LCRO 77/2013

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a Notice of Hearing dated 20 February 2013 issued by [North Island] Standards Committee
BETWEEN	**MR XI** Applicant
AND	**[NORTH ISALND] STANDARDS COMMITTEE** Respondent

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

DECISION AS TO JURISDICTION

Background

[1] Mr XI has applied to this Office for review of a resolution by [North Island] Standards Committee to issue a revised Notice of Hearing in respect of an own motion inquiry by the Standards Committee into the conduct of Mr XI.

[2] Mr XI is the principal of the firm XK. That firm's trust account was inspected by the Law Society Inspectorate in October 2011 and a report was provided to the firm on 4 November 2011. The report noted that the firm had been the victim of a fraud, in that a foreign bank draft for €150,000.00 banked by the firm was considered to be fraudulent.

[3] The bank had initially cleared the draft and allowed Mr XI to pay out against it, but subsequently dishonoured the draft and debited the foreign currency account operated by the firm with the amount of the draft. The bank then sought to recover the funds it had credited to the account (and which had been paid out to the client after deduction of fees) from the firm.

[4] On the basis of the Inspectorate Report the Standards Committee resolved under s 130(c) of the Lawyers and Conveyancers Act 2006 to commence an own motion investigation.

[5] A Notice of Hearing was sent to Mr XI on 4 April 2012. That Notice invited Mr XI to make submissions on the issues raised by the alleged conduct including:

> a) "That Mr [XI] received a forged bank cheque from [name] Bank to the amount of €150,000. This was put into a foreign currency account and when he had received confirmation that the cheque had cleared, he transferred $24,658.79 to his trust account for which represented fees and transferred €134,926.41 to a bank account in [country].
>
> b) Can Mr [XI] substantiate, quantify and provide evidence of the work he carried out on behalf of his client?"

The Notice then included generic matters to be addressed by Mr XI.

[6] Submissions were provided on behalf of Mr XI by Mr XJ on 3 May 2012. However when the Standards Committee met it noted that the BE Bank had also made a complaint about Mr XI in respect of the same events and resolved to defer the hearing of the complaint to enable both matters to be considered at the same time.

[7] The progress of the matter was delayed while the BE complaint was processed although as it turns out, both matters were not dealt with at the same time, and continued to be dealt with by two separate Standards Committees. On 20 February 2013 Standards Committee 1 which was conducting this own motion inquiry, issued a new Notice of Hearing. In the letter under cover of which that Notice was sent, Mr XI was advised that the Notice replaced the earlier Notice of Hearing dated 4 April 2012.[1]

[8] The replacement Notice of Hearing invited Mr XI to make submissions on the issues raised by the alleged conduct, including:[2]

> i. "Whether Mr [XI] breached Rule 11.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 ("RCCC Rules") by failing to take all reasonable steps to prevent a fraud being perpetrated through his practice;
>
> ii. Whether the fee charged by Mr [XI] amounted to a conditional fee agreement and if so, whether it complied with RCCC Rules 9.8 to 9.12; and

[1] Letter to Mr XI from NZLS (20 February 2013).
[2] Notice of Hearing letter to Mr XI (20 February 2013).

iii. Whether the fee charged by Mr [XI] of €15,000.00 (equivalent to NZ$24,658.79 or 10 per cent of the settlement amount of €150,000.00) was a fair and reasonable fee having regard to RCCC Rules 9 and 9.1."

The Notice then included the same generic matters as had been set out in the earlier Notice of Hearing.

[9] On 18 March 2013 Mr XI filed an Application for Review with this Office. That application was accompanied by a memorandum of supporting reasons. The relief sought in the application was the setting aside of the Notice of Hearing of 20 February 2013 and an "[i]ndefinite stay of proceedings due to an abuse of process."[3]

[10] By letter dated 20 March 2013 this Office indicated to Mr XI an initial issue to be addressed was whether the Notice of Hearing issued by the Standards Committee constituted a determination which is subject to review by this Office, and referred Mr XI to an earlier decision of this Office (*Lydd v Maryport* LCRO 164/2009).

[11] In *Lydd v Maryport* the applicant sought a review of a decision by the Standards Committee pursuant to s 144 of the Act to appoint an investigator on the grounds that the appointment of an investigator was prejudicial to the applicant. The reasons for these allegations are not relevant to this decision.

[12] The LCRO decided that a decision to appoint an investigator was not a reviewable "determination", "requirement", "order" or "direction" in terms of s 194. The LCRO observed that there was no general power to review steps taken by a Standards Committee[4] and referred to the requirement of the Act to deal with complaints expeditiously as required by s 120(3). He held that the only matters that were reviewable by this Office were:-

- a determination pursuant to s 152;
- a requirement pursuant to ss 141 or 147;
- an order pursuant to s 156; and
- a direction given pursuant to ss 142 or 143.

[3] Application for Review to LCRO Part 8 (18 March 2013).
[4] At [31].

[13] Mr XJ criticised the decision in *Lydd v Maryport* and made the following submissions:[5]

- "In adopting a restrictive approach the LCRO disregarded the impact of the specific wording of s 194 which refers to "***any*** *determination, requirement, or order made, or direction given* ***in relation to*** *a complaint ... or* ***on a matter arising from*** *a complaint*" and of section 195 "*any requirement* ***in relation to any*** *...* ***matter*** *that the Standards Committee is inquiring into, of its own motion*"." (Emphasis added by Mr [XJ].)

- "The intention for the LCRO's powers of review to have broad application is apparent from the use of the words "**any**", "*in* **relation to**" and "**a matter arising from**.""

- The LCRO failed to consider the impact of ss 209 and 211 of the Act which provide the powers of the LCRO on review where the word "decision" is used.

- That all decisions of a Standards Committee are subject to review, rather than being limited as decided in *Lydd v Maryport*.

- That the LCRO had placed undue emphasis on the requirement of the Act to deal with complaints expeditiously, whereas Parliament had placed far more weight on the requirement to comply with the rules of natural justice, and this requirement is paramount.

- The threshold for the right of review should be the nature and consequences of the decisions in question, rather than a mechanical determination of whether the decision may be categorised as a determination, requirement, order or direction.

[14] Mr XJ noted that the amended Notice of Hearing substantially changed and amplified the issues that Mr XI was expected to deal with, to include matters that were outside the issues raised by the Inspectorate following which the own motion inquiry was commenced. He submits that they are therefore *ultra vires* issues and affect Mr XI's rights, obligations and interests. He argues that the replacement Notice of Hearing therefore constituted a breach of the rules of natural justice and should be set aside.

[5] Submissions from Mr XJ on behalf of Mr XI to the LCRO (28 March 2013).

Discussion

[15] Mr XJ invites this Office to adopt a power of review which would broaden the jurisdiction of this Office beyond that previously assumed. Any broadening of the power of review which would affect the directive of the Act to deal with complaints expeditiously must be carefully considered. In saying this, I do not place expedition above the requirements of natural justice. However, the approach urged on this Office by Mr XJ would necessarily have the effect of rendering all decisions by a Standards Committee subject to review, to the extent that the ability of a Standards Committee to regulate its own procedure[6] would be placed in severe jeopardy.

[16] His submission that the nature and consequences of a decision should determine its reviewability would also remove the certainty provided by *Lydd v Maryport.*

[17] In considering Mr XJ's submissions, it is pertinent to remind oneself that the powers of this Office derive only from the provisions of the Lawyers and Conveyancers Act 2006 and in this regard the observation by the LCRO in *Lydd v Maryport*[7] that there is no general power to review steps taken by a Standards Committee is particularly relevant.

[18] Mr XJ argued that the matters which are reviewable ought to be broadly construed. In making this argument he relies on ss 209 and 211. In particular he noted that those sections identify that the LCRO may refer back for reconsideration any part of a "complaint, matter, or decision"[8] or "confirm, modify, or reverse any decision".[9] He argued that the use of the word "decision" in those sections indicates a broad power of review of all decisions relating to complaints or matters arsing from complaints. He further argued that it was wrong to limit the power of review only to "any determination, requirement, or order made, or direction given" by a Standards Committee (which are the words found in s 195).

[19] The essence of Mr XJ's submission is that where the procedure of a Standards Committee breached its obligation to act in accordance with the principles of natural justice or failed to comply with the provisions of the Act and Regulations, the aggrieved person should be able to avail themselves of a review before this Office without having

[6] Section 142(3) Lawyers and Conveyancers Act 2006.
[7] At [31].
[8] Above n5 at s 209.
[9] Above n5 at s 211.

to show that the action complained of was a "determination, requirement, or order made, or direction given, by a Standards Committee" in terms of s 195.[10]

[20] He sought to rely on recent authority in respect of the broad and untechnical nature of the jurisdiction of the High Court to judicially review administrative actions (citing *Wilson v White* [2005] NZLR 189 (CA)). I do not think that doctrine provides much guidance in the present case as it deals with the inherent jurisdiction of the Court (now articulated by the Judicature Amendment Act 1972). The power to conduct a review by this Office is constrained by the provisions of the Lawyers and Conveyancers Act.

[21] Sections 194 and 195 are clear in their wording – they apply only to "any determination, requirement, or order made, or direction given, by a Standards Committee." There is absolutely no reason or imperative, to conflate these terms into the general term "decision" in these sections as Mr XJ suggests.

[22] The word "decision" is used in ss 209 and 211. Section 209(1) gives the LCRO the power to direct a Standards Committee "to reconsider ...the whole or part of the complaint, matter, or **decision** to which the application for review relates."

[23] Section 211(1)(a) provides that the LCRO may on review:

> confirm, modify, or reverse any **decision** of a Standards Committee, including any determination, requirement, or order made, or direction given, by the Standards Committee (or by any person on its behalf or with its authority). (Emphasis added.)

[24] The use of the word "decision" in s 209 could be interpreted as referring to "any determination, requirement, or order made, or directions given, by a Standards Committee" as referred to in ss 194 and 195, and not therefore expanding those terms at all. However, the use of the word "decision" in s 211(1)(a) is more problematic, in that it is expressed to be inclusive of those actions, suggesting that there is a wider category of "decisions" which are subject to review. In this regard, I accept that Mr XJ's submission has some force.

[25] However, the actions in respect of which a review may be applied for as set out in ss 194 and 195, are quite specific. There are numerous decisions of the Courts which warn against reading or adding words into legislation. I refer for example to the

[10] Above n5 at paragraph 5.3.4.

decision of the Privy Council in *Reid v Reid*[11] where it was stated:

> Their Lordships have in mind what was said by Lord Mersey in *Thompson v Goold & Co* [1910] AC 409,420: "It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do."

[26] Section 5(1) of the Interpretation Act 1999 provides that "the meaning of an enactment must be ascertained from its text and in the light of its purpose." The Supreme Court set out the approach to the application of this section in *Commerce Commission v Fonterra*:[12]

> [22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too, may be the social, commercial or other objective of the enactment.

[27] Mr XJ would argue that the purpose of ss 194 and 195 is to allow all decisions of whatever nature to be subject to review. I am not however persuaded that this was indeed the purpose of those sections, particularly where such an interpretation would impede the ability of Standards Committees to regulate their own procedure, and the result would be to seriously affect the expeditious resolution of complaints. To do so would cut across other objectives of the Act and in the circumstances I do not accept Mr XJ's submissions in this regard.

Is the resolution of the Committee a "determination"

[28] The resolution of the Committee to issue a replacement Notice of Hearing can only be considered within the phrase "any determination". It is not a "requirement", "order" or "direction". The word "determination" is used specifically in s 152 of the Act. Section 152(2) sets out the three "determinations" that can be made by a Standards Committee. The resolution to issue the replacement Notice of Hearing is not one of those. Again, there is no reason, or imperative to extend that term to any other decision to be made by a Standards Committee. Consequently, I do not accept Mr

[11] *Reid v Reid* [1982] 1 NZLR 147 at 150.
[12] *Commerce Commission v Fonterra* [2007] NZSC 36.

XJ's contention that the power of review should be extended beyond the approach previously followed by this Office.

[29] By way of observation it is of note that this approach is consistent with the principle that judicial review of merely administrative steps in the process is not generally available until the conclusion of the process (see for example *Whale Watch Kaikoura Ltd v Transport Accident Investigation Commission* [1997] 3 NZLR 55). This presumption may of course be displaced when the effect of the decision within the process is to affect substantive rights. In the present case the resolution of the Standards Committee to issue a new Notice of Hearing did not finally dispose of any matter. It was merely an administrative step in the process of the Committee as it worked towards disposing of the matter. This supports my conclusion that the resolution to issue a new Notice of Hearing, and the issuing of that notice by the Standards Committee, is not reviewable by this Office.

[30] For the foregoing reasons I have concluded that this Office does not have the jurisdiction to consider the application for review made by Mr XI.

Wider considerations

[31] Although not strictly necessary, it is also appropriate to note that the decisions of the Standards Committee appear to have been made in good faith and for good reasons. It must be the case that it is appropriate for a Standards Committee to recast a Notice of Hearing to better put a Practitioner under inquiry on notice of the concerns of the Committee as occurred in this case.

[32] Mr XJ suggests in his submissions that because the matters raised in the Notice of Hearing went beyond the concerns of the initial inspectors report which triggered the own motion inquiry, it was *ultra vires*. A Standards Committee is not restricted in the matters which it can inquire into, and the fact that it became aware of further issues as the inquiry progressed can not in any way be used to limit the matters that can be inquired into. The purpose of an inquiry is to uncover concerns and it cannot be limited in the way suggested. It is entirely appropriate for the Standards Committee, on inquiry, to expand the matters that it requires the lawyer to address.

[33] Neither can it be a concern that the Standards Committee took into account matters which were before another Standards Committee (in particular the BE complaint on the same facts). The BE complaint was clearly relevant and quite properly formed part of the investigation of the Standards Committee.

[34] Accordingly even if the decision had been to accept jurisdiction, it is unlikely that the Committee's resolution would have been set aside. In addition, this Office does not have the power to stay proceedings of a Standards Committee (indefinitely or otherwise), and that remedy sought by Mr XI could not have been granted.

Decision

This application for review is declined for want of jurisdiction.

DATED this 5th day of July 2013

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O W J Vaughan
Legal Complaints Review Officer

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

Mr XI as the Applicant
Mr XJ as the Representative for the Applicant
[North Island] Standards Committee
The New Zealand Law Society