IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA154/2023
[2024] NZCA 165

BETWEEN	JEREMY JAMES MCGUIRE Appellant
AND	CENTRAL STANDARDS COMMITTEE 3 First Respondent
AND	GENERAL STANDARDS COMMITTEE 1 Second Respondent
AND	GENERAL STANDARDS COMMITTEE 3 Third Respondent
AND	LEGAL COMPLAINTS REVIEW OFFICER Fourth Respondent
AND	WELLINGTON STANDARDS COMMITTEE 1 Fifth Respondent
AND	LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL Sixth Respondent

Hearing:	16 April 2024 (further submissions filed 17 April 2024, 24 April 2024 and 2 May 2024)
Court:	Wylie, Mander and Jagose JJ
Counsel:	R J Latton for Appellant P N Collins for First, Second, Third and Fifth Respondents No appearance for Fourth and Sixth Respondents
Judgment:	17 May 2024 at 12 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay one set of costs to both the first and second respondents jointly, on a band A basis, together with usual disbursements.

REASONS OF THE COURT

(Given by Wylie J)

Introduction

[1] The appellant, Jeremy McGuire, was at all relevant times, a lawyer. Determinations were made against him by the respondent Standards Committees and, on review, by the fourth respondent, the Legal Complaints Review Officer (the LCRO). Some matters were referred to the sixth respondent, the Lawyers and Conveyancers Disciplinary Tribunal (the Tribunal), by some of the Standards Committees. Mr McGuire sought judicial review of these adverse decisions.

[2] In a judgment issued on 20 February 2023, Palmer J, in the High Court at Wellington, declined Mr McGuire's application for judicial review.[1] Mr McGuire now appeals against that judgment, but only in part. He challenges the Judge's decision declining his application for review in respect of four adverse determinations. The impugned determinations are as follows:

(a) A determination made on 14 May 2018 by the first respondent, Central Standards Committee 3, that there had been unsatisfactory conduct by Mr McGuire under s 152(2)(b)(i) of the Lawyers and Conveyancers Act 2006 (the Act) (the caveat liability determination).[2]

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1 *McGuire v Central Standards Committee* [2023] NZHC 242, [2023] NZAR 134 [High Court judgment].

2 *Notice of Determination by Central Standards Committee 3: No 16807*, 14 May 2018 [caveat liability determination].

(b) A determination made on 28 August 2018 by Central Standards Committee 3 under s 156 of the Act (the consequential orders determination).[3]

(c) A decision made on 25 March 2020 by the LCRO (the review decision) under s 211 of the Act confirming the caveat liability determination and the consequential orders determination.[4]

(d) A determination made on 15 June 2021 by the second respondent, General Standards Committee 1 (the refund determination).[5]

[3] Central Standards Committee 3 and General Standards Committee 1 oppose the appeal. The LCRO has taken no stance on the matter. The third and fifth respondents made other determinations which are not the subject of this appeal. They nevertheless have a potential interest in costs if the appeal is allowed and the costs order made by the Judge is vacated. For this reason, they entered an appearance. Appearances from the fourth and sixth respondents were excused by the Judge and neither took any part in the appeal hearing.

Background facts

The caveat liability and the consequential orders determinations

[4] In May 2016, the complainant's father passed away, leaving much of his estate to the complainant's stepmother. The complainant was aggrieved by the terms of his father's will. In June/July 2016, he instructed Mr McGuire to register a caveat against the title to a property which the father and the stepmother owned as tenants in common.

[5] Mr McGuire had the complainant sign an indemnity, which recorded that Mr McGuire had been instructed to register the caveat, that the complainant had seen

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3 *Notice of Determination by Central Standards Committee 3: No 16807*, 28 August 2018 [consequential orders determination].

4 *McGuire v Butler* [2020] NZLCRO 43 [review decision] at [148].

5 *Notice of Determination by General Standards Committee 1: Complaint 21098*, 15 June 2021 [refund determination].

his father's will and that he did not think that it was "right". The indemnity went on to record as follows:

> If, for any reason, this caveat is inappropriate for any reason that has not been disclosed to my lawyer then I fully indemnify Mr McGuire for any costs or damages that may be incurred by him for any reason following him following my instructions to register a caveat over my deceased father's property.

[6] Mr McGuire attempted to register the caveat. Registration was rejected, on the basis that "the estate or interest claimed [was] not a caveatable interest". Mr McGuire however succeeded in registering the caveat on 3 February 2017. The interest then claimed was an equitable interest under a constructive trust.

[7] The complainant, through other solicitors, filed a claim against his father's estate under the Family Protection Act 1955. The solicitors for the estate brought proceedings under s 146 of the Land Transfer Act 1952, seeking to have the caveat removed. Ultimately, the caveat was withdrawn. The Family Protection Act claim was settled, inter alia, on the basis that the costs incurred by the stepmother and the estate related to the lodgement of the caveat be paid by the complainant.

[8] The complainant then complained about the standard of advice provided to him by Mr McGuire. The complainant alleged that:

(a) Mr McGuire had failed to advise him that he did not have a caveatable interest in the property.

(b) Mr McGuire had failed to advise him that, if a caveat was improperly lodged, he would be vulnerable to a claim under s 146(1) of the Land Transfer Act.

(c) As a result of Mr McGuire's failures, he had become liable for the costs of removing the caveat.

[9] On 14 May 2018, relying on this Court's judgment in *Gordon v Treadwell Stacey Smith*,[6] Central Standards Committee 3 issued its caveat liability determination.

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6 *Gordon v Treadwell Stacey Smith* [1996] 3 NZLR 281 (CA).

It found that the standard of advice provided by Mr McGuire, "in conjunction with" a breach of r 2.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), which provides a lawyer must use legal processes only for proper purposes, amounted to unsatisfactory conduct pursuant to ss 12(a), 12(c) and 152(2)(b) of the Act.[7] Central Standards Committee 3 invited submissions on the consequential orders it should make under s 156 of the Act. Mr McGuire declined the invitation to file submissions on the consequential orders. The complainant did however do so. Mr McGuire applied for a review of this decision by the LCRO under s 193 of the Act.[8]

[10] On 28 August 2018, Central Standards Committee 3, in its consequential orders determination, ordered that Mr McGuire be censured for his unsatisfactory conduct, that he pay a fine of $5,000 and costs of $2,000 to the New Zealand Law Society, and that he pay $1,919.50 in compensation to the complainant.[9]

[11] The complainant sought a review of the consequential orders determination.[10] He wanted a rather more extensive compensation order. Whether Mr McGuire also sought a review of this determination is in dispute. We deal with this issue below.

The review decision

[12] On 25 March 2020, the LCRO considered both Mr McGuire's review of the caveat liability determination and the complainant's review of the consequential orders determination. The LCRO confirmed the Committee's caveat liability determination.[11] At the same time, he declined to modify the consequential orders determination as sought by the complainant.[12]

[13] Mr McGuire refused to pay the compensation ordered. The complainant complained again and, on 3 September 2021, another standards committee found that

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7 Caveat liability determination, above n 2, at [23]. It seems there had been a previous determination by Central Standards Committee 3 in relation to the complaint: see [2]. This previous determination was not before us, and no submissions were made in relation to it.

8 Lawyers and Conveyancers Act 2006, s 193.

9 Consequential orders determination, above n 3, at [6] and [11].

10 Lawyers and Conveyancers Act, s 193.

11 Review decision, above n 4, at [95]–[112] and [147]–[148].

12 Both determinations were confirmed pursuant to the Lawyers and Conveyancers Act, s 211(1)(a).

the ongoing refusal to pay was unsatisfactory conduct pursuant to s 152(2)(b)(i) of the Act. It ordered Mr McGuire to pay compensation of $1,500 to the complainant and costs of $1,000 to the New Zealand Law Society.[13] Mr McGuire failed to comply with these orders as well and the same standards committee commenced an own motion investigation in January 2022. On 31 March 2022, this Committee, after conducting a hearing on the papers, directed that the investigation, and the issues involved in it, be considered by the Tribunal.[14]

The refund determination

[14] The complainant in regard to this determination and her partner sold an existing property and purchased a new property in July 2019. Mr McGuire acted for them on the sale and purchase. They were charged a fee of $949 (excluding GST and disbursements) by Mr McGuire in relation to the sale. At the time, Mr McGuire's website quoted a fee of $799 for the sale of a property with no mortgage.

[15] The complainant emailed Mr McGuire on 28 July 2019, asking why she and her partner had been charged a different amount from that advertised on the website. Relevantly, the complainant's email read as follows:

> Hi Jeremy
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> …
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> Also, can you tell me why we were charged $949 for your services for [the sale of the property] when your website says $799 is the full cost for selling a property, with no mortgage. There was no extra work for this sale, it was very basic.
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> Please refund the difference.
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> Thank you

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13 *Notice of Determination by Waikato Bay of Plenty Standards Committee 1: No 20548*, 3 September 2021, at [22] and [26]; and Lawyers and Conveyancers Act, s 156(1)(d) and 156(1)(n).

14 *Notice of Determination by Waikato Bay of Plenty Standards Committee 1: No 22851*, 31 March 2022; and Lawyers and Conveyancers Act, s 152(2)(a).

[16] On 1 August 2019, Mr McGuire replied to the complainant's email in the following terms:

> Dear [complainant], I have been away for the last week and a half. I am back today and will pay the water rates and refund any difference to you when I can. I will need to change my website information as it is outdated and incorrect.
>
> Regards, Jeremy

[17] Mr McGuire failed to make the refund. The complainant sent a number of further chase up emails to him. Mr McGuire did not respond. Eventually the complainant lodged a complaint against Mr McGuire.

[18] On 15 June 2021, General Standards Committee 1 upheld the complaint. It found that Mr McGuire had charged a fee for undertaking conveyancing work which was higher than his advertised fee. It considered that Mr McGuire had agreed to make a refund in his email dated 1 August 2019 and determined that Mr McGuire's conduct in not making the refund was unsatisfactory pursuant to s 152(2)(b)(i) of the Act.[15] Inter alia, it ordered Mr McGuire to reduce his fee to that advertised and to pay a refund of $150 to the complainant.[16]

[19] Notwithstanding the Committee's decision, Mr McGuire did not attend to payment of the refund. This resulted in a further complaint and in a determination by General Standards Committee 1 to refer the matter to the Tribunal.[17]

The Tribunal's decision

[20] As a result of the referrals noted above, charges were laid against Mr McGuire on 29 March and 2 June 2022 before the Tribunal. General Standards Committee 1 charged Mr McGuire with misconduct pursuant to s 7(1)(a)(i) and 7(1)(a)(ii) of the Act, alleging that Mr McGuire had failed to comply with the disciplinary orders made against him in the refund determination. The other standards committee charged Mr McGuire under the same section, alleging he had failed to comply with the

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15 Refund determination, above n 5, at [3] and [12].
16 Pursuant to the Lawyers and Conveyancers Act, s 156(1)(g).
17 *Notice of Determination by General Standards Committee 1: No. 22571*, 8 February 2022.

disciplinary orders made against him in the caveat liability and consequential orders determinations.

[21] Shortly after the charges were laid, Mr McGuire filed his judicial review application, the subject of this appeal, in the High Court. The hearing took place on 7 February 2023 and the Judge delivered his reserved decision on 20 February 2023.[18]

[22] The hearing of the disciplinary charges proceeded before the Tribunal on 19 April 2023. The Tribunal found misconduct by Mr McGuire in both matters.[19] There was a separate hearing on penalty and, on 10 October 2023, the Tribunal made orders suspending Mr McGuire from practice for a period of four months, censuring him, ordering him to pay compensation of $3,000 to each of the complainants and requiring him to pay costs.[20]

[23] The Tribunal's liability and penalty decisions have been appealed by Mr McGuire pursuant to s 253 of the Act. The appeal was scheduled to be heard in the High Court at Auckland on 9 May 2024.

The application for review

The pleadings

[24] In his statement of claim in the judicial review proceedings in the High Court, Mr McGuire broadly claimed as follows:

(a) The caveat liability determination and the review decision were made pursuant to errors of fact and law. Mr McGuire asserted that he had tried unsuccessfully to persuade the complainant not to register the caveat but the complainant had insisted that it be registered. Central Standards Committee 3's caveat liability determination and the

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18 High Court judgment, above n 1.
19 *General Standards Committee 1 v McGuire* [2023] NZLCDT 16 at [45] and [52].
20 *General Standards Committee 1 v McGuire* [2023] NZLCDT 42.

review decision were unreasonable, unfair and failed to take into account relevant considerations.

(b) Central Standards Committee 3 made its consequential orders determination when it knew that its caveat liability determination was subject to review by the LCRO. Mr McGuire had requested that the consequential orders determination should be included in his review of the caveat liability determination. This request had been accepted by the LCRO, but the LCRO in the review decision, omitted to review the consequential orders determination.

Mr McGuire sought orders declaring both the caveat liability and the consequential orders determinations invalid and setting them aside, together with the review decision.

[25] In relation to the refund determination, Mr McGuire again alleged that the determination was made pursuant to errors of fact and of law. He asserted that the complainant signed a client engagement letter that recorded that the estimated fee would be $949 (GST and disbursements inclusive), that the complainant paid this sum, and that Mr McGuire did not at any time agree to refund the complainant $150. He sought an order declaring the refund determination invalid and setting it aside.

The High Court judgment

[26] In regard to the caveat liability and consequential orders determinations, the Judge summarised Mr McGuire's submissions, including his assertion that Central Standards Committee 3 had not considered the indemnity Mr McGuire had the complainant sign. The Judge rejected this submission. He noted that the Committee explicitly referred to the indemnity in the caveat liability determination and concluded that the indemnity demonstrated that Mr McGuire did not consider that the complainant had a caveatable interest in the property. The Judge also noted that the LCRO referred to the indemnity in the review decision. The Judge recorded that Mr McGuire's arguments as to his liability were fully before the Committee. The Judge was unable to identify any other defect in the Committee's caveat liability decision that could sustain a successful judicial review. He recorded that the

appropriate course at the time was for Mr McGuire to have put his advice to the complainant in writing and to have advised the complainant to lodge his own caveat.[21]

[27] The Judge then referred to the review decision. He noted that, on 29 August 2018, the LCRO had advised the parties that he agreed to Mr McGuire's request that the consequential orders determination be included in his review of the caveat liability determination. Nevertheless, the LCRO had recorded on several occasions in the review decision that Mr McGuire had not made a "cross-application" in respect of the consequential orders determination; rather Mr McGuire had been content to set aside the caveat liability determination with the result that the consequential orders determination would fall away.[22] The Judge concluded that even if the LCRO had been wrong about Mr McGuire's cross-application, the LCRO had acknowledged that success in relation to the unsatisfactory conduct finding would have caused the consequential orders determination to fall away. The LCRO had also recorded that, if he had concluded that the caveat liability determination should be supported but in limited terms that called for a re-examination of the nature and extent of the consequential orders, he would have revised those orders. Furthermore, the Judge found that there was no evidence that Mr McGuire had made submissions about penalty that called for consideration other than on this basis. The Judge held that any error by the LCRO regarding the cross-application had not make a material difference to the review decision and he declined the application for review on this ground accordingly.[23]

[28] In relation to the refund determination, the Judge again recorded the submissions made by Mr McGuire. He noted that Mr McGuire was asserting that he had not agreed to refund the difference between the advertised fee and the charged fee, but had said that he was willing to refund what was left over in his trust account, which happened to be $150.[24] The Judge reviewed the relevant email correspondence, commenting that it appeared to relate directly to the complainant's enquiry about the difference between the advertised fee and the charged fee. The Judge held that it was reasonable for General Standards Committee 1 to consider that Mr McGuire had

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21 High Court judgment, above n 1, at [29].
22 At [30].
23 At [31].
24 At [18].

agreed to refund the difference between the advertised fee and charged fee and he declined to find that the Committee had made a mistake of fact.[25]

[29] The Judge noted that Mr McGuire was also asserting that the Committee had erred in law by failing to take into account relevant considerations. The Judge noted various assertions made by Mr McGuire in his affidavit in support of this assertion. He observed that the Committee had reviewed all materials put before it by the parties. The Judge noted that there was no evidence (and that Mr McGuire had not said) that he had made the points to the Committee that he said the Committee had failed to take into account. The Judge further commented that, in any case, the Committee considered the central issue for it was whether Mr McGuire had agreed to refund the $150 and, if so, whether his subsequent refusal to do so was a breach of his professional obligations. The Judge recorded the Committee's conclusion that Mr McGuire's refusal to pay the refund and his failure to respond to the complainant's subsequent enquiries showed a lack of respect and courtesy, and that the failure to comply with the commitment given exhibited a lack of professionalism and failure to properly administer his practice. The Judge observed that, if the considerations belatedly identified by Mr McGuire had been put the Committee, it would still have been entitled to reach its conclusions. He held that there was insufficient evidence that the Committee had failed to consider relevant considerations and that even if it had, it had been entitled to reach the conclusions it reached. Accordingly, the Judge found that there was no error of law by the Committee.[26]

Submissions

Mr McGuire

[30] Mr Latton, appearing for Mr McGuire, argued first that the caveat liability determination was not final and that, as a result, the consequential orders determination was invalid.

[31] Mr Latton noted that, in the caveat liability determination, Central Standards Committee 3 found that the standard of service amounted to unsatisfactory conduct,

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25 At [21].
26 At [23].

and then directed the parties to file submissions regarding the appropriate orders the Committee might make under s 156 of the Act. Mr McGuire applied to review this decision on 15 May 2018, the day after he received it. The review decision by the LCRO was only given on 25 March 2020, some two years later. The consequential orders determination however was made on 28 August 2018, well before the LCRO had reviewed the caveat liability determination. It was submitted that:

(a) The LCRO was seized of the matter in its totality once Mr McGuire applied to review the caveat liability determination and matters were "effectively stayed" pending that review decision.

(b) Alternatively, the caveat liability determination was not "final" under s 152(4) of the Act, after it became subject to review by the LCRO. As a result, the orders made in the consequential orders determination were invalid, because the Committee knew that the caveat liability determination was subject to an ongoing review by the LCRO. The Committee therefore had no jurisdiction to make the orders the subject of the consequential orders determination, because the caveat liability determination had not at the time been confirmed by the LCRO under s 211(1)(a) of the Act.

[32] Further, it was argued that the LCRO breached s 199(1) of the Act, because he failed to deal with Mr McGuire's application to review the consequential orders determination in the review decision. It was submitted that the consequential orders determination has still not been reviewed and that, accordingly, there is still no final determination. It was said that the Judge erred when he found that the LCRO's failure to review the consequential orders determination was immaterial and that Mr McGuire has been dealt with unfairly as a result.

[33] It was also argued that the review decision is flawed in other respects. It was submitted that Mr McGuire did no more than file, as an agent, what the complainant insisted he file. It was put to us that Mr McGuire did not know "the full story" and that the complainant was lodging the caveat in an attempt to gain leverage for his Family Protection Act claim. Reference was made to this Court's judgment in

Gordon v Treadwell Stacey Smith.[27] It was submitted that Mr McGuire had, in all material respects, complied with the guidance set out in that case. Alternatively, it was argued that the *Gordon* decision is distinguishable, and that, in effect, Mr McGuire has been held "vicariously responsible" for the complainant's instructions. It was also argued that the "e-dealing" regime now in place has altered the law.[28] In any event, it was noted that the caveat could readily have been withdrawn. It was argued that the review decision is insupportable on the facts and unreasonable and unfair to Mr McGuire.

[34] In relation to the refund determination by General Standards Committee 1, Mr Latton argued it was ultra vires, because s 132(2) of the Act provides that costs complaints are only to be considered by a standards committee if the complaint meets the criteria prescribed in reg 29 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 (the Regulations). It was observed that reg 29 provides a minimum cap of $2,000 for a costs complaint, unless there are "special circumstances" that would otherwise justify a standards committee considering a costs complaint in respect of a lesser amount. It was put to us that costs of $150 do not meet the prescribed criterion and that there is nothing to suggest that there were special circumstances justifying an exception. As a result, it was argued that the Judge erred in law and that the refund determination was ultra vires from the outset.

[35] It was also argued that the refund determination was made in breach of the rules of natural justice. It was submitted the complainant had complained about being overcharged $150, but that the refund determination held not only that Mr McGuire had agreed to refund that sum but also that his subsequent failure to do so was unsatisfactory conduct. It was submitted that the determination was "different to the complaint" and that there was no evidence that General Standards Committee 1 had explained the change before dealing with the matter. It was submitted that, as a result, Mr McGuire did not receive a fair hearing and that the Judge's (implicit) determination to the contrary was wrong.

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27 *Gordon v Treadwell Stacey Smith*, above n 6.

28 Referring to the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002 and the Land Transfer Regulations 2002.

Standards Committees

[36] Mr Collins, for the Standards Committees, responded to the submission that the caveat liability determination was not final and that the consequential orders determination was invalid, by asserting that the timing was immaterial. It was submitted that the argument did not raise any reviewable error. It was also submitted that Central Standards Committee 3 was entitled to make both determinations concerning respectively liability and the consequential orders, and that the review initiated by Mr McGuire did not detract from that. It was noted that there was no order or direction staying the Committee's caveat liability determination and that it was entitled to proceed as it did.

[37] In regard to the second ground of challenge, that the caveat could have been withdrawn, it was noted that the finding by Central Standards Committee 3 was that registration of the caveat involved a breach by Mr McGuire of his professional obligations, including his obligation under r 2.3 of the Rules. It was argued that the fact that there is an inexpensive procedure for withdrawing a caveat was irrelevant to this finding (albeit that it might be relevant to penalty and to any compensation ordered, particularly if Mr McGuire had adduced additional evidence to the effect that he advised the complainant to follow that procedure). Mr Collins referred to the Committee's conclusion that there was a sufficient causal link between Mr McGuire's conduct and the costs incurred by the complainant, and submitted that, in the circumstances, the Committee's order was reasonable and made on the basis of the limited evidence before it. He argued that no reviewable error was made.

[38] In regard to the relevance of the *Gordon v Treadwell Stacey Smith* decision, it was submitted that the decision still applies and further that it remains the case that a caveat can be lodged by someone other than a legal practitioner by way of a manual dealing using an approved form. It was submitted that in any event, a lawyer can neither be a party to, nor facilitate, an unlawful act.

[39] In regard to the refund determination, Mr Collins accepted that the complaint had its genesis in a relatively minor bill of costs, but submitted that the matter did not proceed as a complaint about overcharging, but rather as a complaint about a refusal

to make a refund as promised. Mr Collins argued that, as a result, reg 29 was not engaged. He also denied that the determination was different from the complaint. The notice of hearing issued by General Standards Committee 1 was produced. It was submitted that the notice of hearing made it clear that what was in issue was whether there was a breach of the Rules and whether Mr McGuire's conduct was unsatisfactory. Mr Collins put it to us that Mr McGuire was invited to make submissions on this issue and that Mr McGuire could not have been in any doubt about the issues the Committee had identified or the factual basis on which the hearing was to proceed. It was argued that there was no breach of natural justice.

Analysis

Judicial review

[40] As this Court recently noted, there remains a distinction between an appeal and an application for judicial review:[29]

> [82] An appeal is the right vested in a party by an Act of Parliament to resort to a higher court or body and invoke its "aid and interposition" to address an error made by a body lower in the curial hierarchy. It is a complaint that the decision of the inferior Court or body is wrong through mistake and it takes the form of a request to a competent superior tribunal to reconsider that decision. An appellate Court will consider the decision under appeal on its merits and can substitute its own decision for that of the body from which the appeal has been taken. The creation of a right of appeal requires legislative authority.
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> [83] In contrast, judicial review does not derive from any statutory authorisation. Rather it forms part of the inherent common law jurisdiction vested in the High Court. In the exercise of its review jurisdiction, the Court confines its enquiry to the legality of the decision maker's determination. Judicial review is mainly concerned with errors of process which go to the jurisdiction of the decision maker and with errors made on the face of the record of the decision. Errors which go only to the merits or wisdom of the challenged decision, are generally not susceptible to judicial review (although, in practice, the distinction between legality and merits has proved to be elastic).

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[29] *Winton Property Investments Limited v Minister of Finance* [2023] NZCA 368 (footnotes omitted). And see *New Zealand Fishing Industries Assoc Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 557; and *Tamil X v Refugee Status Appeals Authority* [2009] NZCA 488, [2010] 2 NZLR 73 at [262], referring to *R (Nasseri) v Secretary of State for Home Department* [2009] UKHL 23, [2010] AC 1 at [12]. And see Philip Joseph *Constitutional & Administrative Law — A to Z of New Zealand Law* (online ed, Thomson Reuters) at [17.22.3.3].

[41] Against this background, we turn to consider the grounds of appeal advanced on behalf of Mr McGuire.

The caveat liability and consequential orders determinations

[42] As noted, Mr Latton sought to impugn the caveat liability and consequential orders determinations by asserting that the caveat liability determination was subject to review at the time the consequential orders determination was made. As a result, he submitted, Central Standards Committee 3 lacked the jurisdiction to make the orders made in the consequential orders determination.

[43] We do not accept this argument.

[44] Where a complaint is made under s 132 of the Act and the complaint is referred to a standards committee, the standards committee can inquire into the complaint, give a direction under s 143 (concerned with negotiation, conciliation and mediation), or decide, in accordance with s 138, to take no action on the complaint. Here the Committee elected to inquire into the complaint. It was clearly entitled to do so.

[45] Central Standards Committee 3 proceeded to determine the complaint under s 152 of the Act. It determined that there had been unsatisfactory conduct by Mr McGuire pursuant to s 152(2)(b)(i) of the Act. This decision was final, but subject to s 156(4) and to the right of review conferred by s 193 of the Act. Mr McGuire, on the day following receipt by him of the determination, applied to the LCRO for a review of the caveat liability determination under s 193. As a result, the caveat liability determination was not final, but the review application did not stay the determination. There is no provision in the Act that provides for the stay of a decision given under s 152 if review is sought by the LCRO. Indeed, it is implicit in the Act that there is no stay in these circumstances. The Act does provide for a stay, but only if there is a complaint about the amount of a bill of costs rendered by a legal practitioner.[30]

[46] Central Standards Committee 3, in its caveat liability determination, recorded that it was going to go on and consider the appropriate orders it might make under

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[30] Lawyers and Conveyancers Act, s 161.

s 156 and it invited submissions in this regard.[31] Submissions were made by the complainant but not by Mr McGuire. By emails dated 15 and 16 May 2018, Mr McGuire stated that he was reviewing the caveat liability determination to the LCRO and that as a result, he was not going to make submissions in relation to penalty. He did not either expressly or by implication seek a stay of the caveat liability determination.

[47] The Committee then proceeded to make the orders it considered were appropriate. This resulted in the consequential orders determination. It cannot be said that those orders were invalid, simply because the caveat liability determination was not final but was instead subject to review. Where a standards committee determines that there has been unsatisfactory conduct on the part of a practitioner under s 152(2)(b)(i), it has to go on and consider whether or not it should make one or more of the various orders referred to in s 156(1). Section 161(4) provides that a complaint is only finally disposed of if the standards committee has made a final determination on a complaint and the complainant has not, within the time allowed, applied to the LCRO for a review of the determination, or if the LCRO has conducted a review of the determination made by the standards committee and has reported the outcome of that review to the interested parties.

[48] Contrary to Mr Latton's submission that the Committee lacked jurisdiction to make the consequent orders because the caveat determination had not been confirmed pursuant to s 211(1)(a) of the Act, we do not consider that section has any bearing on the issue. Rather, the LCRO can, on a review under s 193, confirm, modify or reverse any decision made a standards committee, including any determination or order made by the standards committee. In other words, if the LCRO had determined that the caveat liability determination was in error, he could have modified or reversed the orders made by Central Standards Committee 3 under s 156. As noted below, this was recognised by the LCRO.[32]

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31 Caveat liability determination, above n 2, at [24].
32 Review decision, above n 4, at [55].

The review decision

[49] We turn to Mr Latton's next point — namely that the LCRO, in the review decision, failed to deal with Mr McGuire's application to review the consequential orders determination.

[50] The factual background relevant to this argument is unfortunately not particularly clear. We note the following:

(a) The Committee, in its consequential orders determination, recorded that both Mr McGuire and the complainant had the right to apply for a review of its determination by the LCRO. It detailed the timetable within which any application for review had to be lodged. It gave the LCRO's contact details and it gave a reference to a website giving further information about the LCRO and the review process.

(b) In one of his affidavits filed in support of the judicial review application, Mr McGuire stated that he sought a review of the consequential orders determination.

(c) Gareth Smith, Chief Legal Counsel — Professional Standards, does not, in his affidavit in response to Mr McGuire's affidavit, deny Mr McGuire's assertions. However, he does not expressly refer to any formal request by Mr McGuire for a review of the consequential orders determination.

(d) There is no record of any formal request by Mr McGuire for a review of this determination in the papers which have been put before us. Nor have counsel, despite our requests, been able to make a copy of any formal request for a review of the consequential orders determination available to us.

(e) On 28 August 2018 (the day the consequential orders determination was released), Mr McGuire sent an email to Ms Carolyne Umali, a case manager for the LCRO, attaching the correspondence he had received

that day from the Committee and asking that it be included in his review. He also expressed outrage that this "determination" had been made whilst the matter was the subject of a review and he advised that he would not be paying anything until matters were fully determined.

(f) There is a file note prepared by another case officer for the LCRO, recording a discussion she had with the LCRO. The file note records that the case officer discussed the matter with the LCRO and that the LCRO agreed to Mr McGuire's request. The file note goes on to record as follows:

> No need to lodge a second review application or filing fee.

The file note records that the case officer subsequently spoke to Mr McGuire and told him this.

(g) Ms Umali responded by email to Mr McGuire on 29 August 2018, relevantly stating as follows:

> On 29 August 2018 Mr McGuire submitted Part 2 of the Standards Committee's determination (file number 16807) relating to the above application for the review and requested that this be included in his review. The [LCRO] has agreed to this approach and the review will now extend to Part 2 of the Standards Committee's determination.

(h) On 29 November 2018, Ms Umali sent an email to Mr McGuire asking whether he wanted to respond to Mr Butler's application requesting the LCRO to review the consequential orders determination. On the same day, Mr McGuire responded, saying that he thought he had already applied to review this determination and that his application had been accepted as part of his overall review.

[51] These various matters notwithstanding, in the review decision, the LCRO observed on more than one occasion that Mr McGuire's review was in relation to the

caveat liability determination only and that Mr McGuire had not sought to review the consequential orders determination.[33]

[52] We are satisfied that the LCRO erred in this regard. It appears that Mr McGuire did, at least implicitly, seek review of the consequential orders determination and that the LCRO accepted that a review of this determination had been sought. Mr McGuire was so advised both orally and in writing. The LCRO was, in our view, wrong when he suggested otherwise in the review decision of 25 March 2020.

[53] It does not however follow that the Judge erred when he declined to grant judicial review in respect of this error. The LCRO's decision concerned not only Mr McGuire's application to review the caveat liability determination, but also an application by the complainant seeking review of the compensation awarded in the consequential orders determination. As the LCRO noted in his 25 March 2020 decision:

> [2] In brief terms the issues on review are whether Mr McGuire conducted himself unsatisfactorily and, if so, the correctness of the compensation remedy fixed by [Central Standards] Committee [3].

[54] As already noted, Mr McGuire made no submissions in relation to the consequential orders determination. This notwithstanding, it is clear that the LCRO had jurisdiction to review all aspects of the determinations.[34] The LCRO recorded this and said that he would have reviewed the orders made against Mr McGuire had he reached a different view in regard to the caveat liability determination.[35] The LCRO went on to reiterate as follows:

> [117] I recorded previously that Mr McGuire has not sought a review of the penalty and remedy orders ... He sought only to be relieved of the unsatisfactory conduct finding. Of course, success on that account would have caused the penalty and remedy orders to fall away.
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> …
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> [121] Of course, if I had concluded that the conduct determination should be supported but in limited terms that called for re-examination of the nature

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33 Review decision, above n 4, at [47], [55] and [117]–[121].
34 Lawyers and Conveyancers Act, ss 203(a) and 211(1)(a).
35 Review decision, above n 4, at [55]–[57].

> and extent of the penalty and/or the costs orders, I would have intervened on that account and, as necessary or appropriate, revised those orders. But in this case my views on the conduct shortcomings are essentially in line with those of the Committee, such that no intervention is justified.

[55] We agree with the Judge that the error by the LCRO as to whether or not Mr McGuire had sought to review the consequential orders determination, did not make a material difference to the LCRO's decision.

[56] Mr Latton also disputed the Committee's and the LCRO's reliance on this Court's decision in *Gordon v Treadwell Stacey Smith*.[36] In that case, the appellant and her estranged husband sold their property. The purchasers agreed to transfer an existing house they owned to the appellant and to build a house for the estranged husband on land he already owned. The sale was delayed because of problems with one of the titles. Eventually, the sale settled but with a deduction from the settlement sum. The purchasers reserved the right to recover this sum after settlement. The respondent solicitors, acting for the purchasers, lodged a caveat against the appellant's property claiming an interest in her land by virtue of the agreement for sale and purchase, and alleging losses suffered as a result of the delayed settlement. The appellant successfully applied for removal of the caveat. She also sought compensation asserting that the caveat had been lodged without reasonable cause.[37]

[57] The Court held that there had been no reasonable basis supporting the caveat lodged by the respondent solicitors on behalf of the purchasers.[38] The purchasers only remaining interest following settlement was in relation to the unpaid purchase moneys. This was an unsecured debt. The Court fixed compensatory damages and ordered that they be paid by the respondent solicitors.

[58] The Court observed as follows:[39]

> In examining the position of a solicitor called upon to advise whether a caveat should be lodged — and this will often occur in circumstances of some urgency — the Court will first look at the honesty of the solicitor's belief. When examining reasonableness it will be aware that it is not uncommon for

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36 *Gordon v Treadwell Stacey Smith*, above n 6.
37 At 281–282.
38 At 289.
39 At 289.

> solicitors to be sued for professional negligence where they fail to advise a client to lodge a caveat first and argue for its validity afterwards …
>
> The matter will be judged by the standards of a reasonable conveyancing practitioner possessed of the factual material available to the solicitor whose action in lodging a caveat is under scrutiny and advising and acting in the same circumstances. Would such a practitioner have thought in those circumstances that there was a proper basis upon which a claim could be asserted by the client? We do not consider that the approach we have taken … will create a problem where a solicitor is instructed to lodge a caveat but has a concern about whether this can properly be done. The client can be advised of the doubt and, if still instructed to lodge a caveat, the solicitor can record the advice in writing and seek an indemnity. If that is not thought appropriate and the client wants to proceed, the solicitor can always prepare the document for personal signature and personal lodgment by the client. A solicitor who does so could not be described as a person lodging the caveat.

[59] In Mr McGuire's case, the Committee and the LCRO relied on this decision. The LCRO considered the materials before him. He noted Mr McGuire's assertion that he tried to dissuade the complainant from registering a caveat and that he had advised him about his Family Protection Act claim. He noted the assertion then made by Mr McGuire that the caveat was justified, based on an institutional constructive trust. The LCRO set out his understanding of what a constructive trust is and then commented that nowhere in the available materials did Mr McGuire explain how the facts upon which he said he relied could demonstrate the existence of a constructive trust binding the deceased and his estate.[40] The LCRO noted that an equitable claim to an interest in land does not arise in favour of a child simply because the parent has, or acquires, such an interest in the land and further that there was no evidence that the deceased father's acquisition of the interest in the land was in any way derived from funding provided or work done by, or relevant support or assistance from, the complainant. The LCRO found that no lawyer acting with reasonable competence would reasonably have thought that there was a claim worthy of a caveat on the facts identified by Mr McGuire.[41]

[60] The LCRO observed that Mr McGuire's position was that he strongly advised the complainant against lodging the caveat, but that before the LCRO, Mr McGuire was asserting that it was reasonably arguable that it had been appropriate for him to

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40 Review decision, above n 4, at [71].
41 At [74].

register the caveat.[42] The LCRO ventured the comment that it was only after the complaint was made by the complainant that the justification of reasonable cause was raised and then "as a backstop".[43]

[61] Although Mr Latton sought to persuade us that it was appropriate to revisit the review decision in this regard, we are not persuaded that we should do so. First, a merits-based finding is not open to judicial review, as we have explained above. Further and, in any event, there is no proper basis on which to review the LCRO's decision. The submission made by Mr Latton that Mr McGuire did not know the full story was at odds with Mr McGuire's assertions before the LCRO. It is our view that the review decision was both legally and factually sound.

[62] Mr Latton also sought to persuade us that Mr McGuire followed the guidance given by this Court in *Gordon v Treadwell Stacey Smith*. We have difficulty with this submission. Mr McGuire did not follow the guidance given by this Court. He did not record his (alleged) advice to the complainant about the appropriateness of the caveat. Indeed, on the case Mr McGuire ran before the LCRO, Mr McGuire thought that it was appropriate for him to lodge the caveat. Mr McGuire did obtain an indemnity, but, as the Committee found and the LCRO noted, this demonstrated that Mr McGuire must have had concerns as to whether or not a caveat could be registered. While the complainant no doubt wanted Mr McGuire to lodge the caveat, Mr McGuire could not, on the authority of *Gordon v Treadwell Stacey Smith*, shelter behind the complainant's instructions. Mr McGuire was not simply the complainant's agent. If he had doubts, he could have prepared the document for signature by the complainant and then for subsequent lodgement by the complainant. That course is not precluded by the e-dealing regime which is now in place. Guidance issued by Land Information New Zealand records that, whilst most documents are now lodged electronically, it is still possible to manually lodge title transactions. There is a template instrument available on Landonline and a caveat can be lodged by somebody other than a legal practitioner in a manual dealing using a prescribed form.[44]

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42 At [77].
43 At [78].
44 Toitū Te Whenua: Land Information New Zealand "Approved Paper Forms for the Land Transfer Act 2017" (22 September 2022) <https://linz.govt.nz>.

[63] We cannot see that there was any error in the Judge's decision declining to grant judicial review in respect of the caveat liability determination, the consequential orders determination, or the review decision. This aspect of the appeal must fail.

The refund determination

[64] Mr Latton submitted that this complaint should not have been dealt with by General Standards Committee 1, because it related to a relatively minor bill of costs, well under the threshold set out in reg 29 of the Regulations.

[65] Relevantly, reg 29 provides as follows:

> **29 Complaints relating to bills of costs**
>
> If a complaint relates to a bill of costs rendered by a lawyer … unless the Standards Committee to which the complaint is referred determines that there are special circumstances that would justify otherwise, the Committee must not deal with the complaint if the bill of costs—
>
> …
>
> (b) relates to a fee that does not exceed $2,000, exclusive of goods and services tax.

[66] We agree with Mr Collins' submission that the regulation was not engaged. While the complaint had its origin in Mr McGuire's bill of costs to the complainant for the sale of her and her partner's property, any issue of overcharging was overtaken by the email advising that a refund would be made, the subsequent failure to refund the difference, and the fact that Mr McGuire ignored chase up emails from the complainant.

[67] The matter was not treated or by the Committee as being a complaint about overcharging. The notice of hearing, issued by the Committee, made it clear that the complaint was being treated as a complaint about the refusal to provide the refund Mr McGuire had advised would be forthcoming. This was explained by the Standards Committee in the refund determination.[45] The Committee there noted that it considered that the central issue was not quantum, but whether Mr McGuire had

[45] Refund determination, above n 5, at [8].

agreed to refund the $150 difference between his fee as charged and the fee as advertised on his website, and if he had agreed, whether his subsequent refusal to pay the refund was in breach of his professional obligations.

[68] The Committee found that Mr McGuire's conduct infringed:

(a) Rule 3.1 of the Rules, which requires that a lawyer must at all times treat a client with respect and courtesy.

(b) Rule 10, which requires that a lawyer must promote and maintain proper standards of professionalism in his or her dealings.

(c) Rule 11, which requires that a lawyer's practice must be administered in a manner that ensures that the duties to the court and the existing prospective and former clients are adhered to and that the reputation of the legal profession is preserved.

The Committee did not make any finding of overcharging under rr 9 or 9.1 of the Rules. In other words, it was not a complaint to which the $2,000 threshold in reg 29 applied.

[69] It was further argued that the refund determination resulted from a breach of the rules of natural justice because "the determination was different to the complaint".

[70] This issue can be dealt with shortly. The Committee was required to perform its functions in a way that is consistent with the rules of natural justice,[46] but in this case, it cannot be said that the determination was different to the complaint. A notice of hearing was issued by the Standards Committee on 12 May 2021, before the Committee determined the complaint and before Mr McGuire responded to the

[46] Lawyers and Conveyancers Act, s 142(1).

same. The notice of hearing recorded that the issues raised by the complaint were considered to be as follows:

(a) Whether Mr McGuire agreed to make a refund to the complainant in his email of 1 August 2019 and has failed to make that refund, and whether such failure is a breach of rr 3.1, 10 and/or 11 of the Rules.

(b) Whether Mr McGuire's conduct in respect of any of the above matters amounted to unsatisfactory conduct within the meaning of s 12(a), 12(b) and/or 12(c) of the Act.

[71] Mr McGuire responded by email but he did not address these matters directly. Rather he denied any wrongdoing and referred to r 29 of the Regulations.

[72] It is clear that Mr McGuire was notified of the issues and in straightforward terms. He was invited to respond to the Committee's concerns. He did not do so. There was no breach of the rules of natural justice.

[73] As a result, this aspect of the appeal must also fail.

Result

[74] The appeal is dismissed.

[75] The appellant must pay one set of costs to both the first and second respondents jointly, on a band A basis, together with usual disbursements.