

LCRO 67/2010

CONCERNING

An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of the Auckland Standards Committee of the New Zealand Law Society

BETWEEN

MR RUGBY

of Auckland

Applicant

AND

**AUCKLAND
COMMITTEE**

STANDARDS

Respondent

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

Decision

[1] Mr Rugby (the Practitioner) sought a review of a decision of Auckland Standards Committee which determined to prosecute him before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal. The decision followed an investigation pursuant to section 130(c) of the Lawyers and Conveyancers Act 2006 (the Act). This section empowers the Standards Committee to conduct an investigation of its own motion into the question of whether there has been misconduct or unsatisfactory conduct on the part of a practitioner.

[2] Previous applications by this office for a review of a Standards Committee decision to refer a matter to the Disciplinary Tribunal have analysed the extent to which such a decision is reviewable (see LCRO 133/09). It has been observed that it would be unusual for a statutory power to exist to review the exercise of a prosecutorial discretion. An analysis was undertaken of the various provisions in the Act to discern the legislative intent in relation to this matter. In the course of analysing the relevant legislative provisions an ambiguity was noted between section 194 which, taken with section 152, suggests that a right to review a Standards Committee's decision to prosecute exists on the one hand, and on the other hand that section 158 of the Act did not provide for a practitioner to be notified of the existence of

a right to review, the absence of such notification suggests that it was not intended that there should be a right of review.

[3] Common law principles were also considered, and it was noted that the general position in common law jurisdictions is to take a very restrictive stance in respect of the reviewability of a decision to prosecute, observing that the prosecutor's function is merely to do the preliminary screening and to present the case. It was also recognised that this presumption against the reviewability of decisions to prosecute has been eroded but nevertheless noted that it will only be in exceptional cases that a decision to prosecute will be reversed on review.

[4] The cases considered indicated the kinds of basis upon which a decision to prosecute might be revisited and include situations in which 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.

[5] In considering whether or not the decision to prosecute should be revisited it is not necessary for me to conclude whether or not the conduct complained of fell short of acceptable professional standards. If the conduct was manifestly acceptable then this might be evidence of some improper motivation in the bringing of the prosecution.

[6] The basis for the review application in this case was that the Standards Committee had not taken into account all of the available information before deciding to refer the matter to the Tribunal. The outcome sought by the Practitioner was to have the matter referred back to the Committee for its reconsideration in the light of all relevant information.

[7] I considered the procedures undertaken by the Standards Committee in relation to its investigation. I noted that the Practitioner had been given the opportunity to respond to the Committee's concerns, that he responded on 21 November 2009, and that the Committee was dissatisfied with his response. The Committee then resolved to set the matter down for a hearing on the papers pursuant to section 152(1) of the Act. The Practitioner was sent a Notice of Hearing on 18 February 2010, which advised a hearing date of 19 March 2010, of the issues to be considered and the various steps that the Committee could take or orders it could make. The Practitioner was invited to forward his written submissions by 5pm on 11 March 2010. He did not send any submissions within this timeframe.

[8] Due to a delay the hearing took place about a week later than scheduled. A note on the Standards Committee file records a discussion with the Practitioner on 7 April 2010 which covered the delay and noted that he was informed that the Committee had already met and decided its next step. This meant that by the time of the phone contact the Practitioner was already out of time to forward submissions. The Practitioner then wrote to the Standards Committee the following day (8 April 2010) explaining that he had assumed that he would be informed of the altered hearing date, and requested that the Committee consider the submissions he included in that letter. This comprised the information he still desired the Committee to take into account.

[9] The Committee issued its determination on 8 April, informing the Practitioner that the Standards Committee had considered the matter on 26 March 2010 and determined pursuant to section 152(2) of the Act to refer the matter for consideration by the Disciplinary Tribunal.

[10] For the review the Applicant enclosed a copy of his 8 April posting to the Committee which explained the circumstances regarding his misunderstanding of the processes. There was a review hearing held on 27 May 2010, attended only by the Applicant. The Standards Committee was informed of the hearing and elected to take no part.

[11] I record that the Practitioner did not raise any issues concerning the procedures that had been adopted by the Standards Committee, but rather, hoped for an opportunity to have the Standards Committee reconsider the matters in the light of submissions that had arrived too late for its consideration. Having heard from the Practitioner and undertaken an examination of the file I do not consider that his review application can succeed on any of the above grounds, nor on the grounds of any procedural omission. He has not established any basis upon which it would be appropriate to require the Standards Committee to revisit the determination to prosecute this matter before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

[12] As part of the review I also considered the basis of the Committee's resolution to refer the matter to the Tribunal, noting that the matters under the Committee's consideration concerned the Practitioner's conduct in the context of disciplinary forum in relation to criminal convictions. In this case it is quite clearly arguable that the conduct complained of fell short of professional standards, and accordingly it is inappropriate to require the Standards Committee to reconsider the merits further.

Costs

[13] The Practitioner has been unsuccessful in his application for review. In light of this it is appropriate that an order of costs be made against him. The short duration of the review hearing should be reflected in a costs order. I consider \$500 to be appropriate.

Decision

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

Order

The following order is made:

- The Practitioner is to pay \$500 in respect of the costs incurred in conducting this review pursuant to s 210 of the Lawyers and Conveyancers Act 2006. Those costs are to be paid to the New Zealand Law Society within 30 days of the date of this decision.

DATED this 12th day of July 2010

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:

Mr Rugby as the Applicant
Auckland Standards Committee as the Respondent
The New Zealand Law Society