

CONCERNING

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

AND

CONCERNING

a determination of [Standards Committee X]

BETWEEN

MS AP

Applicant

AND

[STANDARDS COMMITTEE X]

Respondent

DECISION

Background

[1] Ms AP (the Applicant) sought a review of the [Standards Committee X's] decision to prosecute her in the Lawyers and Conveyancers Disciplinary Tribunal.

[2] This followed a complaint made by a barrister, B, who had appeared in [Court proceedings] representing certain claimants who were essentially seeking that the Applicant (as a defendant) account for monies she had received. In making a monetary order against the Applicant, his Honour, Judge [A], made several critical comments about the Applicant in his decision.

[3] B then filed a complaint with the New Zealand Law Society, raising concerns that the Applicant "may have misappropriated money which was given to her in a position of trust regardless of whether she was acting as a lawyer as such or not".¹

[4] The Standards Committee resolved to inquire further. The complaint was notified to the Applicant who, in her response of 19 July 2012, queried whether the [Standards Committee X] had jurisdiction to decide the matter. She nevertheless offered a statement "under duress" acknowledging that the complaint was a serious allegation. The Applicant outlined some of the background leading up to the

¹ Letter of complaint to NLZS, 10 May 2012.

litigation, adding that she questioned the jurisdiction of the [Court] in respect of the application before it, the strength of that application, the “competence and credibility of counsel acting for the Applicant”, competence of the presiding judge and the relevance of the matter being considered by the Standards Committee given the veracity of the allegation made and who has made it.

[5] The Applicant also questioned the role of the [Standards Committee X] in investigating the matter as opposed to a Court, noting that this was not the first matter in which the Standards Committee had attempted “to become involved in matters in the [Court].”² She concluded her eight-page letter by describing this as:³

“a vexatious complaint for which I have previously stated there are judicial processes to deal with it and this is not the jurisdiction of the [Standards Committee X] to run a case in lieu of the appropriate jurisdictions.”

[6] Thereafter, the Standards Committee put several specific questions to the Applicant which she was asked to answer. Pursuant to s 147(2) of the Lawyers and Conveyancers Act 2006 (the Act) the Committee also directed the Applicant to produce certain documents, books, papers, accounts and records under her control, all of which were identified in the letter of 24 July 2012.

[7] The Applicant did not respond.

[8] In October 2012 a Notice of Hearing was issued to the parties, informing them that the complaint was to be the subject of a hearing before the [Standards Committee X], to be conducted on the papers, with a call for submissions. The particular matters to be considered by the Standards Committee are described in that letter.

[9] The Applicant emailed the Legal Standards solicitor to enquire when she (the Officer) would be in the office as she wanted to serve documents. The Standards Officer’s response provided various options, but in the event no further information was provided by the Applicant. When the Standards Committee met to decide the matter in November, there were no submissions from the Applicant; the Committee resolved that the matter should be considered by the Disciplinary Tribunal.

[10] The reasons for the referral were set out in four paragraphs. It is not necessary to set these out, other than to note that the Committee determined that if

² Ms AP submissions to [Standards Committee X], 19 July 2012 at [29.0].

³ Above n2.

proven, the alleged conduct could lead to a finding of misconduct, a finding that only the Tribunal could make, and also noting that the Applicant had failed to respond or comply with a requirement pursuant to s 147(2)(a) to produce for the Committee's inspection certain documents that had been requested.

Review application

[11] The grounds cited by the Applicant for review were bias, procedural unfairness, error in fact and law, wrong in determining the matter reached the necessary threshold of the New Zealand Law Society Disciplinary Tribunal. The outcome sought was that the decision of the Committee be quashed, a determination made as to the facts and law, or deferring the matter until such time as the appeal was heard. These grounds were enlarged in an attached letter and in further correspondence, which altogether contained extensive submissions, particularly concerning the background to the allegations of bias.

[12] The main ground for the review application concerned allegations of bias against most of the members of the [Standards Committee X], and also the Standards Officer, S. Another ground was that the threshold (for referral to the Tribunal) had not been met, and the further ground that the Standards Committee had failed to provide documents she had requested.

[13] Given the seriousness of an allegation of bias, the Standards Committee members were invited to respond to the allegations, and each individual against whom the allegation was made provided a response. All denied any bias on their part. Submissions were also provided for the Standards Committee by its counsel, Mr CF in response to the review application.

[14] The Applicant was sent copies of the above and invited to comment.

[15] The Applicant sought to be personally heard on her application, and attended a review hearing on 1 August 2013, which was also attended by Mr CF. All grounds of the review were addressed at that time, but the main focus was on the allegations of bias, and whether the conduct met the requisite threshold.

Considerations

[16] I have considered all of the material relating to this review. The only decision under review is the decision to refer the matter to the Disciplinary Tribunal. Therefore this is, by nature, a review of a procedural decision that the substantive matters be dealt with in another forum, namely the Disciplinary Tribunal. The

substantive complaints are yet to be determined, and it is not open to me to extend my review to include matters that have not yet been determined by a Standards Committee.

[17] It is well established that the scope of review of a prosecutorial decision is limited, and only in exceptional cases would a decision to prosecute be reversed on review. These could include situations where 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.

[18] The nature of the Applicant's submissions may be considered to touch all of these categories.

Threshold for referral

[19] The Applicant submits that the conduct complained of does not reach a threshold for referral to the Tribunal. There has hitherto been some confusion about whether there is indeed a threshold test for such a referral, but has now been resolved by *Orlov*⁴, when His Honour, addressing argument that such a threshold existed, stated:

“[t]hose arguments have persuaded us that the imposition of a threshold test is an unwarranted gloss on s 152(2)(a) and that the view of the High Court in *Hart* is to be preferred.”

[20] It is therefore now accepted that there is no ‘threshold test’ for a referral to the Disciplinary Tribunal, and that prosecutorial decisions falls under the oversight of the LCRO.⁵

[21] Although an LCRO review does not include consideration of the substantive merits of the complaint, consideration may be given to whether the basis of the decision aligns with the objectives of the statute. Clearly, if the conduct was manifestly acceptable then this might be evidence of some proper motivation in the bringing of the prosecution. This is as far as a consideration of the merits may go.

⁴ *Orlov v New Zealand Law Society* [2013] NZCA 230.

⁵ Above n4 at [54](d).

[22] In considering whether or not the decision to prosecute should be revisited in this case it is not necessary for me to conclude whether or not the conduct complained of fell short of acceptable professional standards. In this case, it is quite clearly arguable that the conduct complained of fell short of professional standards.

[23] I now deal with other allegations that the Applicant contends improperly influenced the Standards Committee in making its prosecutorial decision.

Bias/conflict of interest

[24] The principal theme pursued by the Applicant alleged bias on the part of the Standards Committee members and the Standards Officer, S. Although the Applicant's submissions were made within the context of 'conflict of interest', on questioning, she was unable to explain in what way the parties were conflicted, or what the conflicts of interests were. Given the nature of her submissions, I gained the impression that she used "conflict" in a more general sense, being a conflict in the relationships arising from past events such that she had no confidence that the Committee would deal with her fairly. She described past events that involved one or more of those named in the bias allegation (some of the events relating to disciplinary enquiry), and perceived as the Standards Committee members held a particular view about her. She asked that her concerns be considered in terms of 'looking out from the inside', as opposed to 'looking in from the outside'.

[25] I have considered the Applicant's information concerning her previous history with certain members involved with this Standards Committee (which she noted had comprised mainly the same members) and two individuals in particular, M (a member of the Committee) and S (the Standards Officer). The information included an account of a certain earlier (unrelated) event in particular, that had involved the Applicant and those individuals whose conduct she described in highly derogatory terms. Information about these events was also provided by the individuals so named.

[26] On the basis of the information provided I prefer the evidence of M and S and I do not accept that these individuals were improperly influenced in making the decision now under review. Moreover, the past events described by the Applicant are wholly unrelated to the complaint under the Committee's consideration, and in any event, it remains open to the Applicant to raise these matters in the Tribunal.

[27] In submissions forwarded by Mr CF I was informed that the Applicant had also made a separate complaint against S, which had been dismissed under s 138(2) of

the Act. I also observe that Standards Officers are not part of the Standards Committee and do not make determinations.

[28] The Applicant also claimed that she had raised with the Standards Committee, her concerns about bias and had asked for the complaint to be dealt with by another Standards Committee. I put it to the Applicant that there was no evidence to show that she had done this, and that such communications she did have with the Standards Committee had only questioned its jurisdiction to deal with the matter on the basis that she was by then residing outside of the [local] district. The Applicant considered that her correspondence ought to have alerted the Committee to her concerns. I disagree since no part of the correspondence on the file shows that the Applicant raised with the Standards Committee any issues of bias.

[29] I have found no evidential basis for the allegations of bias against M and S, or against the other Standards Committee members.

Failure to respond to request for information

[30] The allegation is that the Standards Committee refused to respond to the Applicant's request for information. However, her request was made after the Committee issued its decision, and therefore not relevant to this review. The proper step is to seek discovery of information she seeks in relation to the prosecution and I note that the Tribunal has in fact made an Order in relation to discovery.

[31] For reasons given above, I can find no reason to interfere with the decision of the Standards Committee to refer the matter to the Tribunal.

Decision

Pursuant to s 211(1)(a) the decision of the Standards Committee is confirmed.

DATED this 15th day of August 2013

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:

Ms AP as the Applicant

[Standards Committee X] as the Respondent
The New Zealand Law Society