IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA

CIV-2018-085-000488
[2020] NZDC 3011

BETWEEN	JEREMY JAMES McGUIRE Plaintiff
AND	NEW ZEALAND LAW SOCIETY Defendant

Hearing: 18 February 2020

Appearances: Plaintiff in person
P Collins for Defendant

Judgment: 7 April 2020

RESERVED JUDGMENT OF JUDGE C N TUOHY

Introduction

[1] This is an application to strike out Mr McGuire's statement of claim (SOC). The background to the application is set out in my reserved judgment dated 27 September 2019 relating to Mr McGuire's earlier application to strike out the Law Society's statement of defence.

[2] That judgment contained a detailed analysis of the SOC, which I incorporate by reference in this judgment. The judgment also briefly recorded at [28] - [30] the relevant Rule and the legal principles relating to strike out. Given the nature of the issues considered in this judgment, it is appropriate to restate the principle that for a strike out application to succeed, it must be demonstrated that on the material before the Court and in the light of the present state of evolution of the common law, the

causes of action relied upon are so clearly untenable that they cannot possibly succeed.[1]

Grounds of the Application and Opposition

[3] The essential submission made on behalf of the Law Society is that the claim should be struck out as an abuse of process because it is an attempt to re-litigate in the District Court determinations made by Standards Committees which are subject only to review by a Legal Complaints Review Officer (LCRO) under the Act, or judicial review by the High Court.

[4] The basis of Mr McGuire's opposition is set out in his extensive cross-referenced submissions dated 12 February 2020. In them, he addressed two main points before turning to his own still extant application to strike out the Law Society's statement of defence –

- Whether the Law Society is liable for the acts or omissions of Standards Committees;

- Whether the Law Society is protected from liability by s 272 of the Lawyers and Conveyancers Act 2006 (the Act).

[5] The issue of whether the law recognises a cause of action for breach of the statutory duties relied upon by Mr McGuire is a matter which I raised during the hearing of the application. I gave leave to the parties to file a further memorandum after the hearing, bringing to the Court's attention any authority in which breach of a statutory duty of that type had been recognised as the basis for a tortious action for damages. Both parties filed a further memorandum and these are referred to later in this judgment.

---

1 *South Pacific Manufacturing Co Ltd v NZ Security Consultants and Investigations Ltd* [1992] 2 NZLR (CA) at 305, Richardson J.

Discussion

[6] The two causes of action relied on by Mr McGuire are identified by the headings of the sections of the SOC in which they are directly pleaded. They are *"Breach of Statutory Duty"* and *"Bad Faith"*. The allegations contained in those sections were analysed and recorded in [11] and [12] of my judgment dated 27 September 2019, which I adopt for the purposes of this judgment.

[7] In the first bullet point of [11], I omitted to record the specific statutory duty which Mr McGuire pleaded was owed to him and breached by the Standards Committee which made the first determination, that is, s 142(1) of the Act. This provides:

> **142 Procedure of Standards Committee**
>
> (1) A Standards Committee must exercise and perform its duties, powers, and functions in a way that is consistent with the rules of natural justice.

[8] The SOC also refers to Reg 26(1) of the Lawyers and Conveyancers (Lawyers: Complaints Service and Standards Committees) Regulations 2008 (the 2008 Regulations) which provides that the procedures of Standards Committees must accord with the requirements of the rules of natural justice. This does not seem to add anything of substance to s 147(1).

[9] Although not specifically referred to in the allegations that subsequent determinations of Standards Committees were also made in breach of the rules of natural justice, it is implicit that in each case where this has been pleaded, the statutory duty relied upon is that contained in s 142(1).

[10] The only other legislative provisions which it is alleged the Law Society or its employee or a Standards Committee breached are ss 158 and 159 of the Act and Reg 10(1)(a) of the 2008 Regulations.

[11] Mr McGuire's second cause of action is headed *"Bad Faith"*. Although good and bad faith are concepts which have relevance in various areas of the law, there is no cause of action of *"bad faith"* known to the law. Sections 185 and 272 of the Act

provide protection to members of Standards Committees and the Law Society including associated persons respectively from criminal or civil liability unless it is proved that they acted *"in bad faith"*. But, of course, that proviso does not create a cause of action, rather it nullifies a defence.

[12] It is not easy to understand from the allegations made under the heading *"Bad Faith"* exactly what the legal foundation is for this claim. The cause of action appears to be summarised in para 127 of the SOC which states:

> 127. The complaints service (of the Law Society) has effectively been used by people in positions of power over the plaintiff to bully, victimise and intentionally cause him harm rather than to bona fide regulate the legal profession in the interests of the public good.

[13] Although Mr McGuire has not specifically identified the *"people in positions of power"* to whom he is referring, it is implicit that they are the persons identified in the preceding paragraph, viz the Central Standards Committee No 3, Malcolm Ellis and the Canterbury-Westland Standards Committee in relation to the proceedings which resulted in one or other of the five determinations.

[14] The language used in para 127 of the SOC indicates that this claim is intended to be or, at least, should be treated as a claim in the tort of misfeasance in public office, the category described by Lord Steyn in *Three Rivers DC v Bank of England (No 3)*[2] as *"targeted malice"*. This covers conduct by a public officer specifically intended to injure a person.

[15] The subjects which I intend to address in the context of whether these causes of action are reasonably arguable are:

- Vicarious liability of the Law Society for the acts or omissions of Standards Committees and their members

- Whether breaches of the pleaded statutory duties are actionable

---

2 *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1 (HL).

[16] Whether Mr McGuire's claim amounts to an abuse of process because it is an attempt to collaterally attack determinations of Standards Committees is a further issue affecting both causes of action which must be addressed.

[17] Finally, there are two sections of the SOC which were not analysed in my judgment of 27 September 2019. They need to be considered in the context of my findings in relation to the issues identified in the last two paragraphs.

Vicarious Liability

[18] The Law Society has pleaded that it is not liable for the acts or omissions of Standards Committees or their members. At the hearing, when this issue was raised, Mr McGuire called in aid the liability of a principal for the acts of its agent and in his written submissions expressed his astonishment that the point should even be raised.

[19] Section 63(2) of the Act provides that the Law Society is a body corporate which has all the rights and may incur all the liabilities of a natural person of full age and capabilities. It is obviously a different legal person from its members and employees and from the members of Standards Committees who are not its employees and, in some cases, not even its members.[3]

[20] It is those committees and its members who undertook the acts or omissions on which Mr McGuire's claim is founded.[4] Any liability on the part of the Law Society for the tortious acts or omissions of other persons can only arise from the doctrine of vicarious liability.

[21] Vicarious liability is most commonly found where there is an employment or analogous relationship between the tortfeasor and the person held to be liable for his acts or omissions. Mr McGuire's position is that the Standards Committees are mere agents of the Law Society by which I understand that he means that they are integral organs of the Society under its control and carrying out its statutory functions. In

---

3 See s 129 of the Act.

4 With the exception of Malcolm Ellis whose position is considered later in this judgment.

considering this issue, it is necessary to examine the statutory relationship between the Law Society and Standards Committees.[5]

[22] The Act confers on the Law Society the function[6] and necessary powers[7] to control and regulate lawyers in practice in New Zealand. Part 7 of the Act creates the framework in which that function is to be undertaken in respect of complaints and discipline of lawyers.

[23] There is a discrete section prescribing the functions of the Law Society in relation to the complaints service.[8] Those functions which specifically refer to Standards Committees are:

- to enter into contracts, on behalf of the Law Society, with persons who provide services to or are employed to assist, Standards Committees.

- to provide assistance to Standards Committees and to their offices.

- to ensure that decisions of Standards Committees are enforced.

[24] Section 126 requires the Law Society to establish (as part of its complaints service established under s 121) one or more Standards Committees, the members of which are to be appointed by the Law Society. Each Standards Committee must consist of at least three persons, one of whom much be a lay person (i.e. not a lawyer).[9] The rules establishing Standards Committees must prescribe the constitution and proceedings of the committee and include detailed provisions relating to appointment, tenure, replacement and removal of members.[10]

---

5 Analyses of the statutory framework in which Standards Committees operate can also be found in the judgments of the Court of Appeal in *Orlov v NZLS* [2013] NZLR 562 and the High Court in *Hart v Auckland Standards Committee 1 of New Zealand Law Society* [2013] NZHC 83, [2013] 3 NZLR 103.

6 s 65.

7 s 67.

8 s 124.

9 s 129(1) and (2).

10 s 129(4).

[25] Those rules are contained in the 2008 Regulations. Regs 14,15,17 and 18 include detailed provisions for the appointment by the Board of the Law Society of both lawyer and lay members and the mode and criteria for such appointments. Regs 16 and 19 provide that appointments are to be for fixed terms not exceeding 3 years.

[26] Reg 21 gives the Board the power to remove a member from office but only if it is satisfied that one of the following circumstances exist:

- the member has for any reason displayed an inability to perform the functions of that office; or

- the member has neglected his or her duties, including in particular where the member's attendance, conduct, or performance at meetings of the Committee has not been satisfactory; or

- the member has engaged in personal or professional conduct that the Board considers brings the Society into disrepute; or

- the member has been declared bankrupt or is the director of a company that has been put into receivership or liquidation; or

- the member has been convicted of a criminal offence punishable by imprisonment and the Board considers that the conviction reflects on the fitness of the member to serve on the Committee; or

- in the case of a conveyancing practitioner or lawyer member, the Committee or the Disciplinary Tribunal has determined that the member has been guilty of misconduct or of unsatisfactory conduct.

[27] The statutory functions of Standards Committees are set out in s 130:

> **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:

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

[28] The procedure of Standards Committees is prescribed in s 142. Section 142(3) provides that, subject to the Act and to any rules made under it, a committee may regulate its procedure in such a manner as it sees fit. Rules have been made in Part 4 of the 2008 Regulations. As noted above[11] both s 142(1) and Regulation 26(1) include the duty to observe the rules of natural justice.

[29] Section 147 confers powers of investigation on Standards Committees including the power to require the provision of information from certain persons or incorporated bodies. There is a power to employ another person or body to give assistance in which case that person or body is to be treated as employed by the Society.

[30] Section 152 sets out the power of Standards Committees to determine complaints:

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).

---

11 In [7] and [8].

(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

(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.

[31] The orders which a Standards Committee may make on the determination of a complaint are set out in s 156. They are extensive and include inter alia:

- an order censuring or reprimanding a practitioner who is the subject of the complaint;

- an order that the practitioner reduce or cancel or refund his fees;

- an order that the practitioner rectify any error or omission at their own expense;

- an order that the practitioner pay to the Law Society a fine not exceeding $15,000;

- an order that the practitioner to pay to the Law Society such sum as the Standards Committee thinks fit in respect of the cost and expenses of the inquiry, investigation and any hearing concluded;

- an order that the practitioner pay the costs and expenses of the complainant.

[32] As to procedure, s 153 provides that hearings under s 152 are to be conducted on the papers unless the Standards Committee directs otherwise. However, the practitioner has the right to make written submissions which may include additional relevant written material and responses to any submissions made to the committee by any other person.

[33] Section 151 provides that a Standards Committee may receive in evidence any statement, document, information or matter whether or not it would be admissible in a Court of law and may take evidence on oath which any member may administer. Subject to those particular provisions, the Evidence Act applies to a Standards Committee in the same manner as if it were a Court.

[34] The above survey of the functions, powers and procedure of Standards Committees demonstrates that they have both investigative and judicial functions. In its judicial role of making determinations, a Standards Committee is similar in function and procedures to a court of law.

[35] In assessing the degree of similarity, it is helpful to look at the criteria identified by Lord Diplock in *Trapp v Mackie*[12] when considering whether the proceedings of a tribunal should attract witness immunity:

> So, to decide whether a tribunal acts in a manner similar to courts of justice, ... one must consider first, under what authority the tribunal acts, secondly the nature of the question into which it is its duty to inquire; thirdly the procedure adopted by it in carrying out the inquiry; and fourthly the legal consequences of the conclusion reached by the tribunal as a result of the inquiry.

[36] The authority of a Standards Committee emanates from an Act of Parliament. The issues which it has to deal with when making a determination are akin to those which are dealt with in both civil and criminal courts, that is, whether the matter should be passed to a superior tribunal, whether it has been established that a person's conduct fell below a legally prescribed standard and, if so, what consequences should follow.

---

12 *Trapp v Mackie* [1979] 1 All ER 489.

[37] The procedures of a Standards Committee mandated by the Act and the rules made under it are akin to those in civil courts: the requirement to observe the rules of justice; the application of the Evidence Act with modifications which are common for statutory tribunals; the powers to require the provision of information from third parties and to take evidence under oath and administer the oath.

[38] The orders which may follow a determination potentially involve significant reputational and financial consequences for the person subject to them. A determination of a Standards Committee is a binding determination of rights. Section 154(4) provides (subject to two limited provisos) that every determination and every order of a Standards Committee is final.

[39] It is obvious that the members of Standards Committees are not employees of the Law Society. Nor, in terms of the Act, are Standards Committees or their members under the control of the Law Society in the conduct of their functions. Indeed, their quasi-judicial character requires independence and thus positively implies the need for independence.

[40] The statutory framework is consistent with absence of control. The functions of the Law Society in respect of Standards Committees are limited to those identified in [23] above. Although the Law Society has the power to appoint the members of Standards Committees, it has no power to remove them during their tenure except in prescribed and limited circumstances.

[41] The facts that Standards Committees are part of the complaints service established by the Law Society, that their members are appointed by the Law Society, and that the Law Society provides them with various ancillary services cannot justify the imposition of vicarious liability in the face of the lack of any employment or agency relationship and the independence required of Standards Committees in the carrying out of their quasi-judicial functions.

[42] The separate protections from criminal or civil liability accorded to members of Standards Committees by s 185 of the Act and to the Law Society and its officers and employees by s 272 reinforces the conclusion that it was not Parliament's intention

that the Law Society should be vicariously liable for the acts or omissions of Standards Committee members.

[43] It will be for the Law Society to decide whether to stand behind the members of Standards Committees if they are faced with an action for damages in tort. However, as will be apparent from the following sections of this judgment there is little room for such an action apart from the tort of malfeasance in public office in respect of which a claimant faces some formidable hurdles of proof.

[44] After the hearing, Mr McGuire drew the Court's attention to the decision of the Court of Appeal in *S v Attorney-General*,[13] in particular certain dicta of Tipping J on the subject of vicarious liability. While the factual situation in that case was far removed from this one, in coming to my conclusion on this issue I have borne in mind the general approach and policy considerations discussed by Tipping J. In my view they support that conclusion.

[45] Mr McGuire also drew attention to the intituling on certain unrelated High Court proceedings to which Standards Committees were parties, describing them as "Standards Committees of the Law Society". That is immaterial to their statutory relationship with the Law Society for the purpose of tortious liability.

[46] This is a question of law, the answer to which, in my view, is so clear that it is appropriate to decide in the context of a strike out application. The absence of vicarious liability for the acts or omissions of Standards Committees and their members means that both causes of action against the Law Society are clearly untenable.

Abuse of Process – Collateral Attack

[47] The main thrust of the Law Society's submission was that Mr McGuire's claim amounts to a collateral attack on the various determinations made by Standards

---

13 *S v Attorney-General* [2003] 3 NZLR 450.

Committees and for that reason should be struck out as an abuse of process. That is a well-established basis for strike out.[14]

[48] Almost all of the allegations on which the two causes of action are based involve one or other of the five determinations of Standards Committees: that they were wrong in fact and law and made in breach of the rules of natural justice and were also variously ultra vires, unfair and unreasonable. Remedies are available for all of those complaints (if they are valid) pursuant to the Act or by way of judicial review in the High Court.

[49] Section 193 of the Act provides a right of review by a LCRO to anyone affected by the determination of a Standards Committee. The Act provides a detailed framework in which such reviews must be carried out.[15] In carrying out the review the LCRO must observe the rules of natural justice.[16]

[50] The scope of review is broad. It may cover all or any aspect of any inquiry carried out by or on behalf of a Standards Committee in relation to the complaint or matter to which the final determination relates and of any investigation conducted by or on behalf of the Standards Committee in relation to it.[17]

[51] Under s 211 a LCRO has the power to confirm, modify, or reverse any decision of a Standards Committee, including any determination, requirement, or order made, or direction given, by the Standards Committee (or by any person on its behalf or with its authority) and to exercise any of the powers that could have been exercised by the Standards Committee in the proceedings in which the decision was made or the powers were exercised or could have been exercised.

[52] There is also a power for the LCRO to direct a Standards Committee to reconsider and determine, either generally or in respect of any specified matters, the

---

14 *Koyama v NZLS* [2015] 3 NZLR 29 and the cases there cited.
15 In ss 190-215.
16 s 206(3).
17 s 204.

whole or any part of the complaint, matter, or decision to which any application for review relates.[18]

[53] However, the Act does not specify that any particular grounds have to be made out for the exercise of the LCRO's powers on the review of a final determination so that there is no restriction on the grounds upon which an applicant may rely. Thus, it is clear, from both the lack of restrictions on the grounds for review and the wide range of powers available to a LCRO, that the right of review is a broad one, at least equivalent to a right of general appeal. I consider that all Mr McGuire's complaints about the determinations would fall to be considered on a review under s 193 and all are remediable under the powers given to a LCRO on a review.

[54] Additionally, they are all capable of remedy on judicial review in the High Court, apart from the complaint that the determinations were wrong in fact and law which is normally remediable only by an appeal.

[55] Counsel advised that Mr McGuire has applied for review by the LCRO of the first, second and third determinations and that an application by him for judicial review of the fourth determination has been dismissed.[19] But the extent to which he has availed himself of those rights does not affect the principle.

[56] There can be no doubt that, given the pleaded basis for both causes of action, this claim amounts to an attempt to circumvent the process prescribed by the Act and to substitute this Court as the tribunal for review of the determinations of the Standards Committees. As well as that, it is designed by its very nature to provide the vehicle for a judicial review of an inferior tribunal's decision by the District Court when the constitutional forum for such a review is the High Court.[20] For that reason also both causes of action are clearly untenable.

[57] I note that the same conclusion was reached in *Baxendale-Walker v Middleton and Others*[21] in a case where a former solicitor brought an action for damages against

---

18 s 209.
19 *McGuire v NZLS* [2019] NZHC 2748.
20 *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 at 136 per Cooke J.
21 *Baxendale-Walker v Middleton and Others* [2011] EWHC 998 (QB).

the Law Society of England and Wales rather than an appeal to the appropriate tribunal in respect of the decision of the Solicitors Disciplinary Tribunal to strike him off the Roll of Solicitors.

Breach of Statutory Duties Actionable?

[58] Although my conclusions on the issues of vicarious liability and abuse of process are separately conclusive of this application in regards to all but peripheral aspects of the claim, I intend also to address the intrinsic viability of this cause of action. That is dependent on the premise that a breach of the statutory duty to observe the rules of natural justice can provide the foundation for an action for damages in tort. The allegation of breach of the rules of natural justice is made in respect of all five Standards Committee determinations which are the subject of Mr McGuire's claim. In each case they are combined with an allegation that the determination was wrong in fact and in law. In all but one case, there is also an allegation that the determination was bad for bias which would also be a breach of the rules of natural justice. In the case of the fifth determination, there is are additional allegations that the determination was ultra vires and unreasonable and unfair. Possibly the complaint of unfairness may also amount to an allegation of breach of the rules of natural justice.

[59] It must first be pointed out that an allegation that a determination was wrong in fact or in law is not an allegation that it was made in breach of the rules of natural justice. Many appeals to higher Courts are made on this ground in the civil jurisdiction (and some succeed) but without any suggestion the decision appealed from was made in breach of the rules of natural justice.

[60] It must also be pointed out that there is no express statutory duty to be found in the Act requiring a Standards Committee's determination to be right in fact or in law nor that it must be reasonable, fair or intra vires. If it is not, a party to the complaint in which a determination of this nature is made has a right of review by a LCRO under s 193. If the determination is ultra vires or made unfairly or is unreasonable in the *Wednesbury* sense, there is a right to seek judicial review in the High Court. But there is no right of review by or appeal to this Court (not that Mr McGuire's proceeding in this Court purports in its form to be either).

[61] The issue then, in respect of all the allegations of this type in the SOC, is whether a breach of the statutory duty in s 142(1) gives rise to an action for damages. Mr McGuire's claim simply assumes that it does. However, both commentary and case law make clear that not every breach of a statutory duty will give rise to a cause of action for damages. Indeed, the action is available for only a relatively limited category of such breaches.

[62] The question of whether an enactment gives rise to a cause of action for breach of statutory duty is a question of legislative intent.[22] Such a claim in tort will arise if the following can be shown:

> … as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action … [23]

[63] The issue of whether breach of a statutory duty to observe the rules of natural justice is actionable in tort arose directly in the High Court in *Feary v Commissioner of Crown Lands.*[24] In that case the Commissioner had forfeited a pastoral lease pursuant to s 146 of the Land Act 1948. That section provided in subsection (1):

> Where the Board has reason to believe that any lessee or licensee is not fulfilling the conditions of his lease or licence in a bona fide manner according to their true intent and purport, the Board, after holding an inquiry into the case and giving the lessee or licensee an opportunity of explaining the non-fulfilment of the conditions, and being satisfied that any one of the grounds specified in the next succeeding subsection has been established may, with the approval of the Minister, by resolution declare the lease or licence to be forfeited.

[64] The lessees commenced an action against the Commissioner which included a cause of action for breach of the statutory duty in s 146. Although the judgment is not

---

22 *R v Deputy Governor of Parkhurst Prison, ex parte Hague* [1992] 1 AC 58 at 159.
23 *X (Minors) v Bedfordshire County Council* [1995] 3 All ER 353 (HL).
24 *Feary v Commissioner of Crown Lands* [2001] 1 NZLR 704.

entirely clear on the point, the allegation appears to have been that the Commissioner failed to give the lessee an opportunity of explaining the non-fulfilment of the conditions of the lease – which of course would be a breach of the rule of natural justice incorporated in the section.

[65] The following question of law was argued on a pre-trial basis: "does a breach of s 146 of the Act give rise to an action for breach of statutory duty against the Commissioner?" Panckhurst J noted that the answer to that question was determinative of whether the cause of action for breach of statutory duty was available and therefore raised, in effect, a strike-out issue. He, therefore, adopted the usual cautious strike out approach. Nevertheless, he was satisfied that the answer to the question was "no".

[66] In coming to that conclusion, he observed that the wording of the statute, its subject-matter and scope, and the purpose of the provision said to give rise to the cause of action for breach of a statutory duty are highly relevant to the question of whether Parliament intended a breach of such duty to be actionable. He pointed out that the duties created by s 146, including the duty to give the lessee a right to be heard, were procedural and that militated against the recognition of a right of action.

[67] He also noted that s 146(3) provided a right of general appeal to the lessee which would encompass questions of process such as any failure to allow the lessee an opportunity to be heard and that factor separately told against the recognition of a right of action.

[68] In this case also, the Act provides an internal means of redress for a breach by a Standards Committee of the duty to observe the rules of natural justice through the right of review conferred by s 193. The nature and breath of that right of review are fully outlined in the preceding section of this judgment. Additionally, redress may be available through judicial review in the High Court.

[69] With regard to authority, Panckhurst J stated that he was "not aware of a case, and none was cited, where a statutory power of decision, attended by a duty to observe the principles of natural justice, gave rise to a cause of action for the breach

of the latter. Indeed, *Calveley v Chief Constable* [1989] 1 All ER 1025 (HL) at 1029-30 is recent high authority to the contrary." In *Calvely*, the nature of the duty relied upon to found a claim in negligence was procedural, which caused the House of Lords to conclude that the legislature intended it to be redressed by review, not by damages.

[70] In the memorandum he provided after the hearing, Mr McGuire drew the Court's attention to a number of authorities. Some of them involved damages awarded against the Crown for the breach of the right to natural justice enshrined in s 27(1) of the New Zealand Bill of Rights Act 1990 (the NZBORA). Those cases are not pertinent to whether a claim in tort may be made against a non-governmental body for breach of statutory duty. *Baigent's* case,[25] which established the power to award damages against the Crown for a breach of the rights enshrined by NZBORA and the line of cases which have followed it do not create a cause of action in private law against non-governmental defendants.[26]

[71] In any event, damages under the NZBORA will not be available if there is an *"equally convenient or more convenient remedy against the Crown",* an appeal or review process naturally fitting this description.[27]

[72] Mr McGuire cited other cases in his memorandum. None of them support the proposition that a breach of s 142(1) will give rise to a cause of action for damages:

(a) *Byrne v Auckland Irish Society Inc*[28] was a case in which damages were awarded for breach of contract not for the tort of breach of statutory duty.

(b) *Broadcasting Corporation of New Zealand v Broadcasting Tribunal*[29] was a judicial review. It was not a claim for breach of statutory duty.

---

25 *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667.
26 *Baigent's Case* supra n 25; *Attorney-General v Chapman* [2011] 1 NZSC 110.
27 *Baigent's Case* supra n 25 at 713; *Binstead v Northern Region Domestic Violence Panel* [2002] NZAR 865.
28 *Byrne v Auckland Irish Society Inc* [1979] 1 NZLR 351.
29 *Broadcasting Corporation of New Zealand v Broadcasting Tribunal* [1986] 2 NZLR 620.

(c) *Auckland Electric Power Board v Electricity Corporation of New Zealand Ltd*[30] specifically held that a cause of action could not arise for breach of the relevant statutory duty.[31] The Court of Appeal found that the relevant legislation contained alternative accountability mechanisms that showed a lack of legislative intent to allow private law actions.

(d) *Finney v Barreau du Quebec*[32] involved an action in negligence by a complainant against a lawyer's complaints committee, alleging it failed in its public duty to protect the public when it did not disbar an incompetent lawyer promptly enough. The case did not involve a statutory duty to adhere to principles of natural justice nor was it an action for damages for breach of statutory duty.

[73] Like Panckhurst J, I am not aware of any case in which an action in tort for damages for breach of a duty to observe the principles of natural justice has been recognised, whether that duty has been expressly imposed by statute or otherwise. Even if some such authority exists, it is likely that in this case the existence of a review process similar to an appeal within the Act itself and the general availability of judicial review by the High Court would militate strongly against finding a legislative intent to allow claims in tort.

[74] I am satisfied that the decision in *Feary* is directly in point. The reasoning applies equally to this case and, with respect, I consider it to be unimpeachable. There is no real possibility that a breach of s 142(1) of the Act or Reg 26(1) of the 2008 Regulations could be the foundation for an action in tort for damages.

[75] Although breach of the duty in s 142(1) is obviously the major basis for this cause of action, there are also alleged breaches by the Standards Committee which made the first determination of other sections of the Act, namely ss 158 and 159. It is,

---

30 *Auckland Electric Power Board v Electricity Corporation of New Zealand Ltd* [1994] 1 NZLR 551.

31 Supra at 559.

32 *Finney v Barreau du Quebec* 2004 SCC 36, [2004] 2 SCR 17.

therefore, necessary to consider whether they could stand alone as a foundation for the cause of action.

[76] Those sections provide:

> **158 Notice of determination**
>
> (1) If a Standards Committee makes a determination of the kind described in section 152(2)(b) or (c), that Standards Committee must forthwith give written notice of that determination to each of the persons who may, under section 193, apply to the Legal Complaints Review Officer for a review of the determination.
>
> (2) The notice must—
>
> (a) state the determination and the reasons for it; and
>
> (b) specify any orders made under section 156 or section 157 and be accompanied by copies of any such orders; and
>
> (c) describe the right of review conferred by section 193; and
>
> (d) state the period within which an application for a review of the determination or of any such order or both may be lodged (which period is prescribed by section 198(b)).
>
> …..
>
> **159 Power to notify Registrar-General of Land**
>
> (1) If a Standards Committee makes a determination of the kind described in section 152(2)(a) or (b), that Standards Committee may give written notice of the making of the determination to the Registrar-General of Land if the Standards Committee considers that the giving of notice of the making of that determination to the Registrar-General is or may be relevant to the discharge by the Registrar-General of his or her duties under the Land Transfer Act 2017 or any other enactment.
>
> (2) If the determination is of the kind described in section 152(2)(a), the notice must—
>
> (a) state the determination; and
>
> (b) contain a copy of the charge laid before the New Zealand Disciplinary Tribunal in accordance with section 154.
>
> (3) If the determination is of the kind described in section 152(2)(b), the notice must comply with section 158(2) as if it were a notice given under section 158(1).

[77] The Standards Committee which made the first determination censured and fined Mr McGuire for unsatisfactory conduct and ordered him to pay costs. This was a determination under s 152(2)(b) of the Act.

[78] Mr McGuire's factual allegations in relation to this aspect of his claim are set out in paras [28] – [36] and [108] – [110] of the SOC. What they amount to, in simple terms, is an allegation that the Standards Committee breached the sections because:

(a) It sent the determination itself to the Registrar-General of Land rather than merely written notice of *the making* of the determination as s 159 requires.

(b) It failed to give written notice of the determination to Mr McGuire, who is a person entitled to apply for a review of it under s 193, as required by s 158(1).

(c) It failed to advise Mr McGuire that it had sent the determination to the Registrar-General of Land. No statutory duty to do so is cited.

[79] In regard to (a), his assertion of a breach is based on a distinction between serving written notice of a determination and giving written notice of *the making* of a determination, which is a distinction to be found between the wording of s 158(1) and s 159(1). This overlooks the obvious explanation for that distinction which can also be found within the two sections.

[80] Section 158 relates to the duties of Standards Committees in relation to determinations of the kind described in s 152(2)(b) but does not apply to determinations of the kind described in s 152(2)(a), that is, a finding that a complaint should be considered in the Disciplinary Tribunal. Section 159 on the other hand applies to determinations under both paragraphs (a) and or (b) of s 152(2). However, s 159(3) states that if the determination is of the kind described in s 152(2)(b), the notice must comply with s 158(2) *as if it were* a notice given under s 158(1).

[81] It is plain from the structure of the two sections that the reference in s 159(1) to *the making* of the determination is necessary to encompass the more limited notice required by s 159(2) in respect of determinations under s 152(2)(a). However, in respect of determinations under s 152(2)(b), the kind made in relation to Mr McGuire, the written notice which must be given to the Registrar-General under s 159 is the same as that which must be given under s 158 to persons entitled to apply for a review, that is, it must accord with s 158(2).

[82] It follows that Mr McGuire's cause of action for breach of the statutory duty in s 159 is based upon a misconception of the duty it imposes and cannot succeed.

[83] In so far as it is based upon an alleged failure to advise Mr McGuire that notice of the determination had been sent to the Registrar-General, there appears to be no such duty to be found in the statute.

[84] Section 158(1) does create a statutory duty for the Standards Committee to give written notice of its determination under s 152(2)(b) to Mr McGuire, the person in respect of whom it is made. For the purposes of this application it must be presumed that the allegation that written notice was not given is correct. This is the sort of procedural error which is remediable by review under s 193 and will not support an action for damages for the reasons already given.

[85] I also note that, apart from the assertion of a breach of the duty, there is no other mention of this aspect of Mr McGuire's claim within his lengthy SOC. In particular, there is no allegation of any loss to him resulting from the alleged breach. With a few exceptions, proof of damage is an essential element of a claim in tort.[33] It is hard to see that any loss could have resulted. The obvious purpose of the requirement to give written notice of a determination to persons entitled to apply for review by an LCRO is so they can exercise that right. However, under s 198 the time for doing so does not expire until three working days after a copy or notice of the determination is served on, given to, or brought to the notice of any such person. Thus, it is difficult to see how an omission to carry out the relevant duty could have had any practical effect.

---

[33] *McKinnon v Gallaway Cook Allan* HC Auckland CIV-2007-412-993, 5 August 2008 at [27].

Additional Sections of the SOC

[86] There were two sections of the SOC which were not analysed in my judgment of 27 September 2019 because it was unnecessary to do so. They were headed "Ongoing Complaint" and "Certificates since 1 September 2016."

[87] The "Ongoing Complaint" relates to the alleged actions of Malcolm Ellis, described as the complaints service standards officer for the Canterbury-Westland Standards Committee. It is alleged that he told a former client of Mr McGuire "to pay (his) bill so the file could be released **(and) then make a complaint**."

[88] In the following paragraphs it is alleged that a Standards Committee subsequently advised Mr McGuire that the issue of fees needed to be addressed as part of its consideration and that the former client did not ask for a costs revision.

[89] There is further reference to Malcolm Ellis in the section of the SOC headed "Fifth determination" in which it is pleaded that Malcolm Ellis signed the determination but was not a member of the Committee.

[90] In the section of the SOC headed "Cause of Action: Breach of Statutory Duty" there are the following allegations in which reference is made to Mr Ellis:

> 117 Malcom Ellis was not a Standards Committee member and did not have authority to advise the client to make a complaint and his advice to the complainant was contrary to the rules of natural justice.
>
> 118 Malcolm Ellis was biased against the plaintiff.
>
> 122 The Central Standards Committee 3, Mr Ellis and the Canterbury-Westland Standards Committee have variously failed to deal with complaints about the plaintiff in a fair, efficient and effective manner under regulation 10(1)(a).

[91] In the section of the SOC headed "Second Cause of Action: Bad Faith" there is a further (and final) reference to Mr Ellis in Para 126 in which it is alleged:

> 126. The Central Standards Committee 3, Mr Ellis and the Canterbury-Westland Standards Committee have repeatedly made procedural and substantive "errors" that indicate a manifest disinterest in, or disregard of, the rules of natural justice and the principles of justice, fairness and reasonableness.

This pleading comes immediately before the next paragraph 127 in which the cause of action is summarised in the way recorded at [12] above.

[92] Assuming that Malcom Ellis was its employee, the Law Society would be vicariously liable for any tortious acts or omissions on his part. However, in so far as it relates to his signing of a determination, the claim amounts to an abuse of process for the reasons already explained. In addition, the cause of action based on breach by him of a statutory duty under Reg 10(1)(a) of the 2008 Regulations is also clearly untenable because that duty is purely procedural.

[93] There remains the cause of action for misfeasance in public office which is presumably based upon the advice which Mr Ellis is alleged to have given to a complainant. The essential elements of this tort were paraphrased by Heath J in *Delamere v Attorney-General*:[34]

- The plaintiff has standing to sue.
- The person alleged to have abused his or her office held and was acting in the course of a public office.
- The alleged public official knew or is presumed to have known (showed reckless indifference to whether) he or she was acting outside the limits of his power.
- The alleged public official knew or is presumed to have known (in the same sense as above) that his or her conduct was likely to harm the plaintiff, as an individual or as a member of a class.
- The alleged public official's conduct did in fact cause the plaintiff qualifying harm.

[94] A number of difficulties facing such a claim based on the alleged advice given by Mr Ellis suggest themselves, but this aspect of the claim was not the subject of any

---

[34] *Delamere v Attorney-General* HC Auckland CIV-2008-404-1377, 3 March 2010 at [18].

argument at the hearing of this application, no doubt because of its minor and peripheral nature in the context of the claim as a whole. In the absence of any closer analysis I am unable to say at this point that this single allegation is a clearly untenable basis for this cause of action.

[95] The section of the SOC headed "Certificates since 2016" consists of an apparently random complaint that one of the pleadings of the Law Society in a statement of defence in an unrelated High Court proceeding is factually incorrect. Apart from the fact that absolute immunity attaches to Court pleadings, this complaint is not obviously connected to either cause of action and requires no further analysis. Additionally, it appears to be an attempt to relitigate issues already decided against Mr McGuire in the High Court[35] and the Court of Appeal.[36]

Conclusion

[96] In summary, I have found that (with one limited exception relating to the alleged advice given by Mr Ellis) both causes of action should be struck out for separate and independent reasons: because the Law Society is not vicariously liable for the tortious acts or omissions of Standards Committees or their members; and because the claims are an abuse of process in that they amount to collateral attacks on the determinations of Standards Committees. I have also found that the cause of action for breach of the statutory duties pleaded is clearly untenable.

[97] The general principle is that if, after argument, it appears that a claim may be capable of reformulation, time should ordinarily be given to allow amendments to be made to the relevant statement of claim. That is not the position here. The difficulties in this claim are fundamental and cannot be remedied by amendment.

[98] Nor should this proceeding survive because one minor and peripheral allegation might form the basis for a tenable claim of malfeasance in public office. It is questionable whether a claim based solely on such a flimsy foundation would ever have been launched. This is the fourth version of Mr McGuire's SOC and the effect

---

35 *McGuire v NZLS* [2018] NZHC 983.
36 *McGuire v NZLS* [2019] NZCA 433.

of this judgment is that it has been almost entirely expunged. In my view, it would be unfair to the Law Society and oppressive to allow Mr McGuire to amend it again so as to reduce it to a tenuous claim of malfeasance in public office based solely on the alleged oral advice of a complaints service officer to a complainant. If Mr McGuire wishes to make such a claim, he should file a separate claim properly pleaded. The limitation period has not expired. This judgment is not intended to and will not prevent that course of action.

[99] The claim is struck out in its entirety. The Law Society is entitled to costs. A memorandum as to costs is to be filed and served by the Law Society within 14 days of the date of delivery of this judgment. Mr McGuire may file an answering memorandum within a further 14 days. Costs will then be dealt with on the papers.

_____

Judge C N Tuohy
District Court Judge
Date of authentication: 7/04/2020
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.