LCRO 50/2017

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a requirement of the Auckland Standards Committee 3
BETWEEN	**TG** Applicant
AND	**JT and TAP LIMITED** Respondent

DECISION

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

Introduction

[1] Mr TG has applied to review a requirement made by the [City] Standards Committee [X] (the Committee) on 3 February 2017. The requirement was made by the Committee in the course of considering a complaint that had been made against Mr TG by Mr JT and TAP Limited(together, TAP).

[2] The Committee's requirement, made pursuant to s 147(2)(a)(i) of the Lawyers and Conveyancers Act 2006 (the Act) and against Mr TG's objection, was for the production of a letter written by Mr TG to TAP's lawyers in the course of negotiating a copyright dispute between his client ([1234]) and TAP.

[3] Mr TG wrote his letter and forwarded it to TAP's lawyers on 12 October 2015. The letter is said to have been expressed as "without prejudice save as to costs" (Mr TG's letter).

[4] In making the requirement, the Committee relied upon s 151 of the Act, which enables a Committee to receive and consider anything that it considers might assist with its consideration of a complaint, whether traditionally admissible or not (the all-evidence provision).

[5] The Committee's inquiry into the complaint has been put on hold pending this Office's review of the requirement to produce. The Committee has not yet been given a copy of Mr TG's letter.

Complaint

[6] The complaint by TAP against Mr TG is said to allege both a conflict of interest and a breach of confidence.

[7] First, the complaint is that Mr TG had previously acted for TAP and ought not to have subsequently agreed to act for [1234] against TAP, because of a conflict of interest.[1]

[8] TAP further says that Mr TG breached his duty of confidence to them during the negotiations with [1234], by disclosing information that he had obtained whilst acting for TAP.[2]

[9] Apart from that bald description, no other details of the complaint or Mr TG's response to it have been provided to this Office. The parties agree through their lawyers that knowledge of those details is not necessary for the purposes of this review, which is confined to a procedural issue.

[10] Moreover, this Office does not have a copy of Mr TG's letter. Neither party considers it necessary for that letter to be seen by a Review Officer, given the narrow issue engaged by the application for review.

The Standards Committee's requirement

[11] In the course of advancing the complaint on behalf of TAP, counsel then acting, a QC, referred to extracts from Mr TG's letter, but did not provide the Committee with a copy of it. It was said by counsel that the extracts referred to contained the conduct issues complained about.

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[1] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 8.7.1.
[2] Rule 8.7.

[12] On 9 December 2016, the Committee required counsel for TAP to produce to it a copy of the letter for consideration as part of the complaint material. The Committee said:

> Section 151(1) of the Act provides that the Committee may receive in evidence any document that may in its opinion assist it to deal effectively with the matters before it, whether or not the document would be admissible in a court of law. That subsection does not have the effect of disturbing legal professional privilege (s 271 of the Act), for good reason. However, the letter concerned is not subject to legal professional privilege. It is a "without prejudice" communication. … [T]he letter would not be provided to the court in litigation between the parties. Rather, it would be provided to a professional standards committee considering Mr TG's conduct only. Further, all parties involved in this complaint have seen the letter; there is no confidentiality that arises. The litigation between the parties would not be compromised.

[13] Mr TG, through his counsel Mr NP QC, objected on the basis that the letter was written without prejudice, and that both the common law and the Evidence Act 2006 (EA) prevent the production of such communications.

[14] Counsel for TAP argued in favour of production, on the basis of the all-evidence provision in s 151 of the Act.

[15] On 3 February 2017, the Committee confirmed its earlier requirement, and said the following:

> There are different categories of privilege. By all accounts, the letter, if it is indeed privileged, would fall within the category of "without prejudice" communication privilege. The privilege prevents the letter from being produced to the decision-maker in the proceeding to which the letter relates. By providing the letter to the Committee, that privilege will not be disturbed – the decision-maker in the civil proceedings will still not see the letter. The lawyers and clients involved have already all seen the letter. The Committee [reaffirms] the conclusions it made [on 9 December 2016].

Review Application

[16] Through Mr NP, Mr TG filed his application for review on 21 February 2017. The grounds may be summarised as follows:

(a) the Committee's decision is wrong both in fact and in law;

(b) Mr TG's letter is immune from production to the Committee because the privilege has not been waived by both parties, nor abrogated by express statutory provision; and

(c) the privilege is absolute.

The role of the LCRO on review

[17] The role of the Legal Complaints Review Officer (LCRO) on review is to reach his own view of the material before him.

Nature and Scope of Review

[18] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[3]

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
>
> The Review Officer has broad powers to conduct his or 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. These powers extend to "any review" …
>
> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[19] Given those directions, the approach on this review will be to:

(a) consider the available material afresh, including the Committee's requirement for production of Mr TG's letter; and

(b) provide an independent opinion based on that material.

Statutory delegation and hearing in person

[20] As the LCRO with responsibility for deciding this application for review, I appointed Mr Robert Hesketh as my statutory delegate to assist me in that task.[4] As part of that delegation, on 16 October 2017 Mr Hesketh conducted a hearing at which Mr NP appeared for Mr TG and Mr RB on behalf of TAP.

[21] The process by which a Review Officer may delegate functions and powers to a duly appointed delegate was explained by Mr Hesketh. Mr NP and Mr RB indicated that they understood that process and took no issue with it.

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[3] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]– [41].
[4] Lawyers and Conveyancers Act 2006, sch 3, cl 6.

[22] Both counsel provided written submissions in advance of the hearing. Mr NP also provided a bundle of relevant authorities. Counsel made extensive oral submissions before Mr Hesketh.

[23] At the conclusion of the hearing Mr NP was given leave to provide additional material, responding to particular points made by Mr RB in his oral submissions. That material has been received and considered.

[24] Mr Hesketh has reported to me about the hearing and we have conferred about the application for review, and my decision. There are no additional issues or questions in my mind that necessitate any further submissions from either party.

Analysis

Preliminary

[25] When Mr TG's application for review was received by this Office, it was administratively processed as though the respondent party was the Committee. A copy of the application was forwarded to the Committee for comment and the Committee provided brief submissions.

[26] In fact, the correct respondent to the application for review is TAP. Subject to a couple of exceptions, neither having application in the present circumstances,[5] a Standards Committee is not ordinarily invited to make submissions in an application for review.[6]

[27] In his submissions on review, Mr NP expressed concern about the Committee's active engagement with the review hearing. After discussion between counsel and Mr Hesketh, it was agreed that the Committee's submissions responding to the application for review should be put to one side. Counsel agreed that the issue before this Office involves a narrow point of law, which each party has comprehensively addressed in their submissions.

[28] I agree with that approach.

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[5] The exceptions are applications to review the result of an own-motion inquiry by a Standards Committee, and an application to review a Standards Committee's decision to refer a lawyer to the Lawyers and Conveyancers Disciplinary Tribunal for prosecution.

[6] A LCRO may make inquiries of and request explanations from a Standards Committee in relation to the Committee's inquiry or investigation: s 204 of the Act. However, at the time the Committee was notified about Mr TG's application for review, a LCRO had not made inquiry of or requested any explanation from it.

[29] I now deal with the parties' written and oral submissions.

Mr NP's submissions

[30] Mr NP identified the issue as being "whether the Standards Committee had any jurisdiction in law to direct production to receive into evidence the without prejudice letter".

[31] Mr NP's core submission is that the Committee had no power to override the privilege which attaches to Mr TG's letter.

[32] He noted that the cloak of privilege extending to without prejudice communications has its origins in the common law, the principle being that such communications "enable the parties to [a dispute] to seek to negotiate a settlement without fear of such negotiations being put before the Court".

[33] Mr NP submitted that this protection has been recognised by the common law for centuries, and is now enshrined in s 57 of the EA. He argued that inroads into it are rare and only applied on a case-by-case and principled basis.

[34] Responding to the proposition that the Committee would only receive and consider Mr TG's letter for the limited purpose of considering a conduct complaint against him, Mr NP submitted that this:

> overlooks the point that the [without prejudice privilege] is absolute and is not limited either at common law or under [s 57 EA] to the privilege pertaining only in the proceedings in respect of which the without prejudice letter was written.

[35] Mr NP submitted that the without prejudice privilege is a joint privilege and may be waived by both parties. However, [1234] has not given a waiver and importantly, it would not be proper for the Committee to seek that — particularly as [1234] is not a party to the complaint.

[36] In support of his submission that once privileged, always privileged (subject to waiver), Mr NP referred to *R v Derby Magistrates Court ex-parte B*.[7] He submitted that this was followed by the Privy Council in *B v Auckland District Law Society*, which is authority for the proposition that "so inviolate is the privilege that it will only be overridden by another statute but only where there are clear words".[8]

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[7] *R v Derby Magistrates Court ex-parte B* [1996] HC 487.
[8] *B v Auckland District Law Society* [2004] 1 NZLR 326 (PC).

[37] To the argument that the all-evidence provision of s 151 of the Act creates an overriding statutory exception to the general rule that without prejudice correspondence is invariably privileged, Mr NP referred to the decision of the Court of Appeal in *Pallin v Department of Social Welfare*.[9]

[38] In *Pallin* the Court of Appeal was considering an all-evidence provision contained in s 29(1) of the then in force Children and Young Persons Act 1974. A District Court Judge hearing a complaint that a child was in need of care and protection invoked s 29(1) and ruled as admissible, medical evidence that was otherwise protected by doctor-patient privilege pursuant to s 32 of the Evidence Amendment Act (No 2) 1980.

[39] Cooke J held:[10]

> Provisions such as s 29(1) give a discretion to receive evidence which would not be admissible under the strict rules of evidence – as hearsay, for instance. They do not give power to override rights or duties to withhold evidence. … [Section 32 of the Evidence Amendment Act (No 2) 1980] gives a statutory privilege or right to the patient. The prohibition in the section cannot be overcome by a mere power to admit evidence otherwise inadmissible.

[40] Mr NP also relies upon the more recent decision of the Supreme Court in *Complaints Assessment Committee v Medical Practitioner's Disciplinary Tribunal*. (*CAC*)[11]

[41] The facts of *CAC* bear brief mention. Dr C was the subject of a complaint by a former patient, Z. Z provided the Complaints Assessment Committee with a copy of her medical notes, including from medical practitioners who had treated her subsequent to Dr C. In defending Z's complaint Dr C sought access to those subsequent medical notes, to establish what Z had said to those medical practitioners whilst being treated for depression and drug use, and whether that might assist to discredit Z as the complainant in his case.

[42] The Chair of the Medical Practitioner's Disciplinary Tribunal (MPDT) directed the Committee to disclose Z's medical records to Dr C, purporting to act under cl 7 of sch 1 of the Medical Practitioners Act 1995 (MPA).

[43] The Committee challenged that direction through the Courts, maintaining that it could not override the privilege attaching to Z's medical notes involving medical practitioners other than Dr C.

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[9] *Pallin v Department of Social Welfare* [1983] NZLR 266 (CA).
[10] At 268.
[11] *Complaints Assessment Committee v Medical Practitioner's Disciplinary Tribunal* [2006] NZSC 48, [2006] 3 NZLR 577.

[44] The Committee argued that the privilege which attached to the notes, existed by virtue of both s 32 of the MPA and cl 11(1) of sch 1.

[45] At issue in *CAC*, therefore, were a patient's medical notes created by other medical practitioners, required by a doctor defending a complaint by that patient, for the purposes of assessing and perhaps challenging the patient's reliability or credibility.

[46] In *CAC*, the Supreme Court held that "the general power to admit evidence not admissible in a Court of law did not authorise the Tribunal to override privilege".[12]

[47] Mr NP submitted that cl 11(1) of sch 1 of the MPA is to all intents and purposes the same as s 186 of the Act. Section 186 reads:

> **Protection and privileges of witnesses**
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> (1) Every person has the same privileges in relation to—
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> (a) the giving of information to a Standards Committee; and
>
> (b) the giving of evidence to, or the answering of questions put by, a Standards Committee; and
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> (c) the production of papers, documents, records, or things to a Standards Committee—
>
> as witnesses have in a court of law.
>
> (2) In this section, Standards Committee includes an investigator and any other person acting on behalf of, or as the delegate of, a Standards Committee.

[48] Mr NP submitted that the Supreme Court in *CAC* held that the equivalent provision in cl 11(1) of sch 1 to the MPA "prevents disclosure … if the information to be disclosed is subject to a privilege".

[49] Mr NP does not suggest that the veil of privilege can never be pierced; he submits that there must be a proper and principled basis for doing so. To answer the question of where the line is drawn between privilege and production, Mr NP refers to the decision of the English Court of Appeal in *Unilever PLC v The Procter and Gamble Co* and to the following passage from the judgment of Robert Walker LJ:[13]

> Nevertheless, there are numerous occasions on which, despite the existence of without prejudice negotiations, the without prejudice rule does not prevent the admission into evidence of what one or both of the parties said or wrote. The following are among the most important instances.
>
> …

[12] At [18].
[13] *Unilever PLC v The Procter and Gamble Co* [2000] 1 WLR 2436 (CA) at 2444.

> (4) Apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail *or other "unambiguous impropriety"*.
>
> (Emphasis added)

[50] The passage from *Unilever* referred to above goes to the heart of Mr NP's submissions. Accepting that the without prejudice privilege is not inviolate, Mr NP argues that admission into other proceedings of such communications (whether involving all, some or none of the parties to the dispute in which the without prejudice communications took place) can only arise if it comes within one of the exceptions articulated by the Court in *Unilever*.

[51] Mr NP submits that of the eight exceptions there referred to, the exception set out above at [49] is the only one which potentially applies in the present matter.

[52] Developing that submission, Mr NP argues that before the unambiguous impropriety exception can apply, TAP must put evidence before the Committee of that magnitude to enable it to rely upon the all-evidence provision in s 151 of the Act. Merely referring to passages from Mr TG's letter without more, did not cross that threshold.

[53] Mr NP submits that TAP has not laid a foundation on which the Committee can properly use the all-evidence provision to overcome the otherwise inadmissible nature of Mr TG's letter.

[54] To the suggestion that the Committee may simply receive the allegedly offending words used by Mr TG and not the whole of his letter, Mr NP refers to the decision of the House of Lords in *Ofulue v Bossert* in which their Lordships said:[14]

> [T]o dissect out identifiable admissions and withhold protection from the rest of without prejudice communications would not only create huge practical difficulties but would be contrary to the underlying objective, founded partly public policy and partly in the agreement of the parties, of giving protection to the parties so that they could speak freely about all issues in the litigation when seeking compromise.

[55] In summary, Mr NP submits on behalf of Mr TG that:

(a) there is common law and statute based acknowledgment that without prejudice communications are inadmissible;

(b) exceptions are rare;

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[14] *Ofulue v Bossert* [2009] UKHL 9, [2009] 1 AC 990, at [7].

(c) the existence of an all-evidence rule does not in and of itself create an exception;

(d) *Unilever* is authority for the proposition that the only relevant exception in the present matter is that there is evidence of "unambiguous impropriety";

(e) TAP has not provided the Committee with sufficient evidence of any unambiguous impropriety by Mr TG; and

(f) the Committee had no basis upon which it could invoke the all-evidence rule.

Mr RB's submissions

[56] On behalf of TAP, Mr RB's response to the application for review is in two parts:

(a) Mr TG is unable to assert the without prejudice privilege as it belongs to [1234] and TAP; and

(b) regardless of any issue of privilege, s 151 of the LCA permits a Standards Committee to call for and receive the letter as part of its conduct deliberations.

Mr TG cannot assert the without prejudice privilege

[57] Mr RB submits that the privilege attaching to Mr TG's letter belongs to TAP and [1234]. Mr TG cannot, therefore, assert the privilege to resist production in a conduct complaint against him. Further and in any event, production of the letter to the Standards Committee is "unrelated to the dispute between [TAP and [1234]]".

[58] Mr RB referred to the following extract from the judgment of Oliver LJ in *Cutts v Head*:[15]

> the public policy justification [for the without prejudice privilege] … essentially rests with the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the Court of trial as admissions on the question of liability.

[59] Extrapolating, Mr RB submits that the privilege "does not exist to confer an advantage on lawyers who seek to rely on the privilege for their own, non-client purpose".

[15] *Cutts v Head* [1984] Ch 290 (CA) at 306.

[60] In the alternative, Mr RB submits that if it is found that a non-party to a dispute can assert someone else's privilege, *Ofulue* makes it clear that the privilege does not apply where it was "wholly unconnected with the issues between the parties to the proceedings".[16] He submits that the Committee's consideration of TAP's complaint is a wholly unconnected proceeding: "[The Committee] is not at all concerned with the dispute between [TAP and [1234]]. It is concerned with Mr TG's conduct".

[61] Finally, Mr RB submits that a without prejudice privilege, such as might attach to Mr TG's letter, only survives for so long as there is an interest to protect.

Section 151 of the Act authorises production of the letter:

Evidence Act 2006 has no application

[62] Mr RB argues that regardless of whether the privilege may be asserted by Mr TG, the Committee is expressly empowered by s 151(1) of the Act to receive evidence that might otherwise be traditionally inadmissible.

[63] He notes that the general application of the EA to Standards Committee inquiries, provided for in s 151(4), is expressly subject to the all-evidence provision in sub-section 1. Section 151(1), he submits, "could not be clearer".[17]

Unilever

[64] Mr RB submits that *Unilever* is authority for the proposition that when a document, which is otherwise protected by the without prejudice rule, is being introduced for another purpose — i.e. not for the truth of otherwise of an admission that might be contained in the document — then privilege does not apply and the rule does not arise.[18]

[65] To the suggestion that the circumstances in which a decision-maker can override the without prejudice privilege are exceptional and must fit into one of the *Unilever* categories, Mr RB argues that, first, *Unilever* is not a code and secondly, Robert Walker LJ's list of eight categories is not exhaustive and was not intended to be so.

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[16] *Ofulue v Bossert*, above n 14, at [91] per Lord Neuberger.
[17] Noting also that legal professional privilege is an exception to the all-evidence admission, pursuant to s 271 of the Act; and noting further that legal professional privilege was the only one from the suite of privileges (including without prejudice privilege) for which an express exception has been made.
[18] *Unilever v Procter and Gamble Co*, above n 13, at 2443.

B v Auckland District Law Society and Complaints Assessment Committee v Medical Practitioner's Disciplinary Tribunal

[66] Responding to Mr NP's reliance upon *B v Auckland District Law Society*, Mr RB noted that the legislation then in force was the Law Practitioners Act 1982 (LPA). He observed that under s 101(3)(d) of the LPA a District Council or complaints committee investigating a complaint could require the production of documents "in the possession or under the control of the person complained against".

[67] Mr RB argued that the disciplinary provisions in the Act are much broader than those under the LPA. For example, s 151 of the Act provides for a Standards Committee to effectively receive in evidence anything it considers relevant, whether or not it is admissible in a court of law.[19] Moreover, s 151 of the Act is only limited by s 271, which expressly preserves legal professional privilege. In other words, s 271 sets out the only circumstances in which a privilege cannot be overcome.

[68] Mr RB submitted that "if the legislature had not wanted s 151 [of the Act] to override the without prejudice privilege, it would have said so in s 271 [of the Act]".

[69] Mr RB submits that s 151 of the Act has a much broader reach than s 101(3) of the LPA, which was the provision considered by the Privy Council in *B*. Moreover, the Privy Council in *B* was considering whether an all-evidence provision could trump legal professional privilege. Mr RB submitted that "not surprisingly [s 101(3) of the LPA] was found not to abrogate legal professional privilege."

[70] In relation to *CAC*, Mr RB submits once again that the existence of s 271 of the Act clearly shows that legal professional privilege is the only one of the suite of privileges (which includes the without prejudice rule) which is protected. The corresponding legislation in *CAC*, the MPA, did not contain a provision similar to s 271 and so the Court was asked to decide whether the equivalent MPA all-evidence provision could capture material that would otherwise be protected by doctor-patient privilege.

[71] Mr RB further submitted that s 57 of the EA does not fetter the Committee's power to require production of Mr TG's letter:

(a) where there are inconsistencies between the EA and other legislation, the provisions of the other legislation prevail (s 5(1) of the EA);

(b) the EA is subject to s 151(1)– (3) of the Act; and

[19] Lawyers and Conveyancers Act 2006, s 151(1).

(c) the Committee relied upon s 151(1) of the Act when it required production of Mr TG's letter.

Summary

[72] Mr RB emphasised that the Committee's inquiry is limited to Mr TG's conduct, and not the dispute between [1234] and TAP. He put it in this way: the issue for the decision-maker is unconnected with the subject matter of the dispute.

[73] He submitted that there are no public interest considerations in without prejudice communications being disclosed between different parties in a different dispute. Indeed, he argued, there is no good policy reason for a Standards Committee not to receive a without prejudice letter when considering a lawyer's conduct — the conduct has nothing whatever to do with any admissions made between the parties.

[74] Summarising his submissions, Mr RB said:

(a) any privilege that exists does not belong to Mr TG;

(b) the without prejudice privilege operates as an exception to the general rule that relevant documents are admissible;

(c) the without prejudice privilege exception is only able to be relied upon in circumstances which are consistent with the underlying public interest — which is to keep admissions and settlement offers from the judge determining the parties' dispute;

(d) production will not affect the interests of the privilege holders; and

(e) section 151 of the Act permits a Standards Committee to receive without prejudice communications.

Discussion

[75] I am grateful to counsel for the careful and comprehensive submissions that each has filed. This would appear to be the first time that this particular issue of Standards Committee procedure has been considered by this Office on review.

[76] On behalf of Mr TG, Mr NP accepts that the without prejudice rule is not permanently immune from being overridden. His position is that the circumstances in which that might arise are limited to the eight exceptions identified by Robert Walker LJ in the *Unilever* case. Of those eight, Mr NP submits that only one could have any

possible relevance to TAP's complaint against Mr TG: that being the unambiguous impropriety exception.

[77] Mr NP argues that TAP must advance compelling evidence of unambiguous impropriety on the part of Mr TG to justify the Committee receiving Mr TG's letter as part of its complaint inquiry.

[78] Conversely, Mr RB argues that *Unilever* is not a code and that the categories of inroad set out by Robert Walker LJ are not exhaustive.

[79] There is, therefore, agreement between counsel that the without prejudice rule is not impenetrable, in the way that legal professional privilege is.

The all-evidence provision: s 151

[80] Under the LPA, s 101(3)(d) empowered the body dealing with a complaint to require production from the lawyer complained about, of a wide range of material "that relate[s] to the subject-matter of the inquiry".

[81] Section 101(3)(e) empowered the body dealing with a complaint to require the lawyer complained about to provide information about the material that had been produced.

[82] In addition, s 101(4) of the LPA allowed the District Council or complaints committee to "follow such procedure in inquiring into the complaint as it thinks fit".

[83] Sections 147(2)(a)(i) and (iv) of the Act are cast in similar, although certainly not identical, terms to s 101(3)(d) and (e) of the LPA. In the present matter, the Committee was acting under s 147(2)(a)(i) of the Act.

[84] It is relevant to note that under the LPA, District Council and complaints committee roles were "more administrative than judicial".[20] This differs significantly from the role of Standards Committees under the LCA, which is a decision-making role (including where appropriate) the power to impose a penalty on a lawyer in breach of their professional obligations.

[85] It is important to note that there was no equivalent to the all-evidence provision of s 151 of the Act in its predecessor the LPA, nor of s 271.

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[20] Duncan Webb *Ethics, Professional Responsibility and the Lawyer* (2nd ed, LexisNexis, Wellington, 2006) at 149.

[86] I now set out the relevant parts of s 57 of the EA, and s 151 of the Act:

> **57 Privilege for settlement negotiations, mediation, or plea discussions**
>
> (1) A person who is a party to, or a mediator in, a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of any communication between that person and any other person who is a party to the dispute if the communication—
>
> (a) was intended to be confidential; and
>
> (b) was made in connection with an attempt to settle or mediate the dispute between the persons.
>
> (2) A person who is a party to a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of a confidential document that the person has prepared, or caused to be prepared, in connection with an attempt to mediate the dispute or to negotiate a settlement of the dispute.
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> …
>
> (3) This section does not apply to—
>
> (a) the terms of an agreement settling the dispute; or
>
> (b) evidence necessary to prove the existence of such an agreement in a proceeding in which the conclusion of such an agreement is in issue; or
>
> (c) the use in a proceeding, solely for the purposes of an award of costs, of a written offer that—
>
> (i) is expressly stated to be without prejudice except as to costs; and
>
> (ii) relates to an issue in the proceeding; or
>
> (a) the use in a proceeding of a communication or document made or prepared in connection with any settlement negotiations or mediation if the court considers that, in the interests of justice, the need for the communication or document to be disclosed in the proceeding outweighs the need for the privilege, taking into account the particular nature and benefit of the settlement negotiations or mediation.
>
> **151 Evidence**
>
> (1) A Standards Committee may receive in evidence any statement, document, information, or matter that may in its opinion assist it to deal effectively with the matters before it, whether or not the statement, document, information, or matter would be admissible in a court of law.
>
> (2) A Standards Committee may take evidence on oath, and for that purpose, any member or officer of the Standards Committee may administer an oath.

> (3) A Standards Committee may permit a person appearing as a witness before it to give evidence by tendering a written statement and, if the Standards Committee thinks fit, verifying that statement by oath.
>
> (4) Subject to subsections (1) to (3), the Evidence Act 2006 applies to a Standards Committee in the same manner as if it were a court within the meaning of that Act.

[87] When s 151 of the Act is read as a whole, there is little doubt that the all-evidence provision of subs (1) overrides the privilege provisions of the EA, including s 57. Subs (4) says that the EA is subject to subss 1–3.

[88] Section 151(1) is itself subject to s 271 of the Act, which preserves legal professional privilege without limitation.

[89] The addition of s 151(1) and 271 to the Act, in my view, consigns much of the procedural effect of *B*, in relation to production powers, to history. Section 271 of the Act would appear to provide the complete answer to the question being considered in *B*: can lawyer-client privilege be unsealed by a statutory requirement to produce documents?

[90] *CAC* considered the same question, albeit within the medical disciplinary framework, and arrived at the same conclusion as did the Privy Council in *B* — i.e. a statutory requirement to produce documents cannot override doctor-patient privilege.

[91] There is, therefore, no doubt that a Standards Committee has the jurisdiction to require the production of without prejudice material; s 151 of the Act makes that clear.

[92] The issue is whether the Committee on this occasion, ought to have exercised that power.

[93] Mr NP submits that a Standards Committee cannot, without a principled basis, use the all-evidence provision and simply demand production of a document that might otherwise be protected by one of the privileges that exist.

[94] Mr NP argues that the onus was on TAP, when its counsel referred to Mr TG's letter during the course of articulating the complaint, to establish the principled basis on which the Committee could rely when invoking the all-evidence provision. He submits that a reference to Mr TG's letter, without more, falls short of establishing the principled basis upon which the Committee can require production of the letter.

[95] In that regard, Mr NP relies heavily on *Unilever*, and Robert Walker LJ's eight examples of when the without prejudice privilege is overridden. He submits that TAP has not brought its wish to produce Mr TG's letter, into any of those eight exceptions.

[96] Before listing his eight examples in *Unilever*, Robert Walker LJ referred to "numerous occasions" when without prejudice documents would be admissible, and described the eight as "among the most important examples" (emphasis added).[21] In my view, Robert Walker LJ's list of eight are illustrations rather than limitations.

[97] I agree with Mr RB's submission that *Unilever* is not, and does not purport to be, a code precisely defining the circumstances in which without prejudice documents may be introduced in evidence.

[98] There is no doubt that the historical protection of privilege afforded to without prejudice communications is based upon sound principles. The values engaged by the privilege include: the right of parties to settle their dispute confidentially and in a free and frank manner, the public interest in promoting the settlement of disputes and the public interest in preventing offers made by the parties from being seen by the decision-maker.[22]

[99] Lord Justice Oliver put it this way:[23]

> the public policy justification, in truth, essentially rests with the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the Court of trial as admissions on the question of liability.

[100] There is also no doubt that the circumstances in which the protection of the without prejudice privilege evaporates, are generally rare. The authorities, taken as a whole, suggest that there must be a principled basis for doing away with the privilege in any given case.

[101] Privilege — be it without prejudice, lawyer-client, litigation or the privilege against self-incrimination — protects the interests of a party (or parties) to a dispute and not the interests of the lawyers involved.

[102] The protection belongs to the parties.

[103] The focus of the Committee's disciplinary inquiry will be whether Mr TG has committed a conduct breach.

[104] In my view, there can be no positional, transactional or other commercial compromise to either of TAP and [1234] if the Committee examines Mr TG's letter. The Committee has the discrete role of examining lawyer conduct and not the commercial (or personal) interests of clients, or their disputes. Indeed, neither counsel has

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[21] *Unilever v Procter and Gamble Co*, above n 13, at 2444.
[22] See generally *Cutts v Head*, above n 15.
[23] At 306.

suggested that the parties would be compromised in their commercial positions if the Committee was to receive and consider Mr TG's letter.

[105] The Committee is not ruling upon, much less expressing any view about, the dispute between TAP and [1234].

[106] Moreover, the Committee's processes are presumptively confidential to the parties.[24]

[107] I do not accept that a principled approach means that the Committee must fit its production requirement into one of the eight illustrations set out by Robert Walker LJ in *Unilever*. As Lord Rodger observed in *Ofulue v Bossert*, "[o]ver the years the courts have recognised certain exceptions to the [without prejudice] privilege which are made when the justice of the case requires it".[25] His Lordship went on to say "[t]he question is whether creating such an exception would be consistent with the overall policy behind the rule".[26]

[108] As discussed, the policy behind the rule is to protect the interests of parties and not their lawyers.

[109] In my view, it is entirely consistent with a principled approach to disturbing the without prejudice privilege for a Standards Committee examining a lawyer's professional or ethical conduct to be given access to any material that it considers may be relevant to that inquiry. The exception is lawyer-client privilege, as specifically provided for in s 271 of the Act.

[110] This gives effect to the consumer protection focus of the Act. Proper disciplinary inquiry unconstrained by evidential rules, achieves the consumer protection objective by enabling a Committee to impose sanction where appropriate on a lawyer when their conduct falls below the required professional and ethical standards.

[111] Moreover, by preventing the production of without prejudice communications to a Standards Committee, a lawyer will be able use their client's privilege as a shield, when that lawyer's ethical and professional conduct is being inquired into. Such an outcome would thwart proper inquiry, and is inconsistent with the maintenance of ethical and professional standards.

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[24] Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committee) Regulations 2008, reg 31.
[25] *Ofulue v Bossert*, above n 14, at [38].
[26] At [39].

Privilege no longer exists?

[112] Counsel disagree on whether privilege continues to exist in perpetuity. Mr NP submits that, in the absence of waiver from both parties, the without prejudice privilege continues to attach to Mr TG's letter. In his submissions before Mr Hesketh he put it in this way: "the solicitor's mouth is always shut (unless waived)" and "once privileged, always privileged".

[113] Mr RB argues otherwise and submits that the privilege is spent once the subject matter of the dispute comes to an end.

[114] In relation to "once privileged, always privileged", Mr NP submitted that this applies to all subsequent proceedings or enquiries. In support, he relied upon the decision of the House of Lords in *Ofulue v Bossert*, in which their Lordships held that:[27]

> save perhaps where it is wholly unconnected with the issues between the parties to the proceedings, a statement in without prejudice negotiations should not be admissible in evidence.

[115] There is merit in Mr NP's argument that TAP is a common denominator to both the dispute with [1234] and the complaint against Mr TG, such that the privilege continues to travel with Mr TG's letter whenever TAP is involved, as it is here – albeit as the complainant in a disciplinary inquiry.

[116] However, I have reservations about whether the without prejudice privilege continues to attach to Mr TG's letter in the manner contended for by Mr NP.

[117] *Unilever* and *Ofulue* were dealing with on-going litigation between the parties. Their interests were central to the arguments before the Court. Here, as previously indicated, the parties' dispute assumes no relevance to the Committee's inquiry; the fact that they were in dispute merely gives context to an examination of Mr TG's conduct during that dispute. It bears repeating that the Committee has no interest in the rights and wrongs of the tussle between TAP and [1234].

[118] That being said, the main plank of Mr NP's argument was that a principled basis for disturbing the without prejudice privilege attaching to Mr TG's letter has not been established.

[119] I have concluded that, on the contrary, the principled basis for doing so is that the Committee is inquiring into Mr TG's conduct and not the interests of the parties to the dispute being written about by Mr TG in his letter.

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[27] At [91] per Lord Neuberger.

[120] Consumer protection objectives requires such an inquiry to be conducted with as little evidential fetter as possible. Section 151 of the Act provides the vehicle for this to be achieved.

[121] For that reason, I do not consider it necessary to determine the issue of whether the without prejudice privilege is "spent", as Mr RB put it.

Conclusion

[122] I have carefully and comprehensively considered all of the material that was provided to this Office on review. Nothing raised persuades me that the Standards Committee's requirement to TAP that it produces Mr TGs letter, was wrong. The Committee's decision is therefore confirmed.

Decision

[123] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the Committee's requirement to produce Mr TG's letter, is confirmed.

[124] I leave it to the Committee to set any timetable or make any other relevant directions as to the production of Mr TG's letter.

Costs

[125] Mr TG's application for review has been unsuccessful. It is appropriate to order him to pay costs. Pursuant to s 210 of the Act, Mr TG is ordered to pay the sum of $1,200 by way of costs, to the New Zealand Law Society. That sum must be paid by him by within 30 days of the date of this decision.

Enforcement of costs order

[126] Pursuant to s 215 of the Lawyers and Conveyancers Act 2006 I confirm that the order for costs may be enforced in the civil jurisdiction of the District Court.

DATED this 26th day of January 2018

R Maidment
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

TG as the Applicant
NP QC as counsel for the Applicant
JT and TAP Limited as the Respondents
RB as counsel for the Respondents
YL as the Related Person
[City] Standards Committee [X]
New Zealand Law Society