LCRO 47/2017

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [Area] Standards Committee
BETWEEN	**KD** Applicant
AND	**AN APPLICATION FOR REVIEW OF A PROSECUTOREAL DECISION** Respondent

DECISION

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

Introduction

[1] In a decision dated 22 December 2016, the [Area] Standards Committee determined that the conduct of KD, a lawyer practising in Auckland, was such that it should be considered by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (the Tribunal), pursuant to s 152(2)(a) of the Lawyers and Conveyancers Act 2006 (the Act).

[2] Mr KD has filed an application for review of that decision.

[3] The Committee's concerns relate to a payment of $50,000 made by a third party into Mr KD's trust account for an unknown purpose. After Mr KD had applied part of the $50,000 to his fees, and paid the balance out to his client, the third party said it had made the payment by mistake, demanded Mr KD pay it back, and subsequently commenced proceedings to recover the $50,000.

Background

[4] Mr KD is a principal of Law Firm A (the firm).

[5] Dr WS instructed Mr KD to act for him in an employment dispute with CBL. The parties agreed to settle in a without prejudice private mediation. The terms of settlement included provision for Dr WS to take a period of sabbatical leave, a contribution to his legal costs of $50,700 and compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act of $50,000.

[6] The day after the mediation Mr KD issued an invoice to CBL and a statement correctly recording $107,500 as the total amount CBL was to pay under the settlement agreement in compensation and costs.

[7] On or about 16 January 2014 CBL paid a total of $157,500 into Mr KD's trust account.

[8] All of the $157,000 was receipted into the firm's trust account. $107,500 was recorded as "PMT FROM CBL", in accordance with the settlement agreement, invoice and statement and applied to reduce the firm's outstanding fees. Without any instructions having been received as to the purpose for which the $50,000 was to be receipted, it was credited to "Dr WS" and placed in the firm's interest bearing deposit (IBD) account at the bank.

[9] By 17 January 2014 the firm held $50,000 for which no one at the firm knew the purpose.

[10] On Monday 20 January 2014 Mr KD sent an email to Dr WS telling him that the firm had received funds from CBL, and had applied those to Dr WS' account. Mr KD did not mention the $50,000.

[11] On 29 January 2014 Mr KD phoned Dr WS, and made the following file note recording their discussion:

> TT. WS. Adv we received 107500 as per agmnt applied to fees. Received further pymnt of $50k. **Not sure what this is for.** He entitled to sabbatical other payments so he cd treat it as this. He stated & confirmed his entitlement to payments. As on sabbatical incurring costs these payments were to cover these costs entitled to money. Instrted to apply to fees. Furth discn abt his wk & costs. He clear as to his entitlement and costs on sabbatical repeats his instrns to apply fees bal to be held in trust for him.
>
> (Emphasis added)

[12] On 30 January 2014 Mr KD emailed Dr WS saying:

> I would be grateful if you would confirm my record of our telephone discussion yesterday. I phoned to discuss the receipt of funds from CBL. We had received 2 payments, one of $107,500 which we applied to fees as had earlier been discussed and agreed. We also received a second payment of $50,000 from CBL. **We received no information about the 2 payments**. I asked for your instructions concerning the second payment. We had some discussion about you being on sabbatical and you mentioned that you were entitled to this payment and also for arrears. This payment therefore you regarded as a payment of your sabbatical and other entitlements. You were incurring costs being on sabbatical.
>
> Accordingly you regarded the payment as correctly made to you. You specifically instructed that the fee balance ($33000 approx.) was to be paid from the funds received for you from CBL as outlined above. The balance was to be retained in our trust account in respect of future and anticipated work.
>
> Please confirm by return email my record of our telephone discussion.
>
> (Emphasis added)

[13] Dr WS replied:[1]

> Hi KD thats correct you advised the doctrine of legitimate expectation would apply. Keep bal in trust ac so we can record it all - WS

[14] The firm then withdrew $33,757.20 from IBD, cleared its outstanding fees, and left the credit balance on IBD for Dr WS.

[15] On Sunday 2 February Dr WS sent a text message to Mr KD saying:

> KD urgent I have come across information this weekend that suggests CBL payment a set up. My instructions are to reverse the credit to your firm and hold the total sum on trust for the benefit of CBL. I believe a police complaint needs to be made – I will put this in writing Monday – WS

[16] Mr KD replied:

> Noted talk tomorrow already done can't be reversed rumours just upset you think carefully don't react

[17] On Monday 3 February 2014, Dr WS sent an email to Mr KD saying:

> 1. I have reread your email of 30 January regarding the receipt of the $50,000 from CBL. Your email is possibly not totally clear. You rang me the day before to tell me the money had been paid and advised I could retain it on the basis of legitimate expectation. I would not wish to have the matter confused at a latter point in time that I formed an intent to deal

[1] Mr KD later said he did not advise Dr WS that the doctrine of legitimate expectation applied because he did not, and does not, consider it did. However, Mr KD believes he may have used like words in the course of his discussion with Dr WS on 29 January 2014.

> with the funds without your advice that I could as this might be regarded as criminal intent.
>
> 2. I think it might be wise for us to obtain a second opinion on this issue. My thoughts are possibly Mr SN.
>
> 3. There are also various other matters I wish to canvass with you regarding this file.
>
> Please revert as convenient.

[18] Mr KD said in reply:

> Thanks. I think my email summed up our telephone conversation. Accordingly we have treated the money as per your instructions.
>
> The matter only arises if we receive correspondence from CBL. There is no wrongdoing on your part in our view.
>
> I suggest we meet next week. I am away for the rest of the week. How about next Tuesday at 2.30pm.

[19] Mr KD and Dr WS did not meet, and the balance of the $50,000 remained in the firm's trust account.

[20] On 28 February 2014 and 5 March 2014 Dr WS directed the firm to pay the balance of the $50,000 to him. The firm did as directed. All of the $50,000 was paid out on Dr WS' direction, without Mr KD having sought or received any correspondence from CBL regarding the purpose for which it had paid the $50,000 that the firm had receipted into its trust account.

[21] In October 2015 Dr WS made a complaint to the New Zealand Law Society Lawyers Complaints Service (the Complaints Service) referring amongst other things to advice he says Mr KD gave him about retaining the $50,000.

Complaint

[22] Dr WS' complaint traverses his dealings with Mr KD and another partner at the firm, Ms TH. As to Dr WS' complaint about Mr KD, it is alleged that he is guilty of gross professional misconduct on the grounds that he:

(a) Redacted evidence relating to Dr WS' dispute with CBL from the files. Dr WS said Mr KD's file did not contain email correspondence between him and Mr KD recording various instructions from him, and Mr KD's refusals to follow those.

(b) Did not pass proper accounting records to Dr WS and the Complaints Service. Dr WS said Mr KD had misrepresented the amount of his fees,

and gave him an incorrect estimate based on Mr KD taking the lion's share of any settlement payment he calculated Dr WS might receive from CBL. Dr WS also contends he did not agree to pay Mr KD a fixed fee.

(c) Contacted people on Dr WS' behalf without his consent, breached privilege by speaking to Mr BN about the proposed mediation, and forced him to attend mediation and sign the settlement agreement.

(d) Had committed fraud and taken the $50,000 as a "secret commission"[2] from CBL, which is said to have paid the $50,000 by mistake.

(e) Had no right to withhold the materials Dr WS had requested pursuant to rule 4.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the rules).

Mr KD's reply

[23] Mr KD did not accept Dr WS' criticisms and accepted no responsibility for CBL having paid $50,000 by mistake. Mr KD says he did not know, nor should he have known or suspected, that CBL had paid the money in error. He denied any dishonesty or negligence, gross or otherwise. Mr KD says Dr WS told him he was entitled to the money, and he did not know Dr WS was not entitled to it. Mr KD says his duty was to Dr WS, not CBL, and he was obliged by s 110 of the Act to act in accordance with Dr WS' instructions. Mr KD says he received and applied the money in accordance with Dr WS' instructions, and for his benefit which is what s 110 of the Act required of him.

[24] Counsel for Mr KD tendered carefully framed submissions addressing a range of matters including knowledge, fiduciary duties and obligations, legal liability, and dishonest assistance. Counsel highlighted inconsistencies between contemporaneous documents and subsequent explanations provided by Dr WS, and explained what Mr KD knew at relevant times.

Committee process

[25] The Committee considered the materials provided by the parties, and issued a notice of hearing dated 22 July 2016 seeking submissions on four issues including

[2] Taking a secret commission is an offence punishable by seven years' imprisonment under the Secret Commissions Act 1910. Consent of the Attorney General is required to commence a proceeding. As this Office has no jurisdiction under that Act, and there is no evidence of any criminal proceeding having been commenced, no further consideration is given to that allegation in the course of this review.

whether Mr KD had received $50,000 from CBL, and if so whether he had used the funds to pay Dr WS' outstanding fees in circumstances where it was unclear whether Dr WS was entitled to the funds.

[26] The parties provided submissions and documents. Dr WS repeated and expanded on his initial complaint and allegations of dishonesty and deception on the part of Mr KD. Counsel for Mr KD responded essentially on the basis that Mr KD had not acted improperly.

[27] The Committee then issued a second notice of hearing dated 18 November 2016 in substantially the same terms, but reframing the issues around the $50,000 as:

> (iv) Whether Mr KD … used $50,000 of funds received from CBL on 17 January 2014 in a dishonest or grossly negligent or negligent manner by applying $33,757 towards fees owed by Dr WS to Law Firm A, with the balance subsequently paid to Dr WS, when Mr KD … knew or ought to have known that the $50,000 of funds did not belong to Dr WS and that CBL had made the payment in error; and
>
> (v) Whether, since 2014, Mr KD … [had] being dishonest or grossly negligent or negligent in not returning the $50,000 to CBL.

[28] The first and second notices of hearing invited submissions on fact, law, orders the Committee may make if it determined there had been unsatisfactory conduct on Mr KD's part, publication, and the possibility of charges being laid with the Tribunal.

[29] Dr WS filed a memorandum[3] referring to a range of matters, and maintaining that Mr KD told him he could retain the $50,000 "based on the doctrine of legitimate expectation" because the sum covered his work-related expenses. Dr WS wanted substantial compensation, restitution, and a refund of everything he had paid Mr KD.

[30] Counsel filed submissions in reply on behalf of Mr KD, reaffirming Mr KD's position. Mr KD's trust account obligations are addressed in a statement made by RH, who describes himself as an independent Trust Account Consultant to the legal profession and to the licensed conveyancers' profession. He says that the firm's accounts clerk who receipted the $50,000:[4]

> would not have had instructions as to what to do with the $50,000 so in the absence of any contrary instructions from Mr KD or Dr WS she would have followed the standing instruction and put it on IBD.

[3] Memorandum WS to Standards Committee (11 November 2016).
[4] Statement of RH (1 December 2016) at [11].

[31] Mr RH expressed the view that Mr KD and Ms TH fully complied with the trust accounting requirements of the Act and Trust Account Regulations (the regulations)[5] in respect of the payments received from CBL for Dr WS on 16 January 2014. He believes Mr KD was correct to take instructions from Dr WS concerning the $50,000.

[32] Counsel supplied authorities addressing wilful blindness on the part of bankers;[6] Australian authority for the proposition that a lawyer who receives money on behalf of his client/trustee does not become trustee thereof;[7] and the test framed by the New Zealand Court of Appeal for dishonest assistance on the part of a lawyer.[8] Counsel submits Mr KD's state of mind was not dishonest. It is submitted that Mr KD did not have actual knowledge or the requisite suspicion.[9]

[33] Dr WS sent a further email attaching an explanation, apparently prepared by CBL's in-house lawyer, Ms QW, or on her instructions, setting out her explanation of how CBL had come to pay the $50,000. She says CBL paid the $50,000 by mistake.

Decision

[34] Other than issues (iv) and (v), which it considered the Tribunal should consider and determine, the Committee decided to take no further action in respect of the issues raised.

[35] Mr KD applied for a review of the decision.

Charges framed

[36] The Committee provided this Office with copies of the charges framed for the Tribunal, and the particulars on which its case, if it proceeds, will rely. Paragraphs [1] to [18][10] summarise the elements the Committee considers it can prove on the balance of probabilities. The Committee contends Mr KD:

(a) applied the $50,000 to Dr WS' outstanding legal fees despite knowing that the additional payment was outside the terms of the full and final

[5] Lawyers and Conveyancers Act (Trust Accounts) Regulations 2008.
[6] *Westpac New Zealand Limited v MAP and Associates Limited* [2011] 3 NZLR 751.
[7] *Adams v Bank of New South Wales* [1984] 1 NSWLR, 285.
[8] *Fletcher v Eden Refuge Trust* [2012] 2 NZLR 227 (CA).
[9] As Dr CR later put it in the statement he filed on review, any suspicion Mr KD may have had was displaced by the conversation he had with Dr WS on 29 January.
[10] The charges refer to paragraphs [1] to [21], and conduct as described in [21]. I take it the references should be to [1] to [18] which contain the particulars, and [19], which is where the allegation of disgraceful and dishonourable conduct first appears.

settlement and that Dr WS did not appear to be lawfully entitled to the additional payment; and/or

(b) advised Dr WS that there was no wrongdoing involved in Dr WS keeping the additional payments despite knowing of the matters in the above paragraph (a); and/or

(c) failed to query the status of the additional payment with CBL despite knowing of the matters in the above paragraph or (a); and/or

(d) failed to follow Dr WS' instructions to obtain a second opinion about the status of the additional payment and to hold the total sum on trust for the benefit of CBL, despite knowing of the matters in the above paragraph (a); and/or

(e) refused to repay the additional payment to CBL following the demand by CBL's solicitors on 16 September 2016.

[37] The Committee framed charges alleging misconduct and/or unsatisfactory conduct, on the basis that Mr KD's conduct is misconduct:

(a) Pursuant to s 7(a)(i) of the Act, in that it would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable; or

(b) Negligence or incompetence in his professional capacity of such a degree as to reflect on his fitness to practise or as to bring his profession into disrepute, pursuant to s 241(c) of the Act.

Or is misconduct or unsatisfactory conduct in that it:

(c) Amounts to negligence or incompetence in the practitioner's professional capacity of such a degree as to reflect on his fitness to practise or as to bring the profession into disrepute; or

(d) Relates to conduct on the part of the lawyer that occurs at a time when he is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable and includes conduct unbecoming a lawyer and unprofessional conduct, pursuant to s 12(b) of the Act.

Or would be regarded by lawyers of good standing as being unacceptable, pursuant to s 12(b) of the Act.

Hearing in person

[38] Mr KD and his counsel, Mr NL, attended a review hearing in Auckland on 22 June 2017. The Committee did not attend the review hearing, but tendered submissions and an affidavit from Ms SB it had filed in the Tribunal. Mr NL objected to the submissions on the basis that the Committee has crossed the line into advocacy. He says the Committee should go no further than assisting the LCRO, and should otherwise abide the decision of this Office. Acceptance of Ms SB's affidavit was objected to on the basis that Mr KD had not had a proper opportunity to consider and respond to it.

Further information

[39] After the review hearing, Mr NL tendered further information by way of submission, an article titled "Obligation to Maintain a Trust Account"[11] and a decision by this Office.[12]

[40] All of the available materials have been considered in the course of this review.

Statutory framework for the prosecution decision

[41] The Act provides for two categories of conduct which may attract disciplinary sanction, being misconduct and unsatisfactory conduct.[13] The former is the more serious and can lead ultimately to a practitioner being struck off by the Tribunal.[14]

[42] Standards Committees may only make findings about the lesser category of unsatisfactory conduct.[15] When confronted with a complaint[16] in which the spectre of misconduct is present a Standards Committee may direct it to be considered by the Tribunal,[17] and thereafter the Standards Committee must frame and lay any appropriate charges with the Tribunal[18] and serve them on the practitioner (and any complainant).

[43] Significantly, when directing a complaint to be considered by the Tribunal, a Standards Committee is not obliged to provide reasons. This is evident from the

[11] Jeremy Kennerley "Obligation to Maintain a Trust Account" *The Property Lawyer* 13(3) (date).
[12] LCRO *VX and VXZ v [North Island] Standards Committee* 126/2012.
[13] Lawyers and Conveyancers Act 2006, ss 7 and 12.
[14] Section 244.
[15] Section 152(2)(b).
[16] Including an own-motion investigation under s 130(c) of the Act.
[17] Section 152(2)(a).
[18] Section 154.

language of s 158 of the Act, which requires reasons to be given only when a Standards Committee makes a finding of unsatisfactory conduct or determines to take no further action.

[44] It is generally a fundamental tenet of natural justice that decision-makers provide reasons. At first blush it may seem inconsistent with that principle that a Committee with a statutory power of decision-making is not obliged to provide reasons for a particular decision it makes.

[45] In *Orlov v New Zealand Law Society* the Court of Appeal gave careful consideration to the question as to whether a Standards Committee was required to provide reasons for its decision to refer a matter to the Tribunal, and concluded that "it is clear from s 158 that a Standards Committee is not required to give reasons for a decision made under s 152(2)(a) to refer a matter to the Tribunal".[19] Further, the Court noted that if Parliament had intended that a Committee be required to provide reasons for its decision to refer, then it would have expressly said so.[20]

[46] It is also important to note that in *Orlov* the Court of Appeal held that there is no threshold test to meet before a Standards Committee makes a prosecution decision.[21]

[47] Moreover because Standards Committees may not make findings that particular behaviour is misconduct, the decision to prosecute is not a merits-based decision. In effect when directing the prosecution of a practitioner a Standards Committee is saying, "this behaviour may constitute misconduct; if so, only the Tribunal may determine that question".

[48] Furthermore, the Tribunal may make that determination only after charges have been laid and a hearing conducted in that forum. The hearing will include parties giving evidence and being cross-examined as is the case in any traditional first-instance hearing procedure. At the conclusion of that process the Tribunal may make a merits-based decision.

[49] Although a Standards Committee is not required to provide reasons for its decision to refer a matter for prosecution before the Tribunal, the Act confers an express right of review.[22]

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[19] *Orlov v New Zealand Law Society* [2013] NZCA 230, [2013] 3 NZLR 562 at [98].
[20] At [99].
[21] At [53].
[22] Section 193.

Role of the LCRO on reviewing a prosecution decision

[50] In *Orlov* the Court of Appeal noted that "there is now oversight of the referral decision by the independent LCRO".[23]

[51] More recently the High Court was asked to review a decision of this Office in which it had dismissed an application for review of a Standards Committee's decision to prosecute a practitioner. Fogarty J held the following: [24]

> The purpose of a review by the LCRO is to form a judgment as to the appropriateness of the charges laid in the prosecutorial exercise of discretion by the Standards Committee. It is as simple as that ... I agree ... that "a review by the LCRO (should be) informal, inquisitorial and robust". It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination. I agree also there is room in that review for the LCRO to identify errors of fact.

[52] Fogarty J also observed that "a critical question for the LCRO is whether the degree of gravity of the matter should justify the Standards Committee exercising the power to refer [conduct] to the Tribunal".[25]

Analysis

[53] Dr WS alleges dishonesty on the part of Mr KD. He has raised the "spectre of misconduct". A bald allegation alone is not enough to warrant a referral to the Tribunal. There must be some evidential basis that supports the allegation of dishonesty.

[54] The assessment to be made by this Office on review of a prosecutorial decision relates to the framework of professional discipline. It is not an assessment to be made under the Solicitor General's Prosecution Guidelines, a suggestion put by Mr NL, because those guidelines apply specifically to decisions to prosecute for criminal offences.[26]

[55] The starting point for consideration of Mr KD's conduct is the Trust Account Regulations, and in particular reg 12. Reg 12(3) requires a practice to promptly and accurately record trust money received in that practice's trust account receipt records and the relevant client ledger account. Reg 12(4) says that for the purposes of 12(3), each such entry of the receipt of trust money must state, among other things, the purpose of the receipt.

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[23] At [54](d).
[24] *Zhao v Legal Complaints Review Officer* [2016] NZHC 2622 at [23].
[25] At [25].
[26] Solicitor General's Prosecution Guidelines at [1.2].

[56] In the course of this review Mr NL provided a copy of a decision of this Office in which the LCRO explained the position of lawyers dealing with funds paid into the lawyer's trust account in the following way:[27]

> It is imperative that any dealings with client funds are straight forward and clear … Where client funds are concerned, there can be no room for imprecise terminology or misunderstandings.

[57] The LCRO's comments help to illuminate a key issue in the present review: certainty.

[58] As a principal in the firm, Mr KD is responsible for ensuring the firm's trust account is operated in compliance with the Act and the relevant rules. Mr KD and the clerk who filled in the receipt form knew the purpose for which CBL had paid $107,500, but no one, including Mr KD, knew at the time the $50,000 was receipted into the firm's trust account, the purpose for which it was receipted.

[59] The Committee's file indicates it was uneasy about no one at the firm having made enquiry of CBL to find out what the $50,000 was for. That concern is consistent with the regulations calling for prompt and accurate recording, including as to the purpose for which money is received into a trust account.

[60] Accuracy as to the purpose of a receipt is more than simply a question of form. At best, the accounts clerk could only have guessed at the purpose of the receipt, because on Mr RH's evidence, she had no instructions. Accuracy is a question of substance.

[61] There is no evidence to suggest Dr WS knew CBL had paid the $50,000 until nearly two weeks later. It is not entirely clear when Mr KD knew the $50,000 had been receipted into the firm's trust account, but he made inquiry of Dr WS on 29 January. By that stage Mr KD had unpaid fees of $33,000. Dr WS had no job. Without the $50,000, Mr KD faced the risk that he may not be paid in the short term or at all.

[62] Mr KD phoned Dr WS and told him he was not sure what the $50,000 was for. Dr WS did not know. They had a discussion. They agreed to keep the $50,000, and apply part of it to Mr KD's outstanding fees.

[63] Mr KD deducted his fees from the $50,000, and says he was obliged to act on Dr WS' instructions. The obligation to act on a client's instruction is strict, not absolute. Doubts about the legitimacy or lawfulness of a client's instructions, including the

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[27] Above n 12, at [42].

prospect that the lawyer may be implicated in wrongdoing, indicate that where there is uncertainty, as there was here, it may be appropriate for a lawyer to take active steps.

[64] On Sunday 2 February Dr WS indicated he wanted to resile from his agreement with Mr KD. He sent a text message to Mr KD instructing him to reverse the deduction he had made for his fees, and hold all of the $50,000 in trust for CBL. That is a distinct change to the purpose of the $50,000 receipt that Mr KD and Dr WS had agreed.

[65] Mr KD refused to return the money to the firm's trust account, and kept it without knowing whether the purpose for which it had been receipted into his trust account was accurately recorded.

[66] The charges laid by the Committee go further. The Committee considers Mr KD's conduct after the $50,000 was receipted evidences misconduct. That is not for me to say. However, the evidence is such that Mr KD's behaviour in relation to the $50,000 receipted into his trust account may constitute misconduct. If so, only the Tribunal may determine that question.

[67] There is no threshold test to meet before a Standards Committee makes a prosecution decision.[28] However, the charges the Committee framed after it had decided to refer matters to the Tribunal reflect a range of possibilities arising from the evidence. The disciplinary issues tie back to Mr KD's conduct in relation to the $50,000. Whether CBL made a mistake in paying it is not the primary focus of the disciplinary inquiry. In a disciplinary proceeding the question is whether the charge is one which constitutes a recognised form of professional misconduct.

[68] Dishonesty constitutes a recognised form of professional misconduct. The evidence transcends baseless allegation, and emerges into the realm of conduct that warrants inquiry by a body that can appropriately make an original determination on the merits. The substance of the matter is typical of that which is appropriately considered by the Tribunal, rather than this Office or a Committee.

[69] As the High Court noted in *Hall*, the Tribunal is the disciplinary body:[29]

> … designated by the legislature as the appropriate body to make the original determination on the merits. When hearing proceedings, a tribunal is required to have no fewer than five members. At least one member must be a lay person. Lay people may constitute up to half of the members of a Disciplinary Tribunal. A disciplinary tribunal may admit matters in evidence that are not

[28] Above n 19, at [53].
[29] *Hall v Wellington Standards Committee (No 2)* [2013] NZHC 798 (18 April 2013) at [32].

> admissible in a court and is free to set its own procedure. This provides considerable flexibility.

[70] Evidence can be called and admissibility challenged. The Tribunal can resolve any issues that may arise, such as confidentiality and privilege. Witnesses can be cross examined. Mr KD may wish to raise defences. Those can be tested. Evidence could emerge beyond what was available to the Committee, and is available on review. At the conclusion of that process the Tribunal may make a merits-based decision.

[71] If charges are ultimately proven, the Tribunal is best placed to assess where the particulars proved sit in the range of conduct that warrants a disciplinary response, and what penalty, if any, is appropriate in the light of all of the evidence, which the Tribunal will weigh.

[72] It is undesirable for either party to lose the potential right of general appeal from the Tribunal's orders and decisions. That right is as important to the Standards Committee as to the practitioner, and is not available in relation to a decision made by this Office on review.

[73] The High Court says the purpose of a review by this Office is to form a judgment as to the appropriateness of the charges laid by the Committee following an informal, inquisitorial and robust process of review. Although charges can be amended and withdrawn in the course of prosecution, the charges laid by the Committee flow logically from the contemporaneous evidence. This review has not exposed errors of fact in the Committee process.

[74] This process of review involves the LCRO coming to an independent view of the fairness of the substance and process of a Committee's determination. The two notices of hearing gave the parties a clear indication of the areas of concern to the Committee that arose from the information available to it. I have considered the objections Mr NL raised on behalf of Mr KD, but identified no unfairness in the substance or process of the determination.

[75] A critical question on review is whether the degree of gravity of the matter should justify the Standards Committee exercising the power to refer conduct to the Tribunal. Allegations of dishonesty made by Dr WS are grave. They arise from uncertainty about the purpose for which the firm received the $50,000, and a retrospective agreement between Dr WS and Mr KD. The personal and professional consequences for Mr KD if a charge of misconduct is proven against him could be grave.

[76] The issues raised touch on the fundamental obligations that rest on lawyers and the three purposes of the Act: consumer protection, maintaining public confidence in the provision of legal services, and recognising the status of the legal profession.

[77] Mr KD's conduct in the face of uncertainty exposes him to the disciplinary concerns identified by the Committee in the evidence, particulars and charges. If the elements of the evidence on which the Committee's case presently relies are true, charges of misconduct against Mr KD could be made out.

[78] While I am conscious that a Tribunal proceeding places a heavy burden on a practitioner, protection of the public interest and professional discipline in relation to Mr KD's conduct are best addressed in the jurisdiction of the Tribunal.

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 2017

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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 KD as the Applicant
Mr NL as the Applicant's representative
[Area] Standards Committee
Mr CR and Ms ZA as the representative for the Standards Committee
The New Zealand Law Society
Mr LD as a related person
Secretary for Justice