

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

[2020] NZLCRO 177

Ref: LCRO 063/2020

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

SJ

Applicant

AND

**APPLICATION FOR REVIEW OF
A PROSECUTORIAL DECISION**

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

Introduction

[1] Mr SJ has applied for a review of the determination by [Area] Standards Committee [X] to refer all matters arising out of an own motion investigation to the Lawyers and Conveyancers Disciplinary Tribunal.

Background/Standards Committee determination

[2] Following an approach in 2016 from an old friend (Mr QR), Mr SJ agreed that Mr QR could join him in practice as a consultant. That proposal seemed to be a 'perfect fit' for Mr SJ. He says:¹

... from my perspective that as retirement is fast looming being joined by Mr QR gave me an option with respect to backing my practice into his at a later date to give continuity to my own clients. My own succession plan if you like,

¹ Undated response from Mr SJ to the Inspectorate Report.

something which poses a difficulty for all sole practitioners when they approach retirement.

[3] In December 2015, Mr QR had been suspended by the Tribunal for a period of nine months, concluding 23 September 2016. As his period of suspension was coming to an end, Mr QR applied for his practicing certificate to be reinstated. It was noted by the Practice Approval Committee that Mr QR "... intends to act as an independent consultant to 'SJ' who is a sole practitioner with a trust account".

[4] The Committee noted that at the time, there were four open complaints against Mr QR, and although expressing concern about the "serious nature of the allegations in the open complaints it noted it has a limited jurisdiction and could not, in the interests of natural justice, take into account matters which were outside its jurisdiction and under current investigation".

[5] The Committee approved Mr QR's application for a practicing certificate.

[6] Soon after, Mr QR joined Mr SJ's practice as a consultant.

[7] On 24 March 2017 and 28 March 2018, Mr QR had provided certificates to the New Zealand Law Society pursuant to s 317 of the Lawyers and Conveyancers Act 2006 (the Act). The certificates read:

I hereby certify that this practice:

Has not done any of the things specified in s 112(2)(b) of the Act during the preceding 12 months; and

Does not intend to do any of those things during the following 12 months.

I understand that:

The Law Society must be notified immediately if the practice is no longer entitled to rely on section 112(2) of the Act.

[8] Following an Inspectorate review of Mr SJ's practice in 2018, the [redacted] Inspectorate (Mr NB) wrote to the Lawyers Complaints Service:²

In the course of an Inspectorate review of 'SJ' it was noted in [a] range of matters that QR Law Ltd (Mr QR's practice) had been conducting property transactions through the trust account. Mr QR does not operate a trust account and is not entitled to do so.

² Mr NB, letter to the Complaints Service (18 September 2018).

[9] Following Mr NB's letter to the Complaints Service, [Area] Standards Committee 2 "resolved to commence an own motion investigation under s 130(c) of the [Act] and to appoint Mr NB as investigator pursuant to s 144(1) of the [Act]".³

[10] The ensuing trust account review report by Mr NB is comprehensive and expresses concern about transactions conducted by Mr QR as a solicitor being dealt with through Mr SJ's trust account.

[11] Mr NB's concern was that Mr QR was effectively operating his own practice using Mr SJ's trust account, in breach of Mr QR's certificates to the Law Society. For his part, Mr SJ says:⁴

Mr QR ... is I believe authorised to operate a trust account should he elect just as we are authorised to support him as our consultant.

As has been stated throughout both QR and SJ were of the opinion QR as a consultant by our firm was fully entitled to transact business through SJ trust account.

The contention Mr QR was throughout required to have his own trust account was not borne out by what we considered was the authority given and taken from Mr QR to operate as an independent consultant to our firm by the NZLS practice approval Committee. It was Mr QR's contention the Law Society was happy that following suspension he would not operate a trust account immediately and would essentially be subject to "voluntary supervision".

[12] In addition to the matters involving Mr QR, Mr NB also identified other issues arising out of the audit. These are reflected in the Notice of Hearing issued by the Standards Committee:⁵

- (i) Whether Mr SJ's failure to maintain a cashbook (control account) constituted a breach of section 112(1)(c) of the LCA and/or Regulation 14 of the TAR.
- (j) Whether Mr SJ reported to clients as required by Regulation 12(7) of the TAR in respect of the dormant balances referred to in paragraph 2.6 of the Report.
- (k) Whether Mr SJ's monthly certificates to NZLS pursuant to regulation 17 of the TAR contained false certifications by failing to report any non-compliance with the Regulations or Practice Rules and if so, whether he breached Rule 2.5 of the RCCC.

[13] After considering Mr NB's report and the comprehensive response from Mr SJ, the Committee resolved to refer all matters to the Lawyers and Conveyancers Disciplinary Tribunal.

³ [Area] Standards Committee [X], meeting minutes, (11 October 2018).

⁴ Response, above n 1 at [2.2] and [2.4].

⁵ Standards Committee Notice of Hearing (11 November 2019).

Mr SJ's application for review

[14] Mr SJ has provided five reasons for his application for review of the Standards Committee determination:⁶

1. The Standards Committee determination does not appear to attempt to resolve any of the issues raised in the Notice of Hearing:

It is submitted that many of the issues identified are capable of a determination in a hearing on the papers eg 1(c)ii, 1(d)(i)(ii), 1(e), 1(f), 1(g), 1(h), 1(i), 1(j), 1(k)
2. There is no feedback in the Standards Committee's determination merely a blanket referral to the NZ Lawyers and Conveyancers Disciplinary Tribunal.
3. QR requested to be heard in person by the Standards Committee to assist them in their determination but the request was declined.
4. Request that the Legal Complaints Review Officer investigate the matters complained of and make a ruling if applicable or refer those capable of determination at Committee stage back to a Committee for such determination.
5. Investigate whether it was in the interests of natural justice that the Committee would not hear from the defendant QR/SJ in person so as to be better informed and to allow a better understanding of the issues involved and to resolve all or some of the issues identified in the notice of hearing.

[15] The outcome he seeks is:⁷

- (1) A determination of all or some of the issues by the LCRO, or
- (2) A referral back to the Standards Committee with the ability for oral submissions to be made and a redetermination of those issues able to be dealt with.

Review

[16] A review hearing, attended by Mr SJ and his wife,⁸ took place on 16 September 2020.

[17] My immediate view, on reading Mr NB's report was that, by his actions, Mr SJ had enabled Mr QR to continue to practice through Mr SJ's trust account, in

⁶ Application for review (5 April 2020) at Part 7.

⁷ Above n 6, part 8.

⁸ Mr SJ's wife has been an integral part of Mr SJ's practice for many years, maintaining all accounting records and providing other assistance. Mr SJ advised that he relied upon Mrs SJ to assist with overseeing Mr QR's transactions.

contravention of the certificates provided by Mr QR to the New Zealand Law Society.⁹ This view is reinforced by the fact that Mr SJ gave Mr QR authority to operate his trust and practice accounts.

[18] Paragraph 6.11 of the Lawyers Trust Account Guidelines issued by the New Zealand Law Society, includes significant cautionary notes where signing authority is provided to an employee. Mr QR was not Mr SJ's employee, but the precautionary notes remain relevant.

[19] Many of Mr QR's communications with various parties are made on QR Law Ltd letterhead and do not include the words "Consultant to SJ" after his name. On occasions, Mr QR paid fees from Mr SJ's trust account to himself and the fees were also paid by Mrs SJ from the firm's practice account. This would indicate that there was no close scrutiny of payments being transacted through Mr SJ's trust account.

[20] One of the fundamental questions to be answered in this matter, is whether the decision made by Mr SJ to take Mr QR into his practice as a consultant, and give him authority to operate the firm's trust and business accounts, was made with knowledge of the restrictions on Mr QR by reason of the certificates provided by him to the Law Society, and taken with the intent to enable Mr QR to avoid these. That is a question that demands to be addressed in a somewhat more formal environment than that of this Office.

[21] There are many judgments of the Court, and decisions of this Office referring to those judgments, which establish that referral to the Tribunal does not amount to a prejudgement of the issues by either the Standards Committee or this Office and that, unless the conduct is manifestly appropriate, this Office will not interfere with a determination by the Committee to refer matters to the Tribunal.

[22] I refer briefly to some of these authorities:¹⁰

[59] ... In *Orlov v New Zealand Law Society* ... the Court held that there was no threshold test to meet before matters could be referred to the Tribunal.¹¹ The Court also held:¹²

⁹ Depending on the Tribunal's view of the role of a consultant to a law firm, Mr QR may potentially have been in breach of the terms of his practising certificate.

¹⁰ *QR (Application for review of a prosecutorial decision)* LCRO 64/2020 (7 September 2020).

¹¹ [2013] NZCA 230 at [53].

¹² At [50].

... a decision [to lay charges] does not determine the outcome of the complaint. It only determines which body should be seized of it. The decision is procedural in nature and occurs at a very preliminary stage of what is a comprehensive statutory process involving several checks and balances in what the legislature saw as a more responsive regulatory regime.

[60] ... In *FF v Wellington Standards Committee* I referred to the principles which Review Officers have had regard to when addressing this issue.¹³

[49] [Cases previously referred to] 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:

- (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.

[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”.

...

[62] In the same decision, the Review Officer said:¹⁴

[9] The practitioner’s review application largely sought to challenge the sufficiency of the reasons for a referral to the Tribunal. However, I observe that these are matters that the practitioner can put before the Tribunal.

[10] I have noted above the scope of review of prosecutorial decisions is narrow. I have considered all of the practitioner’s review grounds but I cannot find any that fall within the accepted grounds mentioned above or any similar grounds, which would vitiate the Standards Committee decision.

[11] The Committee’s power to refer a practitioner to the Tribunal arises pursuant to Section 152(2) if, in the view of the Committee, concerns have arisen in a professional context, which, if proven, could lead to a finding of misconduct. It is not my role, on review, to decide whether or not the evidence is sufficient to support a finding of misconduct. It is enough that there is some evidence to support a complaint that is of sufficient gravity to warrant a referral to the Disciplinary Tribunal.

...

¹³ LCRO 23/2011 (27 September 2011) at [49]–[51].

¹⁴ At [9]–[11].

[64] In another decision of this Office,¹⁵ the Review Officer commented on the limited occasions when this Office would disturb a determination by a Standards Committee to refer matters to the Tribunal. He said:¹⁶

I observe the general stance in common law jurisdictions is to take a very restrictive stance in respect of the reviewability of a decision to prosecute since “the prosecutor’s function is merely to do the preliminary screening and to present the cases, and that the decisions that count are made on the basis of the trial” [authorities cited omitted]

There is a strong pragmatic argument that the disciplinary process should not be prolonged by permitting a review of a decision to prosecute. Any arguments that the decision to prosecute is ill founded can of course be properly raised before the Tribunal itself....

[23] The Committee has before it, a comprehensive report which identifies a number of instances where Mr NB considers Mr SJ has breached the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, the provisions of the Lawyers and Conveyancers Act 2006, and the regulations promulgated pursuant to that Act. That constitutes sufficient grounds to refer matters to the Tribunal, where the full details of each instance can be examined in detail, and where Mr SJ will have full opportunity to defend the charges brought against him, present evidence, and provide submissions on the law.

[24] Notwithstanding the above comments, there are a number of mitigating factors in Mr SJ’s favour that require careful consideration. I set these out in the following paragraphs.

[25] The majority of Mr NB’s concerns relate to the conduct of Mr QR, in respect of the manner in which he was directing transactions through Mr SJ’s trust account, thereby being in breach of the certificates provided by him to the Law Society. It is primarily Mr QR’s conduct which is under the ‘spotlight’, as it was he who provided the certificates to the Law Society.¹⁷ The question with regard to Mr SJ’s involvement, is whether or not he was facilitating Mr QR’s conduct, knowing that Mr QR and himself were in breach of various obligations.

[26] This is a difficult question to answer. The only information available on which a decision can be made in this regard, is Mr SJ’s assertions that he genuinely believed it was in order for Mr QR, as a consultant to the firm, to conduct transactions through Mr SJ’s trust account, and to have authority to operate the firm’s accounts. Mr SJ has

¹⁵ *Poole v Yorkshire* LCRO 133/2009 (11 November 2009).

¹⁶ At [15]–[16].

¹⁷ And potentially the terms of his practising certificate

been quite open in this regard. However, I have some hesitation in wholeheartedly accepting that assertion. Mr SJ will be aware of the many 'semi-retired' lawyers fulfilling an ongoing role as consultants to their former firms. That role does not amount to 'business as usual' for the consultant.

[27] Mr SJ says he acted to help Mr QR as an old friend¹⁸ and to facilitate a handover of his practice following his imminent retirement, driven largely by a concern to ensure his clients were looked after. He advises that he has been in practice for 40 plus years and has had no complaints against him,¹⁹ and previous audits have not identified any breaches of the trust account rules or any other rules and regulations governing the conduct of lawyers. There is no indication that it was in Mr SJ's nature to "bend the rules".

[28] Mr SJ has retired from, and wound up, his practice. He no longer holds a practising certificate and advises he does not intend to apply for one again. Following the review hearing, a check of the internet returned several entries for Mr SJ's practice so that it seemed that his practice remained active. The reason for the internet search was to establish whether Mr SJ had passed his practice over to Mr QR. On enquiry by this Office, Mr SJ advised that he has immediately removed all entries on the internet referring to his firm and that he did not sell his practice to anyone. He advises that he has referred many clients to local firms of solicitors. In these circumstances, protection of the public is no longer an issue if there were to be any concerns about Mr SJ.

[29] Finally, Mr SJ advises that he has suffered ill health in recent times, necessitating hospital care for some weeks. There is no doubt that referral to the Tribunal will add to the pressures on Mr SJ and his wife.

Summary

[30] The above discussion for and against confirming the determination of the Committee presents a difficult decision to be made on review. However, I have determined that this is a matter which demands to be considered in a forum that is better suited to addressing the issues raised by Mr NB's report, and Mr SJ's responses.

[31] The factors that lead to this decision are:

¹⁸ Mr SJ advises that he has been friends with Mr QR [redacted].

¹⁹ I am aware of a complaint being made against Mr SJ and Mr QR jointly and have otherwise not been able to independently verify this claim.

- (a) In his response to the Committee, Mr SJ refers to Mr QR as being a “knowledgeable, experienced, and trustworthy senior lawyer”.²⁰ Mr SJ can not have been unaware of Mr QR’s disciplinary history and even if he were not, Mr QR’s reference to being in a ‘spot of bother’²¹ with the Law Society should have led a prudent practitioner to make inquiries as to what that ‘spot of bother’ was.
- (b) It is somewhat unusual, if not unheard of, for a consultant to be given operating authority on a firm’s trust account, much less the firm’s practice account. Having made inquiries as referred to in [30](a) above, Mr SJ could then have decided whether Mr QR should have been provided with the degree of trust that he was.
- (c) Viewed objectively, and on the basis of Mr NB’s report, it should have become apparent to Mr SJ after a short while, that Mr QR was continuing to carry on his practice using Mr SJ’s trust account. That is not the role of a consultant. Precisely what that role is needs to be carefully considered and determined in a forum that is somewhat more suited to addressing that issue.
- (d) Mr NB’s report is extremely detailed and although Mr SJ provided a similarly detailed response to the Standards Committee, the matters raised need to be closely scrutinised, evidence to be heard in person under oath, and for those persons to be subject to cross-examination. The processes of the Standards Committee and this Office do not provide that opportunity.
- (e) Without intending to diminish the seriousness for Mr SJ of a referral to the Tribunal, the fact that he has retired and wound up his practice means the referral will not affect his ongoing career. This is a factor which needs to be weighed against any adverse findings by the Tribunal. It is not a reason in itself for reversing the determination of the Standards Committee.

²⁰ Response, above n 1 at [2.2].

²¹ Mr NB, letter to LCS (18 September 2018) at p1.

Decision

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

DATED this 28TH day of SEPTEMBER 2020

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 SJ as the Applicant
[Area] Standards Committee {X}
New Zealand Law Society