

LCRO 36/09

**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 No 4

**BETWEEN** **CLIENT D** of Tauranga

Applicant

**AND** **LAWYER T** of Whangarei

Respondent

## **DECISION**

### **Background**

[1] On 29 September 2008 Client D complained to the New Zealand Law Society regarding the conduct of Lawyer T. The matter was referred to the Auckland Standards Committee 4 for consideration.

[2] On 28 January 2009 the Auckland Standards Committee 4 resolved to take no action on the complaint. Client D sought a review of the decision of the Standards Committee. He initially faxed a request for a review to this office on 12 March 2009. In that fax he failed to include any contact details. On enquiring of the Law Society his details were obtained. On receipt of that information a staff member of this office contacted Client D on 17 March 2009. He was informed of the fact that the application had not been properly made (due to not being on the prescribed form and not being accompanied by the prescribed fee) and was now outside of the statutory time limit. That was confirmed by an email to Client D of the same date. In response to that telephone call Client D couriered the fee and a completed application form. That fee and application was received by this office on 18 March 2009.

[11] I also note that the Standards Committee decision complied with s 158(2)(c) and (d) of the Lawyers and Conveyancers Act in that it clearly stated that a right to

apply to this office for a review of the decision existed, and stated the applicable time limit. In addition to the minimum statutory requirements it also provided telephone and postal contact details for this office as well as the website address. The facsimile number of this office was not provided in that letter.

[3] By s 198 of the Lawyers and Conveyancers Act 2006 all applications for review must be made within 30 working days after the determination of the Standards Committee. The 30<sup>th</sup> working day after the decision of the Standards Committee was 12 March 2009 (when the faxed application was received).

[4] Client D was aware that his formal application was made after the 30 working day period. He stated in the application that he considered the fax was filed within the 30 days and considered that he had complied with the instructions in the decision of the Standards Committee. He observed that the information provided by the Standards Committee did not mention the need for the application to be on a prescribed form or that it be accompanied by a prescribed fee.

[5] The issue to be determined is whether I have jurisdiction to consider this application for review, or whether I am precluded from doing so by virtue of the failure to comply with s 198 of the Act. If the application was made on 12 March 2009 it is within the prescribed time. If it was made after that date it was made outside of the prescribed time.

### **Jurisdiction**

[6] Section 198 of the Lawyers and Conveyancers Act 2006 provides that every application for review must:

- (a) be in the prescribed form; and
- (b) be lodged with the Legal Complaints Review Officer within 30 working days after the determination, requirement, or order is made, or the direction is given, or the function or power is performed or exercised, by the Standards Committee (or by any person on its behalf or with its authority); and
- (c) be accompanied by the prescribed fee (if any).

[7] The Lawyers and Conveyancers Act (Legal Complaints Review Officer) Form and Fee Regulations 2008 set out the prescribed the form and fee for applications. The prescribed form is provided in the schedule to those regulations. Regulation 3(2) states

that “The form set out in the schedule may be varied as the circumstances of a particular case require”. Regulation 4 states that the fee required to accompany an application for review is \$30.

**Was the application “in the prescribed form”**

[7] As already observed, in the present case Client D sought a review initially by sending an application by facsimile. In his application to this office he suggests that this should be taken into account when applying the time limits imposed by s 198. He also observed that he telephoned this office to obtain the appropriate fax number. He states that at that time he was not told of the need for the application to be on a prescribed form or accompanied by a prescribed fee. It appears that the purpose of the telephone call was to obtain the fax number. Client D does not indicate that he mentioned in that telephone call that he intended to make an application for review.

[8] Section 198 of the Act requires that the application be in the prescribed form. The regulations prescribing that form allow for some flexibility “as the circumstances of a particular case require”. In the present case it might be argued that the failure to use the prescribed form should not be fatal and that the circumstances required the faxed informal application. The reasons for using a prescribed form are to ensure that essential information for the progressing of the review are obtained. The informal application received on 12 March 2009 was deficient in this regard. Client D failed to provide any means by which he could be contacted, failed to provide contact details for the respondent and failed to identify the Standards Committee which determined the matter.

[9] I do not consider it necessary to decide whether regulation 3 of the Lawyers and Conveyancers Act (Legal Complaints Review Officer) Form and Fee Regulations 2008 empower me to relax the requirement that an application be made on the prescribed form. It is enough to say that if such a power existed this would not be a case in which it would be exercised. In particular, the informal application was deficient in significant respects. Contact details for the applicant and respondent are essential aspects of an application. It is perhaps of note that the latter was not remedied in the formal application received on 18 March 2009.

[10] I consider that the informal application of 12 March 2009 was not made “in the prescribed form”.

**Was the application “accompanied by the prescribed fee”**

[11] Section 198(c) is clear in stating that an application must be “be accompanied by the prescribed fee (if any)”. The prescribed fee is \$30. The fee did not accompany the informal application of 12 March but was received only on 18 March 2009.

[12] The failure to pay a prescribed fee for the bringing of an appeal or other application that a decision be reviewed will be fatal to an application. This will be the case even where the fee is subsequently paid. In *Cahayag v Removal Review Authority* [1998] 2 NZLR 72; [1998] NZAR 145 a notice of appeal was faxed to the Removal Review Authority along with a faxed copy of a cheque for the prescribed fee. The covering note of the fax stated “Appeal and submissions re. above. Originals being couriered”. The Authority declined jurisdiction to hear the appeal on the basis that the prescribed fee had not been paid. On judicial review and a subsequent appeal the Court of Appeal concluded that the Authority had been correct in declining jurisdiction on the basis that the faxed cheque did not amount to the application being accompanied by the prescribed fee.

[13] This view is confirmed by the case of *Customs Appeal Authority No 29/98* (1999) 1 NZCC 51,128. In that case a party wished to appeal from an assessment of customs duty. A 20-day time limit applied. The appropriate notice of appeal was filed in time but it was not accompanied by the prescribed fee. The appellant was notified of this defect and the fee was provided some days later. When the fee was paid the time for appeal had expired. The notice of the decision of Customs had indicated the time for appeal from the decision but had not noted the requirement that a fee be paid (which is similar to the notification by the Standards Committee of its decision in this case). Following the rule in *Cahayag* Judge Barber considered that the appeal had not been properly brought and the Authority had no jurisdiction to hear the matter. It is of note that his honour considered that this conclusion was not affected by the fact that the registrar had indicated that a late fee would be accepted.

[14] I conclude that the prescribed fee accompanied the application made on 18 March 2009. Accordingly the application for review was not made until the receipt by this office of the application and fee on 18 March 2009.

### **Conduct of Office**

[13] It is also appropriate to consider whether the conduct of this office has any bearing on whether the application was properly made. In particular Client D complains that when he enquired as to the facsimile number of this office he was not informed of the formalities required to make an application. An argument that a duty exists to explain defects in an application was raised in *Cahayag*. There the Court of Appeal concluded that on the facts no such duty could arise. In the present case there is no suggestion that Client D indicated to the staff of this office that he was making an application for review, let alone that he was doing so on the last day of the limitation period. In light of this there can be no suggestion that the failure of this office gives rise to any rights in Client D favour. It should also be noted that when the issue of lateness was discussed it was made clear to Client D by email of 17 March 2009 that whether or not jurisdiction to hear the matter existed would be determined by the Legal Complaints Review Officer.

[16] In any event there would be considerable obstacles to an argument that the jurisdiction of this office to receive an application out of time was in any way enlarged by some failure to explain on the part of staff of the office. As Judge Barber observed in *Customs Appeal Authority No 29/98* (1999) 1 NZCC 51,128 the jurisdiction of a tribunal cannot be extended by the conduct or omissions of its staff.

### **Consequences of application being out of time**

[15] The provisions of s 198 are clear in that the application “be lodged with the Legal Complaints Review Officer within 30 working days”. The cases are clear in showing that where the applicable rules set out the manner in which an application for appeal or review is to be brought those rules must be complied with: *Inglis Enterprises Ltd v Race Relations Conciliator* (1994) 7 PRNZ 404; *Dawson v Chief Executive Officer of the Ministry of Social Development* [2007] NZCA 94; *Cullen v Police* (1999) 14 PRNZ 315.

[10] In this case the letter to the facsimile of 12 March 2009 failed to comply with s 198 in that it was not in the prescribed form and was not accompanied by the prescribed fee. Accordingly the application was not properly made until 18 March 2009.

[13] In the present case between 28 January 2009 and 18 March 2009 thirty-four working days had elapsed. The application for review was therefore made outside of the time limit imposed by s 198.

#### **Power to extend time**

[14] Client D has not explicitly asked me to extend the time for the making of an application to this office, however, in his application he notes that the application is out of time and gives reasons for the delay. In light of this it is appropriate for me to consider whether time for making an application can be extended.

[15] The Jurisdiction of the Legal Complaints Review Officer is entirely statutory and I have only the powers conferred by that Act. While the Act gives broad powers to determine the appropriate procedures for review (for example in s 200 and s 206(3)) such discretion does not extend to the question of whether jurisdiction to hear the review exists.

[16] The Act sets out in s 198 the basis upon which my powers to conduct a review are triggered. There is no provision in that section (or elsewhere) for time to be extended. I acknowledge that this may be a harsh result and there may be numerous instances where for one reason or another a party to complaint may have been unable to make an application within the required period (although I make no finding as to whether this is such a case).

[17] I am reinforced in this conclusion by the fact that similar conclusions have been reached in other jurisdictions. Thus in *Inglis Enterprises Ltd v Race Relations Conciliator* (1994) 7 PRNZ 404 it was held that the High Court had no jurisdiction to extend time for the making of an appeal where the empowering statute set clear time limits. Some guidance can also be taken from *Commerce Commission v Roche Products (New Zealand) Ltd* [2003] 2 NZLR 519. In that case the Court of Appeal strictly applied time limits applicable to the bringing of penalty proceedings under the Commerce Act 1986 refusing to recognise any power to extend time in respect of a statutorily imposed limitation period.

[18] Similarly applications for review under s135 of the Accident Insurance Act 1998 (since amended and renamed the Injury Prevention Rehabilitation and Compensation Act 2001) were subject to a strict 3-month time limit prior to the 2001 amendments. The

courts repeatedly upheld the strictness of that time limited and rejected the existence of any power to extend time (see for example *Zehnder v ARCIC* 12/7/95, Judge Middleton, DC New Plymouth 73/95).

[19] I note further that had the legislature intended to give me a power to extend the time for accepting an application for review it could have done so by the addition words to that effect. Such words are found in other comparable legislation. See for example s 66 of the Legal Services Act 2000 and s 135(3) of the Injury Prevention Rehabilitation and Compensation Act in 2001.

[20] It should also be observed that my jurisdiction is a summary one and that it is an express statutory purpose that complaints against lawyers be processed and resolved expeditiously (s 120(2)(b)). The absence of a power to extend the time to make an application for review ensures that there is finality to the complaints process.

[21] In light of this I conclude that I have no power to extend the time within which an application for review may be made.

## **Result**

[22] In light of the foregoing I conclude that I have no jurisdiction to conduct a review in this matter.

**DATED** this 27<sup>th</sup> day of March 2009

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Duncan Webb

## **Legal Complaints Review Officer**

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

Client D as applicant  
Lawyer T as respondent  
The Auckland Standards Committee 2  
The New Zealand Law Society