

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

[2020] NZLCRO 165

Ref: LCRO 64/2020

CONCERNING

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

CONCERNING

a determination of the [Area] Standards Committee [X]

BETWEEN

QR

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] Following an own motion investigation into the conduct of Mr QR, [Area] Standards Committee [X] determined:¹

... that the matter and any and all issues involved in this matter, should be considered by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal pursuant to section 152(2)(a) of the Lawyers and Conveyancers Act.

[2] Mr QR has applied for a review of that determination.

Background

[3] On 18 September 2018, the [redacted] New Zealand Law Society Inspectorate (Mr NB) wrote a letter to the Lawyers Complaints Service. The first two paragraphs of that letter read:

¹ Standards Committee determination (24 February 2020) at [1].

In the course of an Inspectorate review of '[SJ]' it was noted in a range of matters that QR Law Limited (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.

On 3 October 2016, Mr QR completed a s317 form to elect 'during the next year not to receive, in the course of providing any related services to the public, any money or other valuable property in trust for any person'.

[4] In his letter, Mr NB also referred to certificates provided by Mr QR on 24 March 2017 and 28 March 2018 to the Law Society in which Mr QR certified 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.

[5] Section 112 of the Lawyers and Conveyancers Act 2006 (the Act) provides:

112 Obligation to keep records in respect of trust accounts and valuable property

(1) If, in the course of the practice of a practitioner or an incorporated firm, the practitioner, a related person or entity, or the incorporated firm receives or holds money or other valuable property in trust on behalf of any person, the practitioner, related person or entity, or incorporated firm—

(a) must, in relation to the money, keep trust account records that disclose clearly the position of the money in the trust accounts of the practitioner, related person or entity, or incorporated firm; and

(2) Subsection (1) does not apply to a person (being a practitioner, related person or entity, or incorporated firm)—

...

(b) who, in the course of providing regulated services, does not, on that person's own behalf or in his or her capacity as a director or shareholder of an incorporated firm, do any of the following:

(i) receive or hold money or other valuable property in trust for any other person:

(ii) invest money for any other person:

(iii) have a trust account:

(iv) receive fees or disbursements in advance of an invoice being issued.

...

[6] Section 112 builds on the obligations of practitioners set out in s 110 of the Act which requires “a practitioner who, in the course of his or her practice, receives money for, or on behalf of, any person” to pay the money into a trust account operated by the practitioner or a related entity as that term is defined in s 6 of the Act. Section 6 defines that term as:

in relation to a lawyer, any body (including a partnership or body corporate) on behalf of which, or in association with which, the lawyer provides, whether in his or her capacity as an employee, shareholder, or director or in any other capacity, regulated services to the public; ...

[7] In September 2016, Mr QR had joined the practice of Mr SJ in the capacity of a consultant. Mr NB’s report identified a number of transactions where it appeared that Mr QR was making use of the trust account operated by Mr SJ to facilitate transactions and that thereby, he was in breach of the Act and the certificates provided by him.

[8] At a meeting on 11 October 2018, the Standards Committee considered the report from Mr NB and 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]”.

[9] On 16 October 2018, a Legal Standards Officer (LSO) of the Lawyers Complaints Service wrote to Mr QR advising him of the terms of the resolution. It is important to note that, with that letter, the LSO provided Mr QR with copies of Mr NB’s letter of 18 September, together with the appendices attached to that letter.

[10] In the letter, the LSO invited Mr QR to “make a written explanation in relation to the issues of concern identified in Mr NB’s letter”. Mr QR responded² in some detail to the issues raised in Mr NB’s report and provided copies of a number of documents in support of his response to the issues raised.

[11] He concluded his letter with allegations that “Mr NB had predetermined the matter without seeking any reasonable explanation” and that the Committee also was biased against him to the extent that its objectivity was “clouded”.

[12] Notwithstanding Mr QR’s objections, Mr NB proceeded with the investigation as required by the Standards Committee and provided his report³ to the Standards Committee. In the executive summary of the report, Mr NB presented eight findings which he considered potentially caused Mr QR to be in breach of various sections of

² Mr QR, letter to Lawyers Complaints Service (26 November 2018).

³ Report dated 21 November 2018.

the Act, various Conduct and Client Care Rules,⁴ and various Trust Account Regulations.⁵

[13] Mr NB's report comprises 14 pages of detailed facts about various transactions conducted by Mr QR together with 210 pages of appendices.

[14] On 24 February 2020, the Committee resolved that all matters should be referred to the Lawyers and Conveyancers Disciplinary Tribunal.

Mr QR's application for review

[15] In the letter provided with the review application, Mr QR first expressed concern that the matter had been considered by [Area] Standards Committee [X]. He says:⁶

I am particularly concerned that [Area] Standards Committee [X] even considered this matter as they are clearly conflicted and not objective as they have been involved in previous matters against me. I do not consider they have been objective in any way in assessing the inspector's inaccurate report.

[16] He continues:

I also wish to complain about the extraordinarily abrasive and bullying behaviour of the inspector Mr NB who at his first meeting with my very good and supportive colleague [SJ], reduced RJ, his wife and legal executive of some 40 years' experience, to tears.

[17] He considers it a coincidence that "Mr NB came to inspect Mr SJ's trust account (and I was consulting to Mr SJ) within 3 weeks of me appearing before the Disciplinary Tribunal on (date)" with regard to another matter.

[18] Mr QR also asserts that:

If the committee had not been so dilatory in the first place and bothered to read my lawyer's letter of explanation dated 16th September 2016 they could have made a finding of unsatisfactory conduct themselves and saved me literally \$100's of thousands in unnecessary legal costs.

[19] That comment relates to previous matters which are not the subject of this review.

[20] Mr QR "cannot understand why the Committee would not have given me the courtesy of an oral hearing" and that by denying him this opportunity to be questioned and provide answers, he had been denied natural justice.

⁴ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

⁵ Lawyers and Conveyancers Act (Trust Account) Regulations 2008.

⁶ Mr QR, supporting letter to application for review (5 April 2020).

[21] Mr QR also refers back to matters relating to his previous firm [law firm] which have no relevance to this review and will not be addressed further in this decision.

[22] Mr QR advises that:

When it came for me to reapply for my practicing certificate, the complaint by Mr CM referred to above was still extant. In receiving absolutely no advice or encouragement from the Law Society, I deemed it sensible initially not to apply to run my own trust account but to work as a consultant for my long-standing colleague and friend, [SJ].

[23] The outcome of the review that Mr QR seeks is:

“reverse the decision of the standards committee and make a finding that there were no breaches of any rules or acts”.

[24] That would require a consideration in detail of Mr NB’s report, all of the evidence in relation to the matters raised therein, and to make decisions on each and every matter referred to.

Process of review

[25] Following initial correspondence with Mr QR, he advised that he considered “that it is in the interests of justice that both my review and that of SJ be held together as the facts and circumstances are inextricably entwined”.⁷

[26] Mr QR was advised⁸ that I had directed the review was to proceed independently of the application for review lodged by Mr SJ.

[27] A hearing was scheduled for 7 August 2020.

[28] On 29 July, a Minute was sent to Mr QR in which I advised him that the review would not provide the outcome he sought⁹ and that the review hearing would not provide Mr QR with the opportunity to respond in detail to the matters raised in Mr NB’s report, which would require evidence to be adduced and witnesses cross-examined.

[29] I advised that the only issue to be addressed on review would be whether the Committee’s determination to refer the matter to the Tribunal was an appropriate determination for the Committee to have made.

⁷ Mr QR, email to LCRO (22 July 2020).

⁸ LCRO, email to Mr QR (22 July 2020).

⁹ See [23] above.

[30] Mr QR queried the content of, and reasons for, the Minute. In response, he was advised¹⁰ that I considered the issues in question were best addressed before the Tribunal and that it was “by no means a foregone conclusion that referral to the Tribunal will result in an adverse outcome”.

[31] These communications effectively identified what I considered to be the major issue to be addressed on review:

“Does the cost to Mr QR, and the personal trauma involved, outweigh the need for the detailed issues raised in Mr NB’s report to be considered in a forum best suited to consider these matters?”

At the review hearing Mr QR also referred to the humiliation involved in appearing before the Tribunal.

[32] The hearing proceeded as scheduled on 7 August. Mr QR was represented by Mr VT QC.

[33] On entering the hearing room, I was advised that also present were Mr and Mrs SJ, and Mr QR’s wife. Mr QR had previously been advised that this review would be addressed separately from Mr SJ’s. The reason for this is that I consider the issues to be different for each party and matters of privacy were important, so that each applicant would be able to be frank and free to make comments that he may not otherwise be able to make in the presence of the other.

[34] I therefore asked Mr and Mrs SJ to withdraw which they immediately did. I had no issue with Mrs QR remaining. She left the hearing room part way through the hearing.

[35] Mr VT submitted that the matters addressed by the Committee should be made available to Mr QR in order that he might respond, and that reasons should be provided to him by the Committee for its determination to refer matters to the Tribunal. I therefore agreed to provide Mr VT with agenda notes and minutes of the meetings of the Committee. These are specified in the attachment to this decision.

[36] Mr VT responded with comments¹¹ and these are addressed in the section of this review relating to that issue.

¹⁰ LCRO, email to Mr QR (31 July 2020).

¹¹ Mr VT, letter to LCRO (31 August 2020).

Review

Bias

[37] I deal first with the allegations of bias levelled at Mr NB and the Standards Committee.

[38] Mr NB is a professional. His report comprises the facts as ascertained by him. Members of the Standards Committee are experienced lawyers whose everyday practice requires them to be objective and assess evidence provided.

[39] Section 129 of the Act requires at least one member of the Committee to be a lay member. In addition, members of Standards Committees change from time to time and there is no information before me as to whether the members of the Committee who made the current determination, included members of the Committee which made previous determinations in respect of matters relating to him.

[40] The judgment of the Supreme Court in *Saxmere Co Ltd v Wool Board Disestablishment Ltd* establishes the test for recusal by an adjudicator:¹²

It is well established that apparent bias arises only if a fair-minded and informed lay observer might reasonably apprehend that there is a real and not remote possibility that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.

[41] Mr QR makes allegations against the Committee members and Mr NB. I consider that my comments in [39] above, would be factors which any 'fair-minded lay person' would take into account, and reach the conclusion that Mr QR's allegations have no substance, but are driven by his perception that he is being unfairly treated by the various arms of the disciplinary process.

[42] There is nothing provided on which I could make a decision to accept Mr QR's allegations. These allegations and comments constitute a somewhat emotional, and unsubstantiated view of Mr QR. In themselves, they lack the objectivity that he accuses Mr NB and the Committee of lacking.

[43] They are not accepted as reasons for reversing or modifying the Committee's determination.

¹² [2009] 1 NZSC 72.

Mr QR's application for review

[44] Mr QR's application for review traverses his past dealings with the complaints and disciplinary process.

[45] In the main, Mr QR's application constitutes a somewhat bitter and accusatory attack on the Law Society and persons involved in this and previous issues relating to his involvement with the complaints and disciplinary process.

[46] His principal submission, and those made by Mr VT QC, is that all material considered by the Committee should be made available to Mr QR and that he should have been provided with the opportunity to address the detail of Mr NB's report in person before the Committee. In essence, they submit that the Committee should have conducted the equivalent of a 'hearing' to allow Mr QR to address all of the matters raised by Mr NB.

[47] That was the main submission made on review. As the Committee has not followed that process, they submit that I should myself provide Mr QR with that opportunity.

[48] Where a Standards Committee has not considered particular issues involved in a complaint (in this case, an investigation) the matter is referred back to the Committee to address its oversight. Although Standards Committees have the option of taking evidence on oath¹³ (and by implication receive evidence in person), the matters raised in Mr NB's report, require a degree of consideration that is not suited to meetings of Standards Committees.

[49] It is certainly in Mr QR's interests to be able to address the issues in detail, and at his option to be represented by counsel, and to adduce evidence from witnesses. The entity which considers these matters, may wish to ask questions of Mr QR and any witnesses who appear before it. The Tribunal presents as the best forum to undertake that process.

Agenda notes / minutes

[50] Mr VT submitted that the process adopted by the Standards Committee must be transparent, and everything that was before the Committee should be disclosed to Mr QR. That is inherent in the requirement that the Standards Committee process must comply with the rules of natural justice.¹⁴

¹³ Section 151(2) of the Act.

¹⁴ Section 142(2) of the Act.

[51] The only material on the Standards Committee file that was not disclosed to Mr QR were the agenda notes and Minutes of meetings of the Standards Committee. Section 142(3) of the Act enables Standards Committees to regulate their procedure as they see fit, and it is reasonable for Committees not to provide copies of such documents to the parties. However, to meet the concerns of Mr QR and Mr VT, I have, in this instance, provided these documents to them.¹⁵ The documents provided are listed in the attachment to this decision.

[52] Mr VT responded by way of a letter dated 31 August. He notes that the Committee considered a sample of Mr QR's files but declined Mr QR the opportunity to address the Committee in person. He says that I am now in the same position as the Committee and that I am required to conduct a 'substantive review' of these files. He advises that Mr QR seeks a hearing before me "in order to advance submissions that the Committee has not discharged its function properly in relation to the investigation."

[53] Mr VT says, that at the hearing on 7 August I "advised that a further hearing ... would take place." That is a misinterpretation of the response by me to Mr VT's request that the agenda notes and Minutes be provided to Mr QR.

[54] At the hearing, I advised Mr VT and Mr QR that I considered that, in the circumstances, the review was continuing, and any submissions provided by them after receipt of these documents, would be taken into account. That was not a commitment to conduct a further hearing, as it depended on whatever submissions Mr VT made following receipt of the documents.

[55] The essential point made by Mr VT in his letter, is that the sample files should be obtained, and that I then should allow Mr QR to "identify the factual errors, put forward the correct position (based on the material held), and address me on the factual and legal issues the Committee has considered."

[56] Mr QR could have taken the preliminary step of providing to me the files provided to the Committee, and then made detailed comments on the matters referred to by Mr NB in relation to those files. He did not do that. Nor did he request that process be undertaken until made by Mr VT in his letter.

[57] Mr NB's report refers to many issues. The Standards Committee considered a sample of Mr QR's files referred to in the report, and reached the view that the proper forum before which all matters referred to in the report should be considered is the Lawyers and Conveyancers Disciplinary Tribunal.

¹⁵ This is not intended to either require Standards Committees to do so henceforth, or to establish any precedent to be followed by this Office.

[58] To do as Mr QR requests in his application for review (see [23]) particularly his requested outcome to “make a finding that there were no breaches of **any** rules or Acts) is beyond the jurisdiction of this Office. Neither the Standards Committee or this Office can undertake to do this.

[59] The decision as to what constitutes the best forum in which to examine matters was commented on by the Court of Appeal in *Orlov v New Zealand Law Society* where the Court held that there was no threshold test to meet before matters could be referred to the Tribunal.¹⁶ The Court also held:¹⁷

... 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 fulfilling the role required of it, this Office has proceeded with caution when considering whether or not to interfere with a determination by a Standards Committee to refer a matter to the Tribunal. In *FF v Wellington Standards Committee 2* I referred to the principles which Review Officers have had regard to when addressing this issue.¹⁸

[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”.

[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.

¹⁶ [2013] NZCA 230 at [53].

¹⁷ At [50].

¹⁸ LCRO 23/2011 (27 September 2011) at [49]–[51].

[61] Referring to these, the LCRO has said:¹⁹

The grounds notably do not include a review of the evidence relating to the complaint

That is what Mr QR and Mr VT are suggesting is required of a review officer on review.

[62] In the same decision, the Review Officer said:²⁰

[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.

[63] The Committee has before it, a comprehensive report which identifies a number of instances where Mr NB considers Mr QR has breached the rules of the 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 QR will have full opportunities to challenge those allegations, present evidence, and provide submissions on the law.

[64] In another decision of this Office,²¹ 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:²²

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....

¹⁹ *OJ v PTL* LCRO 168/2011 (27 July 2012) at [6].

²⁰ At [9]–[11].

²¹ *Poole v Yorkshire* LCRO 133/2009 (11 November 2009).

²² At [15]–[16].

[65] These comments suggest that I need not even consider the aspects of Mr QR's application to the extent I do.

[66] The submission that Mr QR should have been given the opportunity to address the Committee orally is addressed in another decision of this Office.²³ The Review Officer said:²⁴

... I am unable to see that the Practitioner was prejudiced in this matter by not being heard personally. He was fully informed of the issues under the Committee's consideration, and given the opportunity to answer them. The practitioner did in fact respond to those matters in a comprehensive way and his response was before the Standards Committee before it reached a determination on the matter. All of the above suggest that the principles of natural justice were fully complied with.

[67] Mr QR was provided with a copy of Mr NB's report and invited to comment on the matters raised therein. Mr QR availed himself of that opportunity, but did not address the report in detail. In some instances, he challenged Mr NB to provide further evidence to support his view²⁵ whilst in others, he simply denied what Mr NB stated in his report.²⁶

[68] Mr QR did not take advantage of the opportunity to respond fully and in detail to the matters raised. He submitted that it was "absolutely essential" that he be given the right to address the Committee in person. He makes a similar submission that process should be undertaken by myself.

[69] That submission is adequately answered by several of the decisions and authorities referred to above. In addition, the comment by Woolford J in *Zhao v Legal Complaints Review Officer* supports the view that consideration of a matter by a Standards Committee, or by this Office on review, is an adversarial process.²⁷

[70] His Honour said:²⁸

... I note however, that the regulatory context, the jurisdiction and the procedure of the LCRO that I have mentioned above mean that these processes are perhaps less than what would be regarded as entirely adversarial.

[71] If Mr QR's requests to be heard orally (either by the Standards Committee or myself) were to be allowed, it would be necessary to hear from the other party or at least Mr NB. If this were to occur, I am sure an adversarial process would ensue.

²³ *CN v Auckland Standards Committee 1* LCRO 106/2010 (23 September 2010).

²⁴ At [23].

²⁵ For example, [25].

²⁶ For example, [7].

²⁷ [2012] NZHC 3247.

²⁸ At [98].

[72] Finally, in a judgment by the Victorian State Court of Appeal, the Court said:²⁹

Axiomatically, what is 'reasonable' for this purpose will depend on the circumstances of the case. Matters to be taken into account in determining the practical content of fairness in the particular case will include

- the nature of the decision to be made;
- the nature and complexity of the issues in dispute;
- the nature and complexity of the submissions which the party wishes to advance;
- the significance to that party of an adverse decision ('what is at stake'); and
- the competing demands on the time and resources of the court or tribunal.

[73] The 'purpose' which the Court was referring to was to ensure that parties were given a reasonable opportunity to present their case. The matters referred to in Mr NB's report are complex, and neither a Standards Committee or this Office are equipped to consider the nature and complexity of the evidence and submissions that I expect Mr QR and Mr VT will wish to adduce and make. In addition, as Mr QR has strongly expressed, 'what is at stake' is significant. It is also in order for the Standards Committee and this Office to take into account the "competing demands on the time and resources of ..." the respective bodies. All of the factors referred to by the Court all support the view that the matters raised in Mr NB's report should be addressed before the Tribunal.

[74] I acknowledge that referral to, and a hearing before, the Tribunal is somewhat daunting, and difficult to endure on a personal level. Mr QR refers to that as the "human factor". However, the decisions and judgments referred to above, overwhelmingly support the determination by the Committee to put the matters raised in Mr NB's report before the Tribunal.

Conclusion

[75] After balancing the effects on Mr QR of answering charges before the Tribunal, against comments made in the various decisions of this Office and authorities cited, I remain firmly convinced that the determination of the Committee was the correct determination to make. The matters identified by Mr NB in his report refer to conduct that is not "manifestly acceptable" and it is appropriate that all of the matters referred to in Mr NB's report be considered by the Tribunal. The requirement for these matters to be thoroughly examined outweighs the personal cost to Mr QR.

²⁹ *Roberts v Harkness* [2018] VSCA 215 at [49].

[76] If Mr QR's confidence that he has not breached any provisions of the Act, the Rules or the Trust Account Regulations is vindicated, that in itself will be a significant beneficial outcome to him.

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

DATED this 7TH 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 QR as the Applicant
Mr VT QC as the Representative for the Applicant
[Area] Standards Committee [X]
New Zealand Law Society

Documents provided to Mr VT QC

1. Agenda note for meeting, 14 February 2019
2. Minutes of meeting relating to this matter
3. Agenda note for meeting, 9 May 2019
4. Minutes of meeting relating to this matter
5. Agenda note for meeting, 13 February 2020
6. Minutes of meeting / hearing, 13 February 2020