

**LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE**

[2021] NZLCRO 074

Ref: LCRO 12/2021

CONCERNING

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

AND

CONCERNING

a determination of [Area] Standards Committee [X]

BETWEEN

OH

Applicant

AND

GC

Respondent

DECISION

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

Introduction

[1] Mr OH has applied for a review of the determination by [Area] Standards Committee [X] to lay charges against him before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

Applicable principles

[2] Before commencing a review of the facts and the Committee's determination, it is necessary, first, to canvas the principles to be applied when conducting a review of a determination to refer matters to the Tribunal. Judgments of the courts provide a useful framework within which to come to a decision in this review:

[3] In *Orlov v New Zealand Law Society*, the Court of Appeal held:¹

- "... a decision under s 152(2)(a) does not determine the outcome of the complaint. It only determines which body should be seized of it."²
- "... the imposition of a threshold test³ is an unwarranted gloss on s 152..."⁴
- "The oversight of the LCRO should ... assist in protecting the resources of the Tribunal and prevent it from being overwhelmed by petty or trivial cases."⁵
- "... it is in our view important that the Tribunal be able to determine some complaints even though the likely sanction will not involve striking off or suspension."⁶
- The Court disagreed with Mr Orlov's submission that "... the matter having been initiated as a complaint under s 132, it was not open to the ... Committee to commence an own motion investigation into the same matter".⁷
- "In our view, 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."⁸
- "... decisions made under s 152(2)(a), unlike ones made under s 152(2)(b) and (c), are not adjudications on the merits of complaints. They are a step in an ongoing process..."⁹
- "... another argument advanced by Mr Orlov was that the matters raised... were trivial and should have resulted in deciding to take no further action."¹⁰

[4] In *Deliu v Hong*, the High Court held:¹¹

¹ [2013] NZCA 230.

² At [50].

³ The High Court judgment refers to a "threshold test" and held that only matters of such seriousness as to warrant suspension or strike off could be referred to the Tribunal.

⁴ At [53].

⁵ At [54](d).

⁶ At [54](h).

⁷ At [89].

⁸ At [98].

⁹ At [99].

¹⁰ At [127].

¹¹ [2012] NZHC 158, [2012] NZAR 209.

- "... 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."¹²

[5] In *Zhao v LCRO* the High Court held:¹³

- "The purpose of the 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."¹⁴
- "... there is room in that review for the LCRO to identify errors of fact."¹⁵

[6] Although Fogarty J in *Zhao v LCRO* considered a summary by this Office of the circumstances where a determination to lay charges before the Tribunal was "out of date",¹⁶ I consider they still provide a useful summary to consider when addressing the issue, bearing in mind that these parameters should not be rigidly applied. These parameters were set out in *FF v Wellington Standards Committee 2*:¹⁷

[49] [Previous LCRO cases] have identified the principles set forth in the various Court decisions where a decision to prosecute might be revisited. These include situations in which the decision to prosecute was:

- significantly influenced by irrelevant considerations;
- exercised for collateral purposes unrelated to the objectives of the statute in question (and therefore an abuse of process);
- exercised in a discriminatory manner;
- exercised capriciously, in bad faith, or with malice.

[50] In addition, it was noted in the *Rugby* decision that "if the conduct was manifestly acceptable then this might be evidence of some improper motivation in the bringing of the prosecution".

[51] While I do not necessarily agree that this might constitute evidence of some improper motivation in the bringing of the prosecution, I do agree that the decision to prosecute should be set aside if the conduct was manifestly acceptable.

¹² At [41].

¹³ [2016] NZHC 2622.

¹⁴ At [23]. The Court of Appeal in *Orlov* approved the process followed by the Lawyers Complaints Service where a determination to lay charges is followed subsequently by the charges themselves. Consequently, it is not possible for a review officer to form a judgement as to the appropriateness of the charges. It is the determination to refer matters to the Tribunal that is under review.

¹⁵ *Ibid.*

¹⁶ At [25].

¹⁷ LCRO 23/2011 (27 September 2011).

[7] I now address the submissions by Mr OH.

The issues

[8] Mr OH submits that “none of the issues raised in paragraph 20 [of the Standards Committee determination] were in fact raised as matters of fundamental concerns by the complainant, Mr GC, at the outset of this matter”.¹⁸

[9] It is understandable that the issues addressed by the Committee may not have been explicitly raised by Mr GC as he would not necessarily have been aware of the specific requirements of the Lawyers and Conveyancers Act 2006, the Conduct and Client Care Rules,¹⁹ the Trust Account Regulations,²⁰ and any other legislation, rules or regulations with which lawyers must comply. However, all of the issues referred to in [20] of the Standards Committee determination are implicit in Mr GC’s complaints.

[10] The Court of Appeal has disagreed with Mr OH’s submission that a Committee cannot commence an ‘own motion’ investigation into matters which become apparent in the course of considering a complaint.²¹ Mr OH may raise before the Tribunal any objections as to the Committee’s procedure in doing so.

Fees

[11] Mr OH says that the Committee appears to have ignored his response to the complaint about fees.²² Mr OH’s response does not provide answers to the potential breaches of the rules and regulations and the Committee is not obliged to enter into ongoing correspondence with Mr OH to clarify and discuss his submissions.

[12] Although a review can be carried out by an “in person” hearing, a Review Officer needs to be satisfied that all potential issues have been addressed and answered, to the extent that it becomes clear that the matters raised do not need to be examined further. That is not the case.

[13] Mr T BV QC was appointed to act as a cost’s assessor. Costs assessors do not make “findings” as referred to by Mr OH in his submissions on review.²³

¹⁸ Mr OH, submissions on review at [2].

¹⁹ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

²⁰ Lawyers and Conveyancers Act (Trust Account) Regulations 2008.

²¹ *Orlov v New Zealand Law Society*, above n 1.

²² Mr OH, letter to Lawyers Complaints Service (23 April 2020).

²³ At [10].

[14] Mr BV considered that Mr OH's fees (\$37,500) could not be justified and a fee of \$5,250 represented a fair and reasonable fee for the work carried out by Mr OH. In doing so, Mr BV commented on the fact that some of the work included in Mr OH's invoices was unnecessary and which he had not been instructed to do.²⁴

[15] Mr BV's report raises serious issues which cannot be properly addressed by a Standards Committee or this Office.

[16] Mr OH suggests that Mr BV was conflicted, in part because Mr BV's brother (Mr W BV) had acted for the complainant in the past. This suggestion can be readily discounted, for the reason that a costs assessor's report represents the opinion of the author and can be adopted or otherwise by a Standards Committee.

[17] In addition, Mr W BV had acted for Mr GC on matters other than those which are the subject of the Standards Committee determination. A suggestion of a conflict arising on one matter only, is insufficient to reverse the determination of the Committee. Mr OH can challenge the objectivity of Mr BV's report before the Tribunal.

[18] It is difficult to identify the relevance of Mr OH's comments as to the state of the files relating to Mr GCs' relationship property matters uplifted from Mr W BV, and the fact that Mr GC asked him to assist in locating an alternative lawyer.

Conclusion

[19] None of the conduct referred to by the Standards Committee and addressed in this review is 'manifestly acceptable'. Mr OH will have the opportunity to respond to the charges brought by the Committee in a forum better suited to considering the issues raised by the Committee's investigation of Mr GC's complaints.

Decision

[20] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Committee is confirmed.

Costs

[21] There are no orders for payment of the costs of this review.

²⁴ Mr OH also included the cost of addressing a complaint against him by the vendors for the property and/or their lawyers.

Publication

[22] In this decision I have summarised the principles relating to reviews of a determination by a Standards Committee to refer matters to the Lawyers and Conveyancers Disciplinary Tribunal. Pursuant to s 206(4) of the Lawyers and Conveyancers Act, I direct that this decision be published in an anonymised format on the website of this Office.

DATED this 25th day of MAY 2021

O 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 OH as the Applicant
Mr GC as the Respondent
[Area] Standards Committee [X]
New Zealand Law Society