing its determination is not permitted by the words of the Regulation.

[19] Because of the view that I have taken in this review, it is not necessary for me to determine those issues here. They will be dealt with either in communications between this Office and the Complaints Service, and/or in a review where these issues have been fully argued. However, I do not accept the submission by Mr CH that the necessary outcome of this review is that the determination is quashed because of that procedural error. This Office has the ability to refer the matter back to the Committee pursuant to s 209 with directions to rectify any error and it seems to me that any procedural error in complying with Regulation 30 could be dealt with in that way.

The direction to publish

[20] Regulation 30(2) of the Complaints Service and Standards Committees Regulations provides as follows:

When deciding to publish the identity of a person who is the subject of a censure order, a Standards Committee and the Board must take into account the public interest and, if appropriate, the impact of publication on the interests and privacy of–

- (a) the complainant; and
- (b) clients of the censured person; and
- (c) relatives of the censured person; and
- (b) partners, employers, and associates of the censured person; and
- (e) the censured person.

[21] It is specifically noted that the Regulation directs Standards Committees, as well as the Board, to consider these factors. In its determination,⁶ the Standards Committee recorded its deliberations on the question of publication in the following way:

- 5. Turning to the question of publication, the Committee considered the following factors:
 - a. Disciplinary proceedings were taken in the public interest and public interest factors were of primary importance at each level of decision-

⁶ Standards Committee Determination (5 October 2012).

making.

- b. The public interest required consideration of the extent to which publication would provide some degree of protection to the public and the profession. See *S v Wellington District Law Society* [2001] NZAR 465, at p469.
 - c. The common law of New Zealand recognised the major interest in openness of proceedings before courts and tribunals. The value of public accountability was one of the values to be imputed by way of parliamentary intention in the absence of clear indications to the contrary and the values of public education and alerting to risk were related and of significance. See *Director of Proceedings v Nursing Council of New Zealand* [1999] 3 NZLR 360 at p378.
 - d. The public's right to know when practitioners have infringed the standards of the profession. See *Gill v Wellington District Law Society* (HC Wellington, AP120/93, 7 December 1993, Barker, Ellis and Doogue JJ) at p9.
 - e. The maintenance of the reputation of the legal profession. See *Bolton v Law Society* [1994] 2 All ER 486.
 - f. The deterrent and educative value of publication to the legal profession.
6. Taking these factors into account the Committee was of the view that the name of [Mr CH] and the facts should be published.

[22] Prior to the High Court decision in *B v The Auckland Standards Committee*,⁷ Regulation 30 did not always apply to publication Orders by a Standards Committee, and the Complaints Service had developed a set of factors to be considered by Standards Committees when making a determination as to publication. These are the factors recorded above.

[23] However, in its judgment, the Court held that a Standards Committee must make an Order censuring a practitioner pursuant to s 156(1)(b) of the Act before it can order publication of the practitioner's name. This view was upheld on appeal.⁸ The result of this, is that Regulation 30 will apply to all name publication Orders made by Standards

⁷ *B v The Auckland Standards Committee* HC Auckland CIV 2010-404-8451, 9 September 2011.

⁸ *The New Zealand Law Society v B* CA663/2011, [2013] NZCA 156 at [51].

Committees, and therefore the impact on persons identified in Regulation 30(2), must be directly considered by a Standards Committee before ordering publication of a lawyer's identity. Although the factors recorded by the Standards Committee refer obliquely to the interests of the persons referred to in Regulation 30(2), they do not squarely address the requirements of the Regulation.

[24] In addition, the Standards Committee determination contains no discussion of which factors the Committee thought were relevant to its considerations and no reasons have been provided by the Committee to enable Mr CH, or myself on review, to ascertain what the Committee's views are in respect of each matter.

[25] One of the purposes of the Lawyers and Conveyancers Act is to provide "a more responsive regulatory regime in relation to lawyers...".⁹ Mrs DX lodged her complaint in September 2011 and the review application was received in November 2012. If I were to refer the matter back to the Standards Committee to reconsider its determination to provide reasons for determining that Mr CH's name should be published, and to specifically address the requirements of Regulation 30(2), further time will elapse before Mrs DX's complaint is finally dealt with. In the circumstances, I have determined to make a final decision myself as to publication.

[26] Mr CH does not oppose the determination to publish the facts and the outcome of the Standards Committee determination, but does oppose the direction to publish his name. It is that issue alone which falls to be decided.

The public interest

[27] The starting point for a decision as to whether or not a lawyer's name should be published is whether it is necessary or desirable in the public interest.¹⁰ In this regard, it is important to note the purposes of the Act as set out in s 3(1) being:

- (a) to maintain public confidence in the provision of legal services:
- (b) to protect the consumers of legal services...

[28] In addressing the issue of name suppression Orders before the Disciplinary Tribunal, Professor Duncan Webb has this to say:¹¹

⁹ Lawyers and Conveyancers Act 2006, s 3(2)(b).

¹⁰ Above n9 at ss 142(2) and 206(4).

¹¹ Duncan Webb *Ethics, Professional Responsibility and the Lawyer* (2nd ed, Butterworths, New Zealand 2000) ch 4.3.6 at 146.

In balancing the parties' interests the High Court has noted that "the public interest referred to is the interest the public, including members of the legal profession, has resulting from its right to know about proceedings affecting a practitioner". It

should also be borne in mind that disciplinary proceedings are not prima facie punitive, but protective of the public. In this sense the practitioner's interests are given less weight than those of the accused in the criminal law. As such the public's interests are generally given greater weight than the wrongdoer's interests. The importance of informing the general public of the fact that wrongdoing practitioners are dealt with appropriately and that this practitioner has been guilty of a serious lapse weigh against any suppression orders.¹²

[29] Unlike proceedings of Standards Committees and the LCRO, proceedings before the Disciplinary Tribunal are to be held in public,¹³ but the issue of public interest is the same.

[30] Mr CH submits there is no need to publish his name to ensure the public is protected in respect of any money lending activities by him or his firm, as the firm no longer has a Nominee Company, or engages in any form of contributory mortgage lending. He and his law partner have made this decision, particularly because of the forthcoming requirements for solicitors' Nominee Companies to be registered by the Financial Markets Authority.¹⁴

[31] That of course is a purely voluntary act that could be changed at any time. However, it would be reasonably safe to assume that having been the subject of a complaint and an adverse determination by the Standards Committee, that this would be sufficient to dissuade Mr CH from operating a Nominee Company again, or at least, if he did, then this experience would be enough to ensure that he paid extra attention to complying with the Rules.

[32] That presupposes that the Rules were not knowingly breached or blatantly ignored by Mr CH. In this regard Mr CH objected to the statements by the Standards Committee in its June 2012 determination that he had acted in this way. He accepted the findings and Orders of the Committee but sought to have all references to any knowing breach or blatant ignoring of the Rules expunged from the determination.

¹² See also *Re Cameron* NZLPDT 7 May 2001 at [55].

¹³ Lawyers and Conveyancers Act 2006, s 238.

¹⁴ I have repeated here Mr CH's understanding of the law but have not independently verified this statement.

[33] For the reasons communicated to the parties and referred to above, this cannot be done. However, it is a factor to be taken into account when considering whether publication of Mr CH's name is in the public interest. If he knowingly breached the Rules, then there is a heightened need for public protection.

[34] In his response to the complaint, Mr CH's Counsel submitted that although Mr CH did not comply with the requirements of the Rules, he did provide information to the contributors and acted in accordance with what he considered were the best interests of the contributors. His Counsel also submitted that even if he had sought specific consent to the proposed course of action from contributors, it was likely that they would have agreed as it constituted the only option available to them.

[35] I acknowledge that I have not considered all of the material submitted in relation to the June decision, but it does seem to me that Mr CH's actions resulted from a lack of awareness of the Rules, rather than a conscious decision to ignore them.

[36] In this regard, I note that this was the first mortgagee sale that the firm's Nominee Company had been involved with for many years, and it is understandable that Mr CH did not have a working knowledge of the requirements. This is not in any way intended to be taken as an excuse for Mr CH's conduct. He would (or should) have been aware of the requirements of the Nominee Company Rules in 2008, and as with all aspects of the law, it behoves a lawyer to acquaint him or herself with the law insofar as it affects his or her practice, and the advice and information being provided to clients.

[37] However, as noted above, even if there were an element of intention involved, I consider that the experience of this complaint and the outcome, should in itself serve as a warning to Mr CH. I also take into account the fact that Mr CH has readily accepted the determination of the Standards Committee and other Orders and has acknowledged that he failed to meet his obligations to his clients. He has also paid the sum ordered by the Committee to Mrs DX and otherwise accepted all of the findings.

[38] There is, however, referring to the comments made by Professor Webb noted above, a further public interest element to be considered, and that is the interests of other lawyers collectively in maintaining the reputation of lawyers. When the facts of this matter are published, they could apply to any lawyer who operates a Nominee Company, and this will detrimentally affect the collective reputation of lawyers.

[39] This could be minimised by ensuring that the region in which the event took place is not identified in any publication of the facts, and in addition, when published, the fact

that Mr CH (i.e. the lawyer referred to in the publication) no longer operates a Nominee Company should also be specifically recorded.

[40] A further safeguard lies in the fact that the Law Society will be advised (as required by the Rules) should Mr CH apply in the future to register a Nominee Company, and in those circumstances, the Society has the ability to withhold its consent.

[41] Further protection can be afforded by limited publication of Mr CH's identity and that of his firm, together with a copy of this decision, to the New Zealand Law Society Inspectorate, so that the Inspectors can take particular care to ensure that no contributory or Nominee Company lending is being conducted by Mr CH as he has assured me will be the case.

[42] I therefore propose to order that a copy of this decision, anonymising all details relating to Mrs DX and other persons, but including the name of Mr CH, be published to the Inspectorate to ensure that it is aware of the assurances provided to the Standards Committee and myself by Mr CH, that he does not intend to engage in any form of contributory lending whether through a Nominee Company or otherwise. If such conduct becomes known to the Complaints Service in the future, then it has the option of commencing an own motion investigation on the basis that Mr CH has acted in contravention of the assurances provided.

Regulation 30(2)

[43] I have decided to adopt the approach set out in the preceding paragraphs after consideration of the impact of publication on the interests and privacy of the persons referred to in Regulation 30(2).

[44] In materials provided prior to the hearing in conjunction with the review, and at the review hearing, Mr CH referred to a prior complaint in 2011 that had been made about him. The Standards Committee determination in that instance had also been adverse to him.

[45] Prior to publication Orders being made by the Committee, information from the determinations was released (not by the Law Society) including Mr CH's name. The information released (wrongly) included statements that he had been fraudulent and would be struck off. Mr CH also provided a copy of an article in the [region] Times following release of the decision (and I assume a publication Order) as an indication of the type of publicity that any further publication would generate.

[46] Mr CH's Counsel also provided the following information to the Standards Committee:¹⁵

3.6 [CK] has existed in [city] for 60 years and has maintained a good reputation. [Mr CH] is an active member of several community organisations. His family has strong connections to the community and the firm's clients. [Mrs CH] works at a local college and [Mr CH] acts for some staff and parents. [Mr CH's] mother, who is 92, lives in [city] and plays bridge with several of his clients. Publication of [Mr CH's] identity could have a serious affect on her health.

...

3.10 The most significant impact of publication of [Mr CH's] identity will be on the interests of [Mr CH's] partner, employees and family. The economic situation for the past two years has been difficult for the firm. Publication of [Mr CH's] identity is likely to have serious financial consequences for the viability of the partnership and [Mr CH's] employees. [CK] is a small two partner firm. It employs one staff solicitor and four legal executives. In the last three years the firm has gone from a five-partner firm to a two-partner firm due to the death of one partner, and dissolution due to the financial circumstances of the firm. These changes resulted in redundancies of four staff. If [Mr CH's] name is published then this could have serious economic effect on the economic viability of the firm and possibly result in further job losses.

3.11 Publication of [Mr CH's] name will also affect his partner and employees' dealings with their own clients, and with other lawyers in a small provincial city.

3.12 [Mr CH] accepts the gravity of the Committee's findings. The order of censure reflects the gravity of the unsatisfactory conduct. However, in the particular circumstances which [Mr CH] faces, publication of his identity in addition to the censure will be highly punitive, and may well end his ability to practice, with the consequent impact on the interests of his partner, employees, clients and relatives.

[47] With the review application, Mr CH also provided letters from his law partner and his wife. His law partner, Mr CJ, referred to the previous publicity and noted the

¹⁵ Submissions from McElroys to NZLS (3 July 2012) at 3.

adverse effect of it on the practice and its staff. He advised that:¹⁶

Directly, we had clients uplift their files, (not just [Mr CH], but mine also) however the full effect of the publication cannot be accurately assessed as we cannot gauge how many clients have 'moved away' to other lawyers without advising us.

[48] He also noted that:¹⁷

The previous publication had a considerable effect on morale of our staff and certainly raised concerns for their continued employment. They are aware now of the possibility of further publication of [Mr CH]'s name and this has caused them considerable concern.

[City], whilst a City has an attitude of a provincial town and the effect of identification here has a far greater effect than in a larger metropolitan city. There is no anonymity. After the last publication I had several comments made to me by clients and other solicitors. Without exception, the staff also had comments made.

I can say with the utmost certainty that the effect of further publication will not only affect [Mr CH] but will also directly affect myself, our firm, and those that we employ.

[49] Mrs CH noted the adverse effects of the previous publication on her and their children. She also noted that the school at which she worked had previously instructed Mr CH to act for it, but since the previous publicity no new instructions had been issued.

[50] She advised that Mr CH's mother, who is aged 92 and not in good health, also lived in [city] and the previous publication caused "her to be upset and worry for the future of her son and his family".¹⁸ Mrs CH advised that she had considerable concerns that a further identification would cause Mr CH's mother more anxiety and could have a severe effect on her fragile health.

[51] Mrs CH also noted the impact on Mr CH's health and the family environment as well as the financial difficulties generally, all resulting from the previous publicity.

[52] All of these comments are extremely persuasive counter-balances to the interests of the public. I also note that Mrs DX herself did not seek publication.

¹⁶ Letter from Mr CJ to LCRO (13 November 2012).

¹⁷ Above n16.

¹⁸ Letter from Mrs CH to LCRO (16 November 2012).

[53] Having considered all of these factors, I am persuaded that the impact on the persons identified in Regulation 30(2) would be far greater than the requirement to publish Mr CH's name for the protection of the public. In addition, publication to the Law Society Inspectorate will provide an independent check to ensure that Mr CH's assurances are adhered to.

The compensation Order

[54] The Standards Committee ordered that Mr CH paid Mrs DX the sum of \$9,018.23 by way of compensation for loss of interest that she would have earned on the funds invested in the mortgage. The sum was calculated as follows:¹⁹

Interest at 13% (penalty rate) on \$48,000	
from 7 January 2009 to 26 August 2009	
calculated by [Mrs DX] as being 234 days	\$3,999.06
Interest at 13% on \$16,800 from August 2009 to	
February 2011 (agreed)	\$3,261.04
Interest at 13% on \$10,012.80 from February 2011	
to July 2012 (agreed)	\$1,758.13
Total Interest	\$9,018.23

[55] In his submissions for the review, Mr CH, pointed out that the period between 7 January 2009 and 26 August 2009 was 231 days, not 234 days as calculated by Mrs DX. I agree with that. Consequently the amount to be paid in respect of the first calculation is \$3,949.15.

[56] Mr CH submitted that RWT at 19.5% was being deducted by the Nominee Company on payments to Mrs DX and that therefore the amount to be paid to her should also have this amount deducted, on the basis that the sum ordered to be paid to

¹⁹ Letter from Mrs DX to NZLS (11 July 2012).

Mrs DX would not be taxable. I requested Mr CH to provide me with authority for this submission but he was unable to do so, and relied instead on the general principle that payments by way of compensation pursuant to Court Orders are not taxable. However, I cannot be certain that the same would apply to this payment ordered by the Standards Committee.

[57] In the circumstances, this part of the review is adjourned until this issue is resolved. I accept Mr CH's submission in principle, and if the amount to be paid to Mrs DX is not taxable, then she should not receive anything more than the net amount that would have paid to her.

[58] A matter not raised by Mr CH but which also needs to be considered is the question of whether Mrs DX's income is in fact taxed at 19.5%. If Mrs DX has additional income, the tax payable by her on this investment income may ultimately have been taxed at a higher rate.

[59] I have noted that Mrs DX has consulted her accountant prior to making submissions to the Standards Committee as to the amount of interest to be paid by way of compensation. In the circumstances, I request Mrs DX to obtain a certificate from her accountant addressed to this Office advising whether or not the amount ordered by the Standards Committee to be paid to Mrs DX by way of compensation will be taxable or not, and if not, at what rate the deemed tax should be calculated so that the net amount payable by Mr CH to Mrs DX can itself be calculated.

[60] I also reserve the right to vary this preliminary view should Mrs DX or her accountant provide submissions that support an alternative view.

Decision

1. Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee that the facts of this matter be published is confirmed.
2. Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the direction of the Standards Committee that the name of Mr CH be published is reversed.
3. Pursuant to s 206(4) of the Lawyers and Conveyancers Act 2006 I direct publication of this decision including Mr CH's name and the name of his firm, but with references to all other persons anonymised, is to be provided to the New Zealand Law Society Inspectorate for the purpose of informing it of Mr CH's

assurances that neither he or his firm intend to engage in any form of contributory lending, whether through a Nominee Company or otherwise. Publication in this manner will be attended to by this Office.

4. The aspect of this review relating to the calculation of the amount to be paid to Mrs DX as compensation for loss of interest is adjourned until receipt of the information requested of Mrs DX in [59].

DATED this 10th day of October 2013

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:

Mr CH as the Applicant
Mr CJ as a related person or entity
Mrs DX as the Respondent
The [North Island] Standards Committee
The New Zealand Law Society