

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

**CIV-2018-485-970
[2019] NZHC 1961**

UNDER the Judicial Review Procedure Act 2016

IN THE MATTER of an application for review of the exercise of statutory power by a body constituted under s 126 of the Lawyers and Conveyancers Act 2006

BETWEEN A LAWYER
Applicant

AND NEW ZEALAND LAW SOCIETY
First Respondent

WELLINGTON STANDARDS
COMMITTEE NO 2
Second Respondent

Hearing: 17 and 18 June 2019

Counsel: F E Geiringer, J K Mahuta-Coye and F R O'Connor for Applicant
P N Collins for Respondents

Judgment: 13 August 2019

JUDGMENT OF THOMAS J

Table of contents

Introduction	[1]
Complaint 1	[6]
<i>Decision to inquire (Decision 1A)</i>	[19]
<i>Decision to appoint an investigator (Decision 1B)</i>	[23]
<i>Further material</i>	[26]
<i>Interim report</i>	[32]
Complaints 2 and 3	[35]

<i>Decision to inquire into and appoint an investigator into Complaints 2 and 3 (Decision 2)</i>	[42]
LCRO	[48]
Legislative framework	[54]
<i>The functions of standards committees</i>	[60]
Submissions	[75]
<i>The Lawyer’s submissions</i>	[75]
<i>Complaint 1</i>	[75]
<i>Complaints 2 and 3</i>	[77]
<i>Respondents’ submissions</i>	[82]
Are the Decisions amenable to judicial review?	[87]
<i>The nature of the statutory power being exercised</i>	[101]
<i>The stage that has been reached in the relevant statutory process</i>	[102]
<i>The extent the statutory power exercised is likely to be influential in the ultimate decision</i>	[109]
<i>Further opportunities in the statutory process to correct any apparent error</i>	[116]
Conclusion	[117]
Result	[119]

Introduction

[1] In 2015, two complainants made complaints to the New Zealand Law Society (NZLS) about a lawyer (the Lawyer). Almost four years later, the complaints remain unresolved. The Lawyer seeks judicial review of decisions by a standards committee of the NZLS (the Committee) to inquire into and appoint an investigator (the Investigator) in respect of the complaints. She also seeks judicial review of the Investigator’s interim report about one of the complaints, his direction the Lawyer produce documents and the nature and conduct of his investigations. The issue for this decision is whether such decisions are amenable to judicial review.

[2] The Lawyer’s application for review involves, essentially, two stages of the Committee’s complaints process. First, the decision to inquire and appoint the Investigator and, secondly, the process adopted thereafter. The Lawyer claims that the first step was properly capable of review on a factual analysis and the second stage involved the Committee outlining a process which exceeded the matters raised in any complaint and the Committee’s jurisdiction.

[3] NZLS participated in the hearing on the basis it was not taking a position as to the ultimate determination of the complaints but simply was concerned with whether

the impugned actions were amenable to judicial review. NZLS disputes that any of the impugned actions constitutes an exercise of a statutory power amenable to judicial review under the Judicial Review Procedure Act 2016. Rather, says NZLS, they are decisions of a preliminary and procedural nature and do not involve any conclusive adverse finding about the Lawyer or any curtailment or limitation on her ability to practise. Instead, the actions are consistent with the Committee's obligation to receive complaints and its entitlement to inquire into complaints in the performance of its statutory function.

[4] The Lawyer says the current state of the law is not that procedural steps or prosecutorial decisions are not amenable to review, but that those matters are relevant considerations at the discretionary stage of considering relief. If the review concerns a procedural step, then that is a species of the materiality consideration.

[5] I will briefly outline the three complaints. However, given the confidentiality provisions which apply to complaints, the explanation of the allegations is necessarily, but perhaps confusingly, cryptic.¹

Complaint 1

[6] Complaint 1 was made by email on 23 June 2015. The complainant (Complainant 1) is a lawyer in practice in the same subject matter areas as the Lawyer. The subject line in the email read:

URGENT Complaint about a lawyer poaching my clients in Treaty of Waitangi Litigation – [the Lawyer]

[7] Complainant 1 alleged that, while the Lawyer was not contacting her clients directly, she was doing so via an entity established to receive funding from a trust (the Trust) in connection with proceedings in the Waitangi Tribunal. Complainant 1 alleged the entity sent emails and invitations to her clients asking them to attend a hui and that contact details of her clients must have been obtained by the entity in an underhand way.

¹ Lawyers and Conveyancers Act 2006, ss 142, 148 and 188; Lawyers and Conveyances Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, regs 31 and 30.

[8] Complainant 1 asked NZLS to take steps to ensure that “this ‘around about way’ of ‘poaching’” did not continue. She said it was not the first time the Lawyer had tried to take one of her clients.

[9] Examples were provided in the form of emails from Ms T and Mr W to a client of Complainant 1 (the Client).

[10] Following Complaint 1, Ms T wrote to NZLS. She explained her role as a hapū liaison officer and that her reasons for contacting the Client and others was to obtain support for a submission to be put to the Waitangi Tribunal regarding various research projects. She said that, contrary to Complaint 1, she did not obtain a list of claimant names and contacts in an underhand way. The details, she said, were in the public arena. She said, once it was known that Complainant 1 objected, all attempts at contact were abandoned.

[11] Ms T said that she herself was a claimant and Complainant 1 was her lawyer.

[12] In her response to NZLS dated 5 August 2015,² the Lawyer explained that she had represented the entity since approximately 2006. She attached a copy of the entity’s trust deed. The Lawyer clarified that, while she represented the entity, she did not represent each of the individual claimants who affiliate to it, noting that approximately 15 law firms represented individual claimants.

[13] The Lawyer explained that the Trust had approved funding to the entity for oral and traditional history reports in respect of a Waitangi Tribunal inquiry. She said the entity believed in transparency and its members, and indeed all claimants, would have access to the research. She explained that regular hui were held to provide updates on research, as required by the Trust. This was done by hapū liaison officers. She confirmed that Ms T was a hapū liaison officer.

[14] The Lawyer questioned how there could have been any breach of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules)

² The Lawyer had been informed that written submissions about Complaint 1 were due by 22 July 2015.

“or any rule that would prohibit Māori leaders from talking to their kin”. She said, as a matter of clarification, she had no interest in “poaching” any of Complainant 1’s clients.

[15] Finally, the Lawyer attached an email from Mr W to Complainant 1 apologising if her clients were caused any anxiety by his contact and explaining the purpose of his email.

[16] On 7 August 2015, NZLS notified the Lawyer that Complaint 1 had been referred to the Committee.

[17] Complainant 1 responded to the Lawyer’s reply on 4 September 2015, raising further issues couched as a claim the Lawyer had breached the privilege that existed between Complainant 1 and her clients. She said the entity’s policy that hapū liaison officers contact claimants was an attempt to breach client counsel confidentiality, noting that the Lawyer now acted for Ms T. Complainant 1 gave other examples which she believed demonstrated the Lawyer had tried to poach her clients. Although Complainant 1’s response was provided to the Lawyer, no response was sought from her regarding the new allegations. The Lawyer was simply informed that the next step was for the Committee to meet and it would contact her once this had occurred.

[18] By her affidavit dated 30 March 2019, the Lawyer set out the responses she would have provided to NZLS had she known Complainant 1’s further complaints were also to be considered.

Decision to inquire (Decision 1A)

[19] The Lawyer was advised of the Committee’s decision to inquire into Complaint 1 (Decision 1A) by letter dated 16 November 2015. The Committee also requested copies of all files relating to the work the Lawyer had undertaken for the entity.

[20] The Lawyer complains that Decision 1A was taken notwithstanding her response and the supporting evidence she provided, and notwithstanding what she says

is an absence of evidence to support Complaint 1. The Lawyer raised her concerns with NZLS and notified it of her intention to seek a review.

[21] On 30 December 2015, the Lawyer referred the matter to the Legal Complaints Review Officer (LCRO) for review (Review 1). She complained that the request for documents was too broad and the decision to inquire was irrational in light of the evidence she had provided.

[22] On 11 March 2016, Complainant 1 wrote again to NZLS requesting an update on Complaint 1 and making new allegations. This included an allegation the Lawyer had conspired with one of her employees to copy client contact information held by Complainant 1 when the employee worked for Complainant 1. This email was disclosed to the Lawyer on 22 March 2016, noting it was “for [the Lawyer’s] information”.

Decision to appoint an investigator (Decision 1B)

[23] By notice dated 22 March 2016, the Committee appointed the Investigator pursuant to s 144 of the Act and pt 5 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committee) Regulations 2008 (the Regulations) (Decision 1B). The purpose of the appointment was to:

- a. meet and/or consult with the parties to the complaint and any other persons you consider necessary to progress your investigation;
- b. to prepare report(s) to the Committee on the complaint or any other matters related to or arising from the complaint or your investigation;
- c. to inspect and review any files or materials you consider to be relevant to your inquiry in the exercise of the powers granted to you under section 147 of the LCA;
- d. to inquire into the actions of [the Lawyer] in relation to the complaint and any other matters related to or arising from the complaint, including but not limited to:
 - i. the directions given to [the entity’s] hapu liaison officers regarding contacting claimants in the [...] Inquiry ...;
 - ii. [the Lawyer]’s role, if any, in instructing [the] hapu liaison officers to contact claimants in the [...] Inquiry, particularly clients of [Complainant 1];

- iii. the circumstances surrounding Ms [T] and Mr [W] contacting [Complainant 1]’s clients and any role [the Lawyer] may have had in that;
- iv. the allegations made in the complaint that [the Lawyer] has essentially orchestrated and/or engaged in inappropriate contact with [Complainant 1]’s clients, either directly or through her staff; and
- v. any other matters you consider to be relevant to the Standards Committee’s consideration of the complaints.

[24] On 22 March 2016, the Lawyer referred Decision 1B to the LCRO for review (Review 2). She complained Decision 1B was disproportionate, irrational, appeared to be biased, was made based on irrelevant considerations and failed to provide adequate reasons.

[25] On 7 April 2016, the LCRO completed Review 1 and found that, as an investigator had been appointed, the document requests made by the Committee had been superseded and should be removed from the letter dated 16 November 2015. The LCRO invited the Lawyer to withdraw her application for Review 1. On 22 April 2016, the Committee notified the Lawyer that it agreed with the LCRO. The Lawyer did not withdraw her application for Review 1 and, on 4 May 2016, requested Review 1 and Review 2 be consolidated as they dealt with substantially similar issues in relation to Complaint 1.

Further material

[26] Around 13 July 2016, the Lawyer provided further material to the LCRO in the form of written submissions with attachments (further material). She contends it comprehensively answers all allegations against her (including in respect of Complaints 2 and 3 which are discussed below). The further material was provided to the LCRO (as opposed to the Committee, NZLS or Investigator) after Decisions 1A and 1B had been made.

[27] The further material pertaining to Complaint 1 included the draft strategic plan of the entity. That contained a section on a communication strategy to ensure, through regular reporting, that all whānau, hapū and iwi were kept informed of all aspects of

the claim and research processes and were able to access all relevant claim and research material.

[28] A document dated 20 June 2011 signed by Complainant 1 saying she was comfortable with the content of, and gave her personal support to, the approach of the entity's draft strategic plan was provided (consent form). A consent form signed by another lawyer saying she had been instructed as counsel for inter alia the Client was also provided.

[29] The Reviews were stayed on 20 July 2016. There is some dispute as to the purpose of the stay, the Lawyer believing it was for the purpose of enabling the Investigator to consider the further material. The evidence, however, suggests the Investigator neither saw nor considered it, as he never received the full LCRO file. The Investigator spoke to various people, including for example the Client, but it does not appear that the Client was asked about the consent form. There is no reference to the further material in the Investigator's interim report discussed below.

[30] The Lawyer withdrew the stay of the Reviews on 14 February 2017 on the basis NZLS and the Committee were refusing to conduct the investigations in a manner fair to her and in accordance with natural justice.

[31] On 16 March 2017, the Committee requested the LRCO reactivate the Reviews on the basis the Lawyer had refused to meet with the Investigator.

Interim report

[32] On 1 March 2017, the Investigator's interim report into Complaint 1 was released. This report was expressly preliminary in nature, with the Investigator calling it "an interim report on the investigation to date" which "[reports] on the preliminary findings of the Investigation ...". This was critical of and adverse to the Lawyer. It suggested she may have breached rr 10.2 and 11.2 (communication and direct solicitation) of the Rules in respect of the Client and two other individuals, may have breached r 10.2 in respect of a named person, and potentially breached r 10.2 in respect of another person given her pattern of behaviour of offering services. The Investigator noted at the end of his interim report that "[g]iven the preliminary nature of the

information received ... I am only able to report on preliminary findings and potential breaches that warrant further investigation and response (if possible) from [the Lawyer].”

[33] The Lawyer believes that the interim report demonstrates the validity of her concerns. It names new people and makes new allegations not raised either in Complaint 1 or in the Lawyer’s response. The Lawyer believes the Investigator failed to clarify certain matters with the witnesses and, had he done so, he would have realised the witnesses were confusing the Lawyer with the entity. The Lawyer says it does not appear that any of the people to whom the Investigator spoke were referred to the documentation the Lawyer had filed, for example the consent forms, pointing out that she could have provided more consent forms had she known to whom the Investigator proposed to speak. As noted above, however, the further material which was provided to the LCRO does not appear to have been made available to the Investigator.

[34] The Lawyer enumerates numerous complaints which all fall into the category of whether a fair process was carried out and whether she had received natural justice.

Complaints 2 and 3

[35] The background to Complaints 2 and 3 is complex. It involves an organisation in which the Lawyer holds an elected position. There is political infighting amongst members of the organisation, the Lawyer being associated with one particular faction. Relationships between representatives of the organisation (including the Lawyer) has led to concerns of nepotism.

[36] On 4 September 2015, NZLS received a complaint from Complainant 2 (Complaint 2). Complainant 2 represented that the Complaint was being brought by him on behalf of the organisation and was on the headed notepaper of the organisation. It concluded:

The outcome I seek is that [the Lawyer] is struck off as a lawyer.

[37] Complaint 2 contained grievances about the Lawyer's actions as a delegate of the organisation. To the extent that it did concern legal work, it alleged the Lawyer had:

- (a) continued acting on a matter after her instructions had been revoked;
- (b) failed to follow instructions in relation to a matter;
- (c) acted without authorisation from the organisation; and
- (d) failed to provide the organisation with invoices for work done for other clients.

[38] Complainant 2 alleged that the Lawyer had a conflict of interest that (in his view ought to have) prohibited her from acting as the organisation's lawyer because:

- (a) a relative occupied a prominent position in the organisation;
- (b) the Lawyer was a member of the organisation in a personal capacity; and
- (c) the Lawyer had acted as a legal representative for and advisor to the organisation.

[39] NZLS invited the Lawyer to provide a written response. However, before any written response was provided, Complainant 2 submitted, on 14 September 2015, a further complaint (Complaint 3). He contended:

- (a) he was bringing Complaint 3 not on behalf of the organisation, but by one of its constituent members and he was authorised to bring Complaint 3;
- (b) the Lawyer acted for the organisation as its lawyer despite a conflict of interest for the same reasons as listed above.

[40] The Lawyer acknowledges that she has acted occasionally as legal advisor to the organisation, but says it has very limited funding, no legal budget and she has sometimes been refunded her expenses only. She says she is conscious of potential conflicts of interest and does not participate in any decision or discussion which might affect her personal interest, including any decision to instruct her law firm to act for the organisation. The Lawyer responded to Complaints 2 and 3 by two letters, dated 18 September and 12 October 2015. Her response was essentially that:

- (a) there was no complaint from the organisation because Complainant 2 had never been authorised to bring such a complaint;
- (b) the constituent member had never resolved or otherwise authorised Complainant 2 to bring a complaint. Even if it had, the constituent member itself had never been authorised to complain about the Lawyer on behalf of the organisation, and the Lawyer had never acted for the constituent member so did not owe it any duties nor could she have acted in breach of any such duties;
- (c) the Lawyer had at all material times acted with undivided loyalty to the organisation and nothing about the circumstances gave rise to divided loyalty;
- (d) the Lawyer had no control or influence over the manner in which the organisation issued instructions to her;
- (e) the means by which the organisation issued instructions was not something controlled by the Rules, nor was it something that NZLS had the power to regulate or inquire into generally; and
- (f) Complaints 2 and 3 were vexatious and/or made in bad faith, having been motivated by an underlying and long-standing political dispute between competing electoral factions within the organisation.

[41] The Lawyer and the organisation provided documents to NZLS, including a statement from its chair, the minutes of a meeting of the organisation and a letter from the organisation to the Lawyer, signed by the Secretary. These documents purported to confirm the Lawyer's firm's instructions, that the Lawyer's firm had never been removed as the organisation's solicitor and information as to approvals required for litigation. Evidence of how conflicts were managed was included.

Decision to inquire into and appoint an investigator into Complaints 2 and 3 (Decision 2)

[42] By letter dated 29 March 2016, the Committee informed the Lawyer that it had resolved to inquire into Complaints 2 and 3 and to appoint an investigator (Decision 2). The Committee appointed the Investigator (being the same investigator as was appointed for Complaint 1) to investigate Complaints 2 and 3. The purposes of the appointment included:

4. to inquire into the actions of [the Lawyer] in relation to complaints [...] and [...] and any other matters related to, or arising from, the complaints including but not limited to:
 - a. [Complainant 2]'s standing to complain on behalf of the [organisation] and/or the [constituent body];
 - b. [The Lawyer]'s actions when acting for the [organisation] and any conflict of interest issues that may have arisen (including any perceived, potential or actual conflict) in relation to, but not limited to:
 - i. [the Lawyer]'s general association and connection with the [organisation] and whether this may conflict with her role as legal counsel for the [organisation] and the instructions she receives;
 - ii. [the Lawyer]'s relationships with [...] and his roles with the [organisation] and the Trust;
 - iii. [the Lawyer]'s relationship with [...] and her appointment as [the organisation's] Secretary;
 - iv. [the Lawyer]'s other roles, including her role with the [...];
 - v. [the Lawyer]'s role with the [various organisations involved in the allegations of conflict];

- vi. [the Lawyer]'s role as legal counsel in relation to the [various organisations involved in the allegations of conflict];
- c. the circumstances surrounding the dismissal of an alternative law firm instructed to act in relation to [...] in [...];
- d. the circumstances surrounding [the Lawyer] continuing to act in relation to the [...] claim following a meeting of Executive members on [...];
- e. [the Lawyer]'s conduct in relation to the urgent hearing on [...];
- f. whether [the Lawyer] has failed to keep the [organisation] informed about work being undertaken and to provide adequate fee information and advice;
- g. the allegations made in [the] complaint ... that [the Lawyer] has proceeded on matters without instructions;
- h. the allegations made in [the] complaint ... that [the Lawyer] has, with [...] made decisions that are within the remit of the [organisation]'s executive;
- i. the events of the meeting of the [organisation] held [...] and the resolutions that were passed to establish a legal committee and with regards to [...] continuing to act for the [organisation]; and
- j. allegations made in [the] complaint ... that [the Lawyer] has harassed and bullied [organisation] members to support her; and
- k. any other matters you consider to be relevant to the Standards Committee's consideration of the complaints.

[43] The Lawyer referred Decision 2 to the LCRO for review on 27 April 2016 (Review 3). She complained Decision 2 was disproportionate, irrational, appeared to be biased, was based on irrelevant considerations and failed to provide adequate reasons. Review 3 was dealt with alongside Review 1 and Review 2.

[44] The further material provided to the LCRO on 13 July 2016, referred to above at [26], included more documentary evidence from the organisation which the Lawyer claims comprehensively answered Complaints 2 and 3. The further material comprised:

- (a) The organisation's letter to the Lawyer regarding its instruction to her to file a claim with the Waitangi Tribunal on the matter complained of. It noted that a claim had already been filed by the law firm that Complainant 2 alleged the Lawyer should have instructed.
- (b) Evidence by way of a report, affidavit and letter approving the appointment complained of.
- (c) An affidavit from the organisation's treasurer confirming that no money had been paid to the Lawyer's law firm for legal fees and the only payments to her were reimbursements of agreed disbursements.
- (d) A copy of the confirmed minutes of various meetings of the organisation. Some of these documents were also sent to the NZLS.
- (e) The organisation's letter to the NZLS addressing Complaints 2 and 3 and refuting all of the assertions. A draft of the letter had been given to members of the organisation at a full meeting which resolved to approve it.

[45] Again, the evidence suggests these matters did not come before the Investigator.

[46] No report regarding Complaints 2 and 3 has yet been issued, however, in November 2018 the Investigator wrote to the Lawyer with a notice requiring production of documents and requesting a meeting, saying he would like to discuss:

- a. Whether or not [the Lawyer] is able to exercise independent judgment on behalf of the [organisation];
- b. Whether or not [the Lawyer] has any personal, professional, or business interests in any of the matters she is advising on;
- c. Whether or not [the Lawyer]'s relationship with [...] compromises her ability to discharge her obligations as an independent advisor to the [organisation]; and
- d. Is there a risk of conflict and the nature of any such risks between [the Lawyer]'s duties to the [organisation] and any other persons or entities involved with the [organisation]?

[47] He amplified those matters as follows:

More specifically I would like to cover the following (and any other relevant matters):

- a. [The Lawyer]'s actions and roles when acting for the [organisation] and the nature of matters on which she was advising;
- b. Her general association and connection with the [organisation] and whether or not this may conflict with her role as legal counsel and the instructions she receives;
- c. Any role [the Lawyer] has in advising on constitutional matters and electoral processes with the [organisation] and any potential conflicts;
- d. Any role [the Lawyer] has in resolving disputes within the [organisation];
- e. [The Lawyer]'s other roles including with [...];
- f. [The Lawyer]'s role with the [...] and the circumstances surrounding [certain appointments];
- g. [The Lawyer]'s role as legal counsel in relation to [an alleged conflict];
- h. The circumstances surrounding the dismissal of an alternative law firm instructed to act in relation to [...];
- i. The circumstances surrounding [the Lawyer] continuing to act in relation to the [...] claim following a meeting of the executive on [...];
- j. Information provided by [the Lawyer] to [the organisation] about her instructions;
- k. Engagement processes with [the organisation] and in respect of legal aid matters;
- l. [The Lawyer]'s involvement in decision making processes;
- m. [The Lawyer]'s association and arrangements with [...];
- n. The events of the meeting of the [organisation] held on [...] and the resolutions passed;
- o. [The Lawyer]'s perspective on allegations of bullying and harassment made in [the] complaint ... so that [organisation] members would support her.

LCRO

[48] The Lawyer sought review by the LCRO of Decisions 1A and B and Decision 2.

[49] The LCRO’s decision dated 18 December 2017 addressed the submissions of Mr Geiringer, for the Lawyer, that there was “no case to answer” and the “decision to launch an investigation [was] irrational”. The LCRO said:

[29] In the matter under review here, the Committee has not completed its investigation. The whole of the “prosecution case” has not been made out. The time for a submission there is no case to answer to be made would be on completion by [the Investigator] of his investigation and, as noted above, [the Lawyer] will have the opportunity to comment on [the Investigator]’s report. The submission there is no case to answer is one to be made to the Committee. It is premature to be making an application to this Office now.

[50] The LCRO did not consider that the case *Zhao v NZ Law Society*, relied on by Mr Geiringer (and discussed further below), provided any support for the Lawyer’s application because the challenge was to the resolution to appoint an investigator per se.³

[51] Relevantly, the LCRO said:⁴

[39] The “practical reality” of this Office accepting jurisdiction to review a resolution of the Committee to appoint an investigator is that this Office would thereby be interfering with the role of the Committee at a stage when no determination of a complaint has been made.

[40] Any person may complain about a lawyer’s conduct. The role of the Committee is to assess the strength of the complaint and either inquire into the complaint, give a direction to refer the matter to mediation or determine to take no further action on the complaint. That is not a role this Office should assume.

[41] In the present instance, the Committee has determined to inquire into the complaints and appoint [the Investigator] to act as an investigator. [Complainant 1]’s complaints include complaints that [the Lawyer] has contacted her clients directly. Her complaints are founded on information received from her clients. [The Lawyer] denies that she has made direct personal contact with [Complainant 1]’s clients.

[42] The decision by the Committee to appoint an investigator was reasonable. The Committee cannot merely accept [the Lawyer]’s denials. To do so would be abdicating the Committee’s responsibility to form an independent view of the complaints. To do this, it needs further information.

[Complainant 2]’s complaints

[43] To properly understand and determine [Complainant 2]’s complaints, the Committee must have a full understanding of the varied and complex

³ *Zhao v NZ Law Society* [2012] NZHC 2169, [2012] NZAR 894.

⁴ Footnotes omitted.

issues raised. A detailed investigation of the issues, followed by a full report from [the Investigator], will help the Committee understand and reach a view on the complaints.

[44] Such a step may favour [the Lawyer], as in the course of dealing with [the Investigator] she will presumably meet with him in person. This will enable her to convey her views directly and ensure that the Committee does receive all information relevant to the complaint. She would also have the opportunity to comment on [the Investigator's] report. In this manner, she can ensure the Committee is fully appraised of all information [she] wishes to put before it.

[52] The LCRO relied on the Supreme Court decision of *Orlov v NZLS*,⁵ which she considered equally applicable to the Lawyer's review. The LCRO observed:⁶

[46] The principle followed by the Court was that "the court would not normally permit judicial review proceedings to be heard ahead of the statutory proceedings other than in exceptional cases". The Court held it was not necessary in the interests of justice if the point in issue can be taken on appeal after the substantive proceeding is concluded.

[47] [The Lawyer] has a statutory right to apply for a review of a determination of a complaint by the Committee. The Committee has not yet made a determination. It may very well decide, having completed its investigation, to take no further action on the complaints against [the Lawyer].

[53] The LCRO noted that the Committee must provide a copy of the Investigator's report to the Lawyer and the rules of natural justice mean she must be given the opportunity to respond to any matters in it. She considered that, if the LCRO intervened in procedural decisions by a standards committee as to whether and how a complaint was investigated, it would constitute a serious block on the statutory right of a standards committee to regulate its own procedure.

Legislative framework

[54] The purpose of the Act includes:

3 Purposes

(1) The purposes of this Act are—

- (a) to maintain public confidence in the provision of legal services and conveyancing services:

⁵ *Orlov v NZLS* [2013] NZSC 94.

⁶ Footnotes omitted.

- (b) to protect the consumers of legal services and conveyancing services:

...

[55] One of the means of achieving those purposes is to provide a more responsive regulatory regime in relation to lawyers.⁷

[56] The Act contains fundamental obligations on lawyers in the following terms:

4 Fundamental obligations of lawyers

Every lawyer who provides regulated services must, in the course of his or her practice, comply with the following fundamental obligations:

- (a) the obligation to uphold the rule of law and to facilitate the administration of justice in New Zealand;
- (b) the obligation to be independent in providing regulated services to his or her clients;
- (c) the obligation to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients;
- (d) the obligation to protect, subject to his or her overriding duties as an officer of the High Court and to his or her duties under any enactment, the interests of his or her clients.

[57] Misconduct, which is defined in the Act, is the purview of the NZLS Disciplinary Tribunal.⁸

[58] Unsatisfactory conduct is the domain of standards committees. It is (relevantly) defined:

12 Unsatisfactory conduct defined in relation to lawyers and incorporated law firms

In this Act, **unsatisfactory conduct**, in relation to a lawyer or an incorporated law firm, means—

- (a) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; or

⁷ Lawyers and Conveyancers Act, s 3(2)(b).

⁸ Section 7.

- (b) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including—
 - (i) conduct unbecoming a lawyer or an incorporated law firm; or
 - (ii) unprofessional conduct; or
 - (c) conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm, or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 7); or
- ...

[59] Notably, unsatisfactory conduct is not confined to the conduct of a lawyer in providing regulated services.

The functions of standards committees

[60] NZLS is required to establish one or more lawyers' standards committees as part of its complaints service.⁹ The functions of standards committees are:

130 Functions of Standards Committees

The functions of each Standards Committee are (subject to any limitations imposed on the committee by or under this Act or the rules that govern the operation of the committee)—

- (a) to inquire into and investigate complaints made under section 132:
- (b) to promote, in appropriate cases, the resolution of complaints by negotiation, conciliation, or mediation:
- (c) to investigate of its own motion any act, omission, allegation, practice, or other matter that appears to indicate that there may have been misconduct or unsatisfactory conduct on the part of a practitioner or any other person who belongs to any of the classes of persons described in section 121:
- (d) to intervene, in the circumstances prescribed by this Act, in the affairs of practitioners or former practitioners or incorporated firms:
- (e) to make final determinations in relation to complaints:

⁹ Section 126(2).

- (f) to lay, and prosecute, charges before the Disciplinary Tribunal.

[61] Any person may complain about the conduct of a practitioner or the standard of service provided.¹⁰

[62] The Regulations are made pursuant to the Act and deal with the complaints procedure. They establish the complaints service of NZLS,¹¹ set out how a complaint is made,¹² and then set out the procedure on receipt of a complaint.¹³

[63] There is no dispute that, in the present case, the appropriate procedure on receipt of the Complaints was followed. The Act provides three options for a standards committee on receiving a complaint:

137 Action on receipt of complaint

- (1) A Standards Committee, on receiving a complaint, may—
 - (a) inquire into the complaint; or
 - (b) give a direction under section 143; or
 - (c) decide, in accordance with section 138, to take no action on the complaint.
- (2) A Standards Committee that receives a complaint must, as soon as practicable, advise the complainant and the person to whom the complaint relates of the procedure that the Standards Committee proposes to adopt under subsection (1).

[64] A direction under s 143 requires the parties to explore the possibility of resolving a complaint by negotiation, conciliation or mediation.

[65] The Lawyer's case is that the Committee should have decided to take no action on the Complaints in accordance with s 138, which provides:

¹⁰ Section 132.

¹¹ Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations, reg 6.

¹² Regulation 8.

¹³ Regulation 9.

138 Decision to take no action on complaint

- (1) A Standards Committee may, in its discretion, decide to take no action or, as the case may require, no further action, on any complaint if, in the opinion of the Standards Committee,—
- (a) the length of time that has elapsed between the date when the subject matter of the complaint arose and the date when the complaint was made is such that an investigation of the complaint is no longer practicable or desirable; or
 - (b) the subject matter of the complaint is trivial; or
 - (c) the complaint is frivolous or vexatious or is not made in good faith; or
 - (d) the person alleged to be aggrieved does not desire that action be taken or, as the case may be, continued; or
 - (e) the complainant does not have sufficient personal interest in the subject matter of the complaint; or
 - (f) there is in all the circumstances an adequate remedy or right of appeal, other than the right to petition the House of Representatives or to make a complaint to an Ombudsman, that it would be reasonable for the person aggrieved to exercise.
- (2) Despite anything in subsection (1), a Standards Committee may, in its discretion, decide not to take any further action on a complaint if, in the course of the investigation of the complaint, it appears to the Standards Committee that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate.

[66] The Lawyer relies in particular on s 138(1)(b), (c) and (e). Notably a decision not to take any further action may be taken during the course of investigating a complaint.¹⁴ In Mr Collins' submission, for the respondents, this is a further safeguard available to the Lawyer in the present case, akin to the decision taken by NZLS in relation to the organisation's complaint against another lawyer. That complaint was also in the context of a Waitangi Tribunal hearing and alleged that documents filed by that lawyer in the Tribunal included untrue allegations about inter alia the Lawyer and the organisation. A breach of the Rules was claimed. The standards committee, however, decided that there was nothing to support a finding that the lawyer had breached the Rules and resolved to take no further action pursuant to s 138(2) of the Act.

¹⁴ Lawyers and Conveyancers Act, s 138(2).

[67] If a standards committee decides to inquire into a complaint, it must do so as soon as practicable¹⁵ and give notice to the person to whom the complaint or inquiry relates, inviting them to make a written explanation for it. It may require the person complained against to appear and request specified information.¹⁶

[68] The procedure of standards committees must be consistent with natural justice but otherwise standards committees may regulate their procedures as they think fit.¹⁷

[69] Standards committees have the power to appoint investigators as follows:¹⁸

146 Investigations by investigators

- (1) A Standards Committee may, for the purpose of inquiring into any complaint or matter, require an investigator appointed under section 144(1)—
 - (a) to inquire into the complaint or matter and any matters related to, or arising from, the complaint or matter; and
 - (b) to furnish to the Standards Committee a report on the complaint or matter and any such related matters.
- (2) The investigator may, in inquiring into, and reporting on, the complaint or matter and any such related matters,—
 - (a) examine (among other things) any accounts (including trust accounts) kept—
...
 - (b) state (among other things), in his or her report, the investigator's opinion on the question whether there are reasonable grounds to suspect that a breach of any of the provisions of this Act or the practice rules has been committed—
...

[70] A standards committee or investigator has wide powers of investigation, including requiring a source of information to produce and provide copies of all documents, accounts or records in the possession or control of the source of

¹⁵ Section 140.

¹⁶ Section 141.

¹⁷ Section 142. Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations, reg 26 also provides that the procedures of each standards committee must accord with natural justice.

¹⁸ Lawyers and Conveyancers Act, s 144.

information and which are reasonably necessary for the purposes of the inquiry or investigation, and provide any information or particulars that may be required by the standards committee or investigator.¹⁹

[71] A standards committee must consider an investigator's report in private²⁰ but must give a copy of the report to any person to whom it relates, any practitioner representing such a person and the complainant (with some qualification if there is good reason).²¹

[72] A hearing to be conducted by a standards committee is to be on the papers unless the standards committee directs otherwise and written submissions can be made by the complainant, the person in respect of whom the complaint is made and certain other people.²²

[73] The powers of a standards committee to determine a complaint are:

152 Power of Standards Committee to determine complaint or matter

(1) A Standards Committee may,—

- (a) after both inquiring into a complaint and conducting a hearing with regard to that complaint; or
- (b) after both inquiring into a matter under section 130(c) and conducting a hearing with regard to that matter,—

make 1 or more of the determinations described in subsection (2).

(2) The determinations that the Standards Committee may make are as follows:

- (a) a determination that the complaint or matter, or any issue involved in the complaint or matter, be considered by the Disciplinary Tribunal:
- (b) a determination that there has been unsatisfactory conduct on the part of—
 - (i) a practitioner or former practitioner; or
 - (ii) an incorporated firm or former incorporated firm; or

¹⁹ Section 147.

²⁰ Section 148.

²¹ Section 149.

²² Section 153.

- (iii) an employee or former employee of a practitioner or incorporated firm:
- (c) a determination that the Standards Committee take no further action with regard to the complaint or matter or any issue involved in the complaint or matter.
- (3) Nothing in this section limits the power of a Standards Committee to make, at any time, a decision under section 138 with regard to a complaint.
- (4) Subject to the right of review conferred by section 193 and to section 156(4), every determination made under subsection (1) and every order made under section 156 or section 157 is final.

[74] Notably, every determination is subject to the right of review to the LCRO under s 193.

Submissions

The Lawyer's submissions

Complaint 1

[75] In Mr Geiringer's submission, the purpose of the investigation into Complaint 1, as outlined in Decision 1B, went further than investigating any breach of the Lawyer's duties, given there was no evidence in Complaint 1 of breach of any Rule. He noted that r 10.2, which provides for communication with another lawyer's client, specifically authorises a lawyer to recommend to a client that he or she make direct contact with any other party. In his submission, therefore, the Committee erred in directing an investigation in respect of something which cannot constitute a breach of the Rules. Instead, he said, the purpose of the appointment was to seek out more issues. He complained that the inquiry included Complainant 1's subsequent allegations about which the Lawyer had not been given the opportunity to comment.

[76] One of the Lawyer's reasons for refusing to meet with the Investigator was that he refused to provide details of the people to whom he had spoken. In Mr Geiringer's submission, this was a clear error and a breach of natural justice, reinforcing, in his submission, the need for review of the process.

Complaints 2 and 3

[77] In Mr Geiringer's submission, the majority of Complaints 2 and 3 did not relate to the provision of legal services but complained about the Lawyer's actions as a delegate to the organisation. That, in his submission, did not contravene the Rules. Mr Geiringer submitted it was clear that Complaints 2 and 3 were, in essence, about the internal workings of the organisation over which NZLS has no jurisdiction. He accepted the overall expectation in the Rules that a lawyer should act with professionalism but said that must still be within the sphere of legal work.

[78] Rule 5.4 of the Rules, which is the rule governing conflicts, provides that a lawyer must not act or continue to act if there is a conflict or a risk of a conflict between the interests of the lawyer and the interests of a client for whom the lawyer is acting or proposing to act. In Mr Geiringer's submission, r 5.4 is focused on a conflict in carrying out legal work whereas Complaints 2 and 3 sought to preclude the Lawyer from participating in the organisation simply because she is a lawyer and is related to an office-holder. Complaint 3 involved matters wholly outside the jurisdiction of NZLS and wholly inside the jurisdiction of the organisation, in Mr Geiringer's submission.

[79] Mr Geiringer accepted it was possible to construe some aspects of the Complaints as related to the Lawyer's legal practice but, in his submission, the investigation or inquiry should have been limited to those matters.

[80] Mr Geiringer also accepted that the further material provided to the LCRO in July 2016 should have been provided at an earlier stage. He said it was a complete answer to all Complaints, yet the Investigator's November 2018 "wide-ranging" request was made without regard to it. He suggested the further material either completely disposed of the Complaints, or there was no relevant breach of duty identified, or there was nothing to support the allegation. Again, I note that, beyond any document sent directly to the NZLS, the further material does not appear to have been provided to the Investigator.

[81] Mr Geiringer submitted that, overall, the Decisions constituted errors of law, the failure to take into account relevant considerations and the taking into account of

irrelevant considerations. He said these errors have affected the Lawyer's rights and interests in material aspects and materially affected the fairness of the process in that:

- (a) the scope of the investigations has been nebulous and changing. It has irrationally expanded and become unduly broad. The Investigator's terms of appointment are far in excess of any scope reasonably established by the original Complaints;
- (b) the Lawyer has been directed to undergo an evidential interview by the Investigator without, despite her request, being provided with the substance of the allegations that she is required to answer;
- (c) the breadth of the investigations includes matters which are clearly permitted under the Rules;
- (d) the investigations include matters that fall outside legal practice or the authority of the respondents;
- (e) the Lawyer was hindered from responding effectively and forthrightly to Complaints 2 and 3 because the respondents refused to restrain Complainant 2's repeated breaches of confidentiality;
- (f) the Lawyer was being asked by the Committee and/or its Investigator to disclose confidential and privileged information which will be shared with the Complainants – both of whom are (or act for) an adverse party in related proceedings; and
- (g) both investigations are being handled by one standards committee and one investigator, creating a significant risk of cross contamination and a risk that a decision on each alleged breach will not be made solely on its own merits.

Respondents' submissions

[82] Mr Collins submitted that a review of the legal framework demonstrates that the decision to inquire is what he termed a “basic reception step” and the question for a standards committee is which category of s 138 of the Act applies. He observed that the only circumstance in which there would be no inquiry would be if a complaint could objectively and readily be seen as falling into the s 138(1) category. Otherwise, he said, a standards committee would be embroiled in a form of inquiry before it had in fact resolved to undertake an inquiry. In his submission, none of the Complaints could objectively, on their face and in light of the Lawyer’s response, be seen as falling under s 138(1). Therefore, he said, the Committee was obliged to inquire and not simply accept the Lawyer’s response. Had it not done so, he suggested it would be subject to valid criticism, referring to the Committee’s statutory duty to maintain public confidence in the legal profession and ensure a responsive regulatory regime.

[83] Mr Collins then submitted that the Decisions were appropriately characterised as the exercise of a function by the Committee rather than a statutory power because they did not affect the Lawyer’s ability to practise or result in any adverse professional record. They were simply consequential on receipt of a complaint, and not susceptible to review. Mr Collins suggested the Lawyer herself had simply protracted the entire procedure which had begun over four years ago.

[84] As to whether Complaint 1 could properly be considered to fall within r 10.2 of the Rules, Mr Collins said the purpose of the rule is to protect the sanctity of the lawyer-client relationship and an allegation of “poaching” fell into that category. He also pointed out that, although Complaint 1 might have been headed “poaching clients”, it did not necessarily mean that the behaviour complained of fell into that category. It was the role of the Committee to determine what Complaint 1 was really about and what rules it might engage. That observation was also relevant to Complaints 2 and 3. Complaint 2 involved disputed facts, including the standing of Complainant 2, and the relationship between the organisation and the Lawyer.

[85] Mr Collins rejected any allegations of the “shifting nature” of the allegations, saying if there were any validity in that criticism, it was simply a reflection of the early stages of the inquiries.

[86] In Mr Collins’ submission, standards committees have an obligation to observe natural justice and it was not for a lawyer the subject of a complaint to tell a committee how to run its investigation. He said any confidentiality issues do not mean the Lawyer should disengage from the complaints process. Notably, nothing in the complaints and discipline provisions of the Act, part 7, affects legal professional privilege.²³ He emphasised that the Lawyer had a positive duty to cooperate.²⁴

Are the Decisions amenable to judicial review?

[87] The purpose of the Judicial Review Procedure Act is:

3 Purpose of this Act

- (1) The purpose of this Act is to re-enact Part 1 of the Judicature Amendment Act 1972, which sets out procedural provisions for the judicial review of—
 - (a) the exercise of a statutory power:
 - (b) the failure to exercise a statutory power:
 - (c) the proposed or purported exercise of a statutory power.
- (2) The reorganisation in this Act of those provisions, and the changes made to their style and language, are not intended to alter the interpretation or effect of those provisions as they appeared in the Judicature Amendment Act 1972.

[88] The meaning of a statutory power is:

5 Meaning of statutory power

- (1) In this Act, **statutory power** means a power or right to do any thing that is specified in subsection (2) and that is conferred by or under—
 - (a) any Act; or

²³ Lawyers and Conveyancers Act, s 271.

²⁴ Lawyers and Conveyancers Act, s 3(1) and (2)(b); *Parlane v New Zealand Law Society (Waikato Bay of Plenty Standards Committee No 2)* HC Hamilton CIV-2010-419-1209, 20 December 2010 at [109]; *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] NZHC 83, [2013] 3 NZLR 103 at [108].

- (b) the constitution or other instrument of incorporation, rules, or bylaws of any body corporate.
- (2) The things referred to in subsection (1) are—
- (a) to make any regulation, rule, bylaw, or order, or to give any notice or direction that has effect as subordinate legislation; or
 - (b) to exercise a statutory power of decision; or
 - (c) to require any person to do or refrain from doing anything that, but for such requirement, the person would not be required by law to do or refrain from doing; or
 - (d) to do anything that would, but for such power or right, be a breach of the legal rights of any person; or
 - (e) to make any investigation or inquiry into the rights, powers, privileges, immunities, duties, or liabilities of any person.

[89] In order for an action or decision to be reviewable under the Judicial Review Procedure Act, it must flow from a statutory power as defined in s 5, which includes any investigation into the rights or liabilities of any person.²⁵

[90] In Mr Collins' submission, however, the Decisions were better defined as the exercise of a function by the Committee rather than a statutory power. He drew an analogy with the circumstances of *Deliu v The Executive Board of the New Zealand Law Society*.²⁶ Mr Deliu sought to judicially review the resolution of the Board of the NZLS to instruct counsel in preparation for the potential issuing of proceedings and the resolution to seek access to Court files. The Judge in that case found that neither resolution involved the exercise of a statutory power as any adverse proceeding against Mr Deliu was simply a future possibility, rather than certainty.

[91] Mr Collins emphasised that the present case involved simply procedural steps to facilitate an inquiry into the Complaints. He drew an analogy with the limits on judicial review of decisions to prosecute, citing the High Court decisions of *Hayes v Logan* and *Orlov v New Zealand Law Society*.²⁷ Both decisions refer to the reluctance of this Court to grant judicial review in relation to the decision to prosecute or in

²⁵ Consistent with s 4 of the Judicature Amendment Act 1972.

²⁶ *Deliu v The Executive Board of the New Zealand Law Society* [2013] NZHC 2504, [2013] 3 NZLR 833.

²⁷ *Hayes v Logan* [2005] NZAR 150 (HC); *Orlov v New Zealand Law Society* [2012] NZHC2154, [2013] 1 NZLR 390.

relation to procedural steps leading to a reviewable decision. The High Court decision in *Orlov v New Zealand Law Society* was appealed. The Court of Appeal helpfully said:²⁸

[50] ... Unlike a prosecutor, the Standards Committee can only reach its determination after first conducting an inquiry and holding a hearing (albeit usually on the papers). Further, while the Standards Committee has the power to regulate its own procedure, the Act also expressly requires that in exercising and performing its duties, powers and functions, a Standards Committee must do so in a way that is consistent with the rules of natural justice. On the other hand, there is a strong legislative imperative that complaints are to be dealt with promptly and accordingly it is appropriate, as noted by Heath J, that the rules of natural justice be tailored to meet that objective. A further important consideration is the existence of the statutory right of review to the LCRO, whose decision is in turn amenable to judicial review. Also highly relevant is the fact that 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. 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. Suffice it to say we accept the court must be circumspect and that there is very limited scope for review. Examples of where judicial review might be available would be cases where there has been non-compliance with the statutory prerequisites to the making of the decision, such as failing to conduct a hearing as required by s 152(1) or where there has been bad faith.

[92] Mr Geiringer referred to the decisions of *Zhao v New Zealand Law Society* and *Singh v Chief Executive Ministry of Business, Innovation and Employment* in support of his argument that preliminary decisions were amenable to judicial review.²⁹ Both cases involved preliminary steps taken before any final decision and both involved some discussion of the availability of review in such circumstances.

[93] The High Court decision of *Zhao v New Zealand Law Society* concerned an application for review by a practitioner, Mr Zhao, seeking approval to practise on his own account.³⁰ Mr Zhao performed poorly in an interview involved in that process. The interviewers recommended against approval of his application which was referred to the Society's Fitness for Practice Committee. Despite his requests, Mr Zhao was not provided with the interviewers' reasons for recommending against him or given the opportunity to address the Committee. He argued that the adverse

²⁸ *Orlov v New Zealand Law Society* [2013] NZCA 230, [2013] 3 NZLR 562 (footnotes omitted).

²⁹ *Zhao v New Zealand Law Society*, above n 3; *Singh v Chief Executive Ministry of Business, Innovation and Employment* [2014] NZCA 220, [2014] 3 NZLR 23.

³⁰ *Zhao v New Zealand Law Society*, above n 3.

recommendations and the convening of the Committee without prior reasons or an invitation to appear were unlawful administrative acts.

[94] Kós J, as he then was, held that the application for judicial review was not premature as both the interview process and the Committee’s intended exercise of statutory powers was capable of altering Mr Zhao’s rights and interests. He noted that a positive recommendation from the interviews was given considerable weight by the Society in exercising its statutory power of decision and their report on a negative recommendation would be influential in any determination by the Committee, following reference to it.³¹ The actions were therefore susceptible to review.

[95] Kós J said:³²

Of course, where processes leading to a final decision are not completed, review remains discretionary and will be exceptional.

[96] The Court of Appeal in *Singh v Chief Executive Ministry of Business, Innovation and Employment* outlined the considerations of when a preliminary decision is amenable to judicial review.³³ In that case, Mr Singh was investigated by Immigration New Zealand (INZ) as to whether he had gained a residence visa by deception. He applied to review two letters sent to him by INZ advising of their investigation. The Court held that, while the letters were technically a proposed exercise of a statutory power, “it does not follow [from s 4 of the Judicature Amendment Act 1972] that every exercise of a statutory power will be amenable to review ... [t]he real question is whether there is a sufficient basis for the Court to invoke its undoubted jurisdiction under s 4”.³⁴ In making this assessment, the Court noted the following considerations were relevant:³⁵

- (a) The nature of the statutory power being exercised.
- (b) The stage that has been reached in the relevant statutory process
- (c) The extent to which the statutory power exercised is likely to be influential in the ultimate decision.

³¹ At [66].

³² At [67].

³³ *Singh v Chief Executive Ministry of Business, Innovation and Employment*, above n 29.

³⁴ At [31].

³⁵ At [38].

- (d) Whether there are any further opportunities in the statutory process to correct any apparent error including the availability of a right to appeal or seek judicial review of a decision ultimately reached at the conclusion of the statutory process.

[97] The Court went on to say:

[39] Where matters have reached only a preliminary stage and the powers exercised to that point are unlikely to be influential in the final decision, the Court will not usually intervene by way of judicial review. There are sound policy reasons why that should be so. Where an investigation is merely at the information gathering stage, and the party under investigation has adequate opportunity to address issues raised for his or her response, it is most unlikely that the subject's rights will be adversely affected. Moreover, where there are adequate opportunities for appeal or review of any decision ultimately reached, it is not in the public interest that those responsible for conducting preliminary investigations should be put to the time and trouble of responding to applications for review. Similarly, the courts should not generally be troubled with judicial review applications in such circumstances.

[40] That said, we accept there may be cases where the Court's intervention by way of judicial review may be justified. Cases of this type are likely to be exceptional but where it is demonstrated that an error of law or process has occurred which is likely to have a material influence on the final decision, the Court may be prepared to intervene. ...

[98] The Court noted that *Zhao and Marlborough Aquaculture Limited v Chief Executive, Ministry of Fisheries*³⁶ constituted examples of such an exception.³⁷ In *Marlborough Aquaculture*, Ronald Young J had said:³⁸

... there may be situations where because the procedure of decision-making has seriously gone off the rails at an early stage in the process it is essential that the Court quashed the decision. This will particularly be the case where no form of further consultation with the aggrieved party can cure the defect. An obvious example is overt bias by a decision-maker. If established at a preliminary stage it will probably be fatal to all subsequent decision-making.

[99] Returning to the present case, it is clear the Committee was exercising statutory powers when it made the Decisions to inquire, appoint an investigator and set the terms

³⁶ *Marlborough Aquaculture Ltd v Chief Executive, Ministry of Fisheries* [2003] NZAR 362 (HC).

³⁷ See also *Hot Holdings Pty Ltd v Creasy* [1996] HCA 55, (1996) 134 ALR 469, a preliminary assessment and recommendation by a mining warden had a discernible effect upon the Minister's subsequent exercise of a discretion to grant a mining licence and was therefore reviewable.

³⁸ *Marlborough Aquaculture Ltd v Chief Executive, Ministry of Fisheries*, above n 36, at [15].

of the investigations. The powers of investigation are provided for by the Act³⁹ and the Committee may decide to either take no action⁴⁰ or pursue the complaints further.⁴¹

[100] The appropriate approach, therefore, is to assess whether there is a sufficient basis for the Court to invoke its review jurisdiction in line with the guidance provided by *Singh*.⁴² The *Singh* considerations apply to the present case as follows:⁴³

The nature of the statutory power being exercised

[101] The Committee is exercising its statutory power to inquire into a complaint about a lawyer's conduct, appoint an investigator and set the ambit of that investigation. Its actions are in the context of the regime set out in the Act to achieve the Act's statutory purpose of protecting consumers of legal services and maintaining public confidence in the provision of those services.

The stage that has been reached in the relevant statutory process

[102] The statutory process is in its preliminary investigatory stages. A decision to inquire has been made, an investigator has been appointed and the scope of that investigation has been set. An interim report only has been issued in relation to Complaint 1, but there is no report as yet in relation Complaints 2 and 3. No determination has been made by the Committee.

[103] I agree with the respondents that, for the Committee to have dismissed the Complaints without making any inquiry, only because of the Lawyer's responses, would have been a failure to receive and responsibly deal with them consistently with the statutory purposes of the Act. None of the Complaints was so obviously lacking in credibility as to amount to a vexatious complaint justifying dismissal without inquiry.

³⁹ Lawyers and Conveyancers Act, s 144.

⁴⁰ Section 138.

⁴¹ Section 152.

⁴² *Singh v Chief Executive Ministry of Business, Innovation and Employment*, above n 29, at [31].

⁴³ At [38].

[104] The Complaints include allegations which, if substantiated, would raise issues of professional responsibility within the jurisdiction of the Committee. They involve disputes of fact and seek to engage the complaints procedures. The Lawyer's responses have raised a number of matters which require an inquiry to enable the Committee to reach an informed view. The fact political and professional rivalry could be seen as a motive for the Complaints makes the validity of them more difficult to establish and emphasises the need for an inquiry. The presence of motive does not mean there is no substance to the Complaints.

[105] While one or more of the Complaints may eventually prove to be misconceived and lacking in merit, as the Lawyer contends, that can only be determined following an inquiry for which a resolution under s 137(1)(a) of the Act was necessary, and for which the appointment of the Investigator under s 144 was appropriate.

[106] The investigation is in the information gathering stage and "it is most unlikely that the subject's rights will be adversely affected".⁴⁴ The investigator has not submitted his final reports to the Committee. The Committee has made no final decisions, it has not indicated whether it believes there is a case to answer.

[107] The three options open to the Committee remain undisturbed: to take no action on the Complaints (a decision which can be taken at any time);⁴⁵ to find the Lawyer has engaged in unsatisfactory conduct; and to refer the Complaints to the Disciplinary Tribunal.⁴⁶ The Decisions have had no impact on the Lawyer's practice, apart from the requisite time and energy in responding to the Complaints. This is an incident of professional life.⁴⁷

[108] Much of the Lawyer's dissatisfaction boils down to the fact she feels she has provided sufficient information to answer the Complaints, and that what is alleged is not a breach of the Rules. It is unfortunate that the further material was provided only to the LCRO and not the Committee or the Investigator. Notably, it was provided well after the Decisions. This emphasises that the Lawyer's proper remedy is to engage in

⁴⁴ *Singh v Chief Executive Ministry of Business, Innovation and Employment*, above n 29, at [39].

⁴⁵ Lawyers and Conveyancers Act, s 138(2).

⁴⁶ Section 152(3).

⁴⁷ *Deliu v The Executive Board of the New Zealand Law Society*, above n 26.

the investigation process and provide the evidence which she says exonerates her to the Investigator and the Committee.

The extent the statutory power exercised is likely to be influential in the ultimate decision

[109] The appointment of an investigator and setting the terms of the investigation are not determinative of (or prejudicial to) the Lawyer’s rights or entitlements and do not imply or express any adverse findings about her. The Decisions simply allow the Committee to obtain the necessary information to be in a position to make an informed decision as to the Complaints. They were a mechanism to enable it to carry out its functions, involving procedural steps to facilitate a legitimate inquiry into the Complaints. It cannot be said that there has been some irretrievable flaw in the process or unreasonable decision that will be influential in the ultimate decision.

[110] The breadth of the instructions given to the Investigator are part of the decision to appoint an investigator. Although the Lawyer might have concerns about the breadth of matters the Investigator wanted to discuss, his inquiry is subject to the Committee’s terms of the investigation, which themselves must be read subject to the Complaints. Investigators already have broad statutory powers. The Committee “may, for the purpose of inquiring into any complaint ... require an investigator ... to inquire into the complaint ... and any matters related to, or arising from, the complaint ...”.⁴⁸ The Investigator is also able to require the production of various documents or records as long as they are reasonably necessary⁴⁹ and information related to those matters as long as it is reasonably required.⁵⁰ The breadth of the instructions in this case does not widen the net so significantly that it extends beyond the investigatory powers of the Investigator.

[111] While an interim report has been issued in relation to Complaint 1, this case is readily distinguishable from *Zhao*.⁵¹ As noted, the report is expressly an interim one that reaches preliminary findings only of potential breaches of the Rules and expressly states that further investigation is required, the Investigator saying that “[a] statement

⁴⁸ Section 146(1).

⁴⁹ Section 147(2)(a)(i).

⁵⁰ Section 147(2)(a)(iv).

⁵¹ *Zhao v New Zealand Law Society*, above n 3.

should be obtained from [the Lawyer] ...". The Investigator is clearly seeking input from the Lawyer, who therefore has the opportunity to engage with him and provide the further material and any other evidence in support of her position. This is very clearly different from *Zhao*, where a final report and recommendation had been provided to the Fitness for Practice Committee, and there was no suggestion any further inquiries would be made or that Mr Zhao was be permitted to be heard before its final recommendation. In contrast, the Investigator in the present case has not concluded his investigation and actively seeks input from the Lawyer before preparing his final report.

[112] No report has been issued in respect of Complaints 2 and 3 and the Lawyer has the opportunity to put all relevant material to the Investigator to influence that report also.

[113] Following the Investigator's final report in respect of each Complaint, the Committee must conduct a hearing and, although the hearing may be on the papers, the Lawyer has the right to make submissions, including referring to the further material or any other information.

[114] It is then for the Committee to ensure its decisions are appropriately focused and lawful. It is well equipped to do so.

[115] The Lawyer therefore has had considerable opportunity since the Decisions and adoption of the processes (in respect of which she seeks judicial review) to have input into the process and influence the ultimate decision. That opportunity remains open to her.

Further opportunities in the statutory process to correct any apparent error

[116] If, following a hearing, a decision is made that is adverse to the Lawyer, she has a right of review to the LCRO⁵² whose decision is also amenable to judicial

⁵² Lawyers and Conveyancers Act, s 193.

review.⁵³ If the matter progresses to being heard before the Disciplinary Tribunal, the Lawyer will have a right of appeal from that body.⁵⁴

Conclusion

[117] There is a high bar for the availability of judicial review in preliminary decisions such as these. The Court of Appeal in *Singh* described such cases as “exceptional”.⁵⁵ This is not such an exceptional case. Decision-making has not “gone seriously off the rails”.⁵⁶ In the circumstances of this case, there is an insufficient basis for this Court to invoke its jurisdiction under the Judicial Review Procedure Act at this stage in the proceedings.

[118] I would also observe that the Lawyer has already pursued the statutory review procedures and failed. It is in the interests of the Complainants, the Lawyer, and the public that the Complaints be investigated and decisions made in an informed manner with minimal further delay.

Result

[119] The application for judicial review is dismissed.

Thomas J

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⁵³ *Orlov v New Zealand Law Society*, above n 28, at [50].

⁵⁴ Lawyers and Conveyancers Act, s 253; *Hall v Wellington Standards Committee (No 2)* [2013] NZHC 798, [2013] NZAR 743.

⁵⁵ *Singh v Chief Executive Ministry of Business, Innovation and Employment*, above n 29, at [40].

⁵⁶ *Marlborough Aquaculture Ltd*, above n 38, at [15].