

LCRO 05/2010

CONCERNING

An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of the Waikato Bay of Plenty Standards Committee 1

BETWEEN

MS BIRKENHEAD

of Hastings

Applicant

AND

MS HOLYWELL

of Rotorua

Respondent

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

DECISION

[1] The Applicant is Ms Birkenhead who sought a review of a decision by a Standards Committee which declined to uphold her complaints against the Practitioner, Ms Holywell.

[2] I note at the outset that the complaints under consideration in this review relate to conduct that occurred prior to the coming into force of the Lawyers and Conveyancers Act 2006 (the Act). This is material insofar as when the Act commenced (on 1 August 2008) it introduced a new Code of Conduct for lawyers, replacing the Code that applied under the Law Practitioners Act 1982 (repealed). However, the Act provided, by section 351, that complaints made after the commencement of the Act, about conduct that had occurred prior to its commencement, were to be considered against the professional standards that applied at the time the conduct occurred.

[3] The standards applicable to the complaints are therefore those found in the Law Practitioners Act 1982 and the Rules of Professional Conduct for Barristers and Solicitors. The pre 1 August 2008 standards are found in ss 106 and 112 of the Law Practitioners Act 1982. The threshold for disciplinary intervention under the Law Practitioners Act 1982 was relatively high and may include findings of misconduct or conduct unbecoming. Misconduct was generally considered to be conduct:

of sufficient gravity to be termed 'reprehensible' (or 'inexcusable', 'disgraceful' or 'deplorable' or 'dishonourable') or if the default can be said to arise from negligence such negligence must be either reprehensible or be of such a degree or so frequent as to reflect on his fitness to practise.

(*Atkinson v Auckland District Law Society* NZLPDT, 15 August 1990; *Complaints Committee No 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105).

[4] Conduct unbecoming could relate to conduct both in the capacity as a lawyer, and also as a private citizen. The test will be whether the conduct is acceptable according to the standards of "competent, ethical, and responsible practitioners" (*B v Medical Council* [2005] 3 NZLR 810 per Elias J at p 811). For negligence to amount to a professional breach the standard found in s 106 and 112 of the Law Practitioners Act 1982 must be breached. That standard is that:

the negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute

[5] Therefore, an adverse finding may be made only if it is shown that the Practitioner's conduct meets the above threshold.

Background

[6] In December 2007 the Applicant instructed the Practitioner to act for her in relationship and property matters following her separation from her partner. Their one and only meeting occurred on 18 December 2007. After some early correspondence sent out by the Practitioner for the Applicant, the Applicant moved to Napier to live with her new partner, having informed the Practitioner of the shift. Copies of correspondence received by the Practitioner were forwarded to the Applicant but not received by her. The reasons are not altogether clear but one posting at least was incorrectly addressed. It also seems that other forms of communication were equally unsuccessful.

[7] As a result it appears that the Practitioner received no further instructions from the Applicant, and the Applicant heard nothing more from the lawyer. Eventually the Applicant instructed another lawyer, and forwarded a complaint about the Practitioner to the New Zealand Law Society.

Complaints

[8] The complaints were that the Practitioner failed to carry out work on the Applicant's behalf, and had failed to inform her of correspondence received and telephone conversations had with her former partner's lawyer. She sought to be compensated for what she perceived to be the Practitioner's incompetence which she claimed had cost her both time and money.

[9] In reply the Practitioner confirmed that instructions had been received, but otherwise rejected the allegations. She outlined correspondence that had been sent to the Applicant, and the telephone messages that had been left for the Applicant, and claimed that the Applicant had not responded to her requests for further instructions.

[10] The Standards Committee determined that no further action was necessary or appropriate. The Committee referred to the communication difficulties surrounding letters, telephone calls and emails, and the disputed evidence. It's decision was largely based on a perception that it could not resolve what it found to be the "diametrically opposed views on the sending and receipt of correspondence". The Committee also considered that there was no jurisdictional basis for it to consider her claim for compensation, and suggested that the Applicant seek independent legal advice on that matter.

Review application

[11] The reason for the Applicant seeking a review of that decision were stated to be:

- (a) that the Standards Committee ignored most, if not all, of the documentation she submitted;
- (b) that it had little or no grasp of the key issues in her complaint;
- (c) that the real issues the Standards Committee overlooked or ignored were:
 - i. the Practitioner's failure to advise that she was on extended leave and would not be returning until 20/02/2010;

- ii. the Practitioner's failure to inform her about correspondence received from her former partner's lawyers in January through May 2008 in a timely fashion; and
- iii. The Practitioner's failure to respond to her emails during the same period.

[12] The Applicant made further submissions, largely repeating what she has previously asserted over the course of this matter. It was clear that a key issue in her complaint was the Practitioner's failure to have communicated to her a settlement offer from her former partner contained in a letter dated 5 March 2009, an offer that was withdrawn before the Applicant had become aware of it. She asserts that had she been advised of this offer she could have finalised a settlement with her ex-partner without the need to engage another lawyer or be still involved in Court proceedings.

[13] Both parties consented (pursuant to s 206(2) of the Act) to the review being determined on the papers, that is, on the basis of such information, records, reports, or documents as are available to me and without the parties appearing in person. This comprised of the Standards Committee file and information provided by the parties for the review.

Review

[14] The Applicant maintained that she regularly emailed the Practitioner with instructions, and forwarded copies of emails she had sent to the Practitioner which showed dates of 15, 16, 17, 18 and 21 January 2008. Much of this appeared to be providing more information rather than giving instructions although the 21 January email contained a proposed response to the former partners' lawyer, apparently drafted by the Applicant's new partner, J. J sent an email to the Practitioner on 14 February expressing concerns that none of the Applicant's emails had been acknowledged and that nothing had been heard from the Practitioner since their original meeting. In response to this last email, the Practitioner's firm advised that the Applicant was on leave until 20 February 2008.

[15] On the morning of 21 February 2008 a further email was sent by the Applicant to the Practitioner which contained further information relating to the file. The Practitioner responded later that day with, "*I shall review your file and discuss matters further with you in the morning.*" The next day the Applicant emailed the Practitioner again with "*Thank you in advance for reviewing my file today*", also adding some further information. The Applicant sent another email on 3 March, and in a further email on 7 March she expressed concerns that the Practitioner had not yet replied to her.

[16] On 2 April the Practitioner emailed the Applicant with, "*Would you please contact the writer to discuss matters.*" The Applicant appears to have received this message, as a handwritten note (presumably by the Applicant) on the email records, "*Phoned her office twice but she was unavailable and did not return my calls.*" Another email sent by the Applicant on 7 April stated that she was unsure of what 'matters' the Practitioner referred to, adding concerns that little appeared to have been achieved.

[17] On 17 April the Practitioner emailed the Applicant with, "*I haven't heard from you. I've sent several lots of correspondence to you. Please contact me as soon as possible so we can discuss matters. Are you likely to be in ... any time soon? I think it would be good to have another meeting.*" On the same day the Applicant replied, informing the Practitioner that she had no idea what correspondence the Practitioner had referred to as she had received nothing.

[18] There is no evidence of further contact by the Applicant about her case after that date. Nor is there any evidence of further contact by the Practitioner. It is understood that the Applicant then instructed another lawyer in June.

[19] In August 2008 the Applicant emailed the Practitioner's employer expressing her dissatisfaction and stating that another law firm had been engaged. She added that a complaint would be made against the Practitioner. An email sent to the Applicant by her new lawyer was dated June referred to advice from her former partner's lawyer that the Practitioner had been unable to obtain instructions from the Applicant in relation to correspondence sent to her. In any event the former partner's lawyers forwarded copies of their four letters (previously sent to the Practitioner) to the new lawyers, who scanned them to the Applicant, who in turn came to learn of the settlement offer that had been made.

[20] The settlement offer is contained in one of the letters (5 March 2008) that had been sent to the Practitioner by lawyers acting for the Applicant's former partner. The Practitioner informed the Standards Committee that all such letters were sent on to the Applicant. There was evidence of one posting having been wrongly addressed. The Practitioner advised the Committee that none of the postings sent to the Applicant had been returned to her office. The Practitioner also informed the Standards Committee that messages had been left on the Applicant's voice mail, but not returned. The Practitioner's overall response was that the firm was left without meaningful instruction.

[21] The Practitioner acknowledged that the Applicant had sent emails, and explained that she did not respond because she was 'apprehensive' about responding or giving

legal advice by way of email as she was concerned that instructions were coming from the Applicant's new partner rather than from the Applicant. The Practitioner perceived the new partner to be a 'dominant force' at her initial meeting with the Applicant. The Practitioner said that her attempts to call the Applicant on her cell phone were unsuccessful as the phone was not operative. (In a letter sent on 6 March the Practitioner advises the Applicant that her cell phone appears not to be working.) The Practitioner said that she had left messages on the voice mail of the Applicant's new partner asking the Applicant to contact her directly, which the Applicant did not do. The Practitioner accepted that there were delays in communications but maintained her position with regard to the allegations.

[22] In reviewing all of the information pertaining to this complaint, there is little doubt that it largely revolves around missed communications between the parties. It is clear that the Applicant blames the Practitioner and holds her responsible for not establishing timely communications. This has particularly affected the Applicant because the settlement offer by her former partner did not find its way to the Applicant. It appears that delays and the changes in the property market ultimately led to a settlement for less than had originally been offered, and that the Applicant seeks to be compensated for her loss.

[23] There is nothing to show that the Applicant contacted the Practitioner again after her 17 April email communication informing the Practitioner that she had not received any of the correspondence referred to. This might be considered somewhat surprising given that the Applicant had been informed of the fact of the correspondence. It seems she took no steps to obtain copies of that correspondence.

[24] Equally clear is that the Practitioner considers that the matter was not progressed due to the Applicant's failure to respond to requests to contact her which left her without clear instructions. The Practitioner has explained why she preferred to have direct communications with the Applicant, which may also explain why the letters were not scanned to the Applicant. No further action appears to have been taken by the Practitioner on learning that the Applicant had received none of the correspondences that had been sent, which may also be considered surprising. I have also taken into account that the Practitioner appeared to have relied on her 17 April email that the Applicant should attend a meeting with her.

[25] There is evidence that supports and/or explains the version of events forwarded by each of the parties, and like the Standards Committee, I find myself confronted by conflicting evidence, but also note the gaps in the explanation for the communication

failures. Had this complaint fallen to be considered against the professional standards set out in the Lawyers and Conveyancers Act 2006 and the rules contained in the Code of Conduct and Client Care, some further enquiry may have been warranted into questions such as why the Applicant waited for two months before taking any further steps in the matter and instructing another lawyer, and also the degree of attention paid by the Practitioner in progressing the Applicant's file particularly in relation to following up on the settlement offer. I note that Rule 3.2 of the Conduct and Client Care Rules requires a lawyer to respond to a client in a timely manner, noting the responsibility that falls on a lawyer. However, in the context of a review of the Standards Committee decision, I am required to consider the conduct against the higher threshold of the professional standards that apply to this complaint.

Threshold of conduct

[26] A central question in this review is whether the conduct complained of, if proven, was of sufficient gravity to have reached the threshold required by section 351 of the Act. The threshold was discussed in the opening paragraphs of this review, where it was particularly noted that the conduct had to reach a threshold of gravity that could have led to proceedings of a disciplinary nature under the Law Practitioners Act. If there was negligence involved, then the negligence needed to reach a threshold of 'gross negligence' before disciplinary action could be taken against the lawyer. Instances of what might be called ordinary negligence had to be pursued through the courts. It is presumably for this reason that the Standards Committee suggested that the Applicant seek independent legal advice as to her remedies, having made no adverse finding against the Practitioner.

[27] Having considered all of the information in relation to the complaint, it is not necessary for me to determine whether the conduct of the Practitioner was incompetent or not. If it was incompetent it is clear that it was not grossly so. If there was an error it is in not replying to certain emails and not scanning and emailing copies of the documents that were posted to the Applicant. I take into account that the Practitioner assumed that the copies of letters sent to the Applicant were received by her, a not unreasonable assumption given that they had not been returned by the postal system. Only one letter appears to have been incorrectly addressed, this again not a matter that would lead to disciplinary action. Even if the Practitioner's stated reason for not communicating by email (i.e. that she was concerned a third party may have been acting on the Applicant's behalf) is flawed, I do not consider it arguable that it is grossly so. It follows from this that, even if incompetent, I do not consider the

conduct in question is such that it reflects on the Practitioner's fitness to practise, or tends to bring the profession into disrepute. This means that I do not find that the omissions or failings of the Practitioner reached the threshold required for disciplinary action to follow.

[28] That is not to overlook that the Practitioner could have done more to establish contact with the Applicant. The concerns about the new partner's influence over the Applicant seem a little thin in the circumstances, although I accept, as did the Standards Committee, that the concern was genuinely held, and that the Practitioner had meanwhile assumed that the copied letters sent via postal mail had reached the Applicant. I further noted that the Practitioner required several promptings to communicate with this office, and that additional requests needed to be made by the Standards Committee on obtaining the Practitioner's response to the complaints.

[29] The issues identified by the Applicant have been addressed by this review. I am satisfied, after reviewing the Standards Committee's file and considering all further submissions, that it was open to the Standards Committee to reach the decision it made. There is nothing to indicate that the Committee was not fully aware of the issues arising in the complaint, or that it did not understand the key issues, although its reasoning was set out in less detail than has been included in this decision. I find no reason to interfere with the Committee's decision to take no further action.

Decision

Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

DATED this 18th day of August 2010

Hanneke Bouchier
Legal Complaints Review Officer

In accordance with s.213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Ms Birkenhead as the Applicant
Ms Holywell as the Respondent

Dover Law as an interested party
The Waikato Bay of Plenty Standards Committee 1
The New Zealand Law Society