

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of the Auckland Standards Committee 4 of the New Zealand Law Society

**BETWEEN**

**Ms Walsall**  
of Auckland  
Applicant

**AND**

**Mr Monmouth**  
of Auckland  
Respondent

**DECISION**

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

[1] Ms Walsall complained to the New Zealand Law Society in respect of the conduct of Mr Monmouth. Ms Walsall complained that the service provided by Mr Monmouth in relation to certain proceedings in the Family Court was unsatisfactory. At the centre of the complaint was the allegation that Mr Monmouth had failed to act diligently in obtaining certain evidence from Maritime New Zealand and that consequently an affidavit could not be filed prior to the scheduled hearing of the matter. This led to the hearing being adjourned, further costs being incurred, and a costs order against Ms Walsall being made by the Court. The proceedings concerned a variation to parenting orders that were opposed by Ms Walsall's former partner Mr D. I observe that Mr G (who is Ms Walsall's partner) dealt with Mr Monmouth on Ms Walsall's behalf throughout the conduct of the matter. He also acted as Ms Walsall's representative in making this complaint.

[2] The matter was considered by the Auckland Standards Committee 4 of the New Zealand Law Society. The Standards Committee considered the matter and concluded that Mr Monmouth acted appropriately and professionally. It took the view that the

complainant did not understand court procedures. It also concluded that the fees charged were in all of the circumstances reasonable and resolved not to conduct a full hearing but rather to take no further action on the complaint. Ms Walsall applied for a review of that decision.

[3] A hearing in respect of the application for review was conducted on 2 October 2009. Ms Walsall attended with Mr G. Mr Monmouth chose not to attend (and was not required to do so). At that hearing Ms Walsall explained the nature of her complaint and gave reasons and arguments as to why the Standard Committee decision ought to be revisited. No new information was presented at that hearing.

[4] I also record that on 1 October Mr Monmouth wrote to this office indicating that he did not propose to attend and raising a number of other matters. That letter was forwarded to Ms Walsall early on 2 October (the day of the hearing). In that letter Mr Monmouth made a number of points regarding the procedure of the review. For example, he was concerned that Mr G had driven the process of the review and indicated that it might not be appropriate to place undue weight on the material he had written. He also queried whether Mr G was entitled to speak on behalf of Ms Walsall. On 5 October (some days after the hearing) Mr G responded to those matters by email. In the event I do not consider it necessary to take into account Mr G's later email.

[5] I satisfied myself at the hearing that Ms Walsall was the genesis of this complaint and that while Mr G was assisting her he was not inappropriately driving the complaint and review. I also observe that by s 206 of the Lawyers and Conveyancers Act I may determine my own procedure. This office has issued general guidelines as to the procedures adopted. At Para 33 of those guidelines it is noted that "Parties are entitled to be accompanied by a representative and/ or support person". There is no requirement that a representative be a lawyer. As such Mr G was entitled to conduct the complaint and speak on Ms Walsall's behalf.

[6] I also observe that by s 207 of the Lawyers and Conveyancers Act 2006 I may take into account evidence which would normally be inadmissible in a court of law. Clearly in doing so I must exercise caution in the weight I attribute to evidence that would not normally be admissible and take into account the reason why it would not usually be admissible. This would be especially the case where there was a significant dispute about matters of fact. In this case I have taken into account various information provided by Mr G that was contained in the correspondence provided to this office. I observe (and Mr Monmouth acknowledges in his letter of 1 October) that most of the dealings in this matter were between Mr G and Mr Monmouth. If Mr Monmouth wished

to challenge the evidence provided the place to do so was at the hearing or in his own correspondence.

[7] I observe that it was not particularly helpful of Mr Monmouth to raise these matters the day before the matter was to be heard while at the same time electing not to attend the hearing.

### **Background**

[8] At the centre of the complaint is the timelines of certain conduct of Mr Monmouth and as such it may be useful to set out the events which took place (all dates are 2008). The case concerned a variation to certain parenting orders in respect of Ms Walsall's child. The matter was scheduled to be heard on 4 November, however on that occasion the judge resolved to adjourn the matter to obtain the views of the lawyer for the child. It appears that this was unexpected. No criticism was directed towards Mr Monmouth in respect of this delay, although Mr Monmouth suggested that this may have contributed to Ms Walsall's frustration in respect of the later adjournment. The matter was rescheduled to be heard on 9 December. That hearing was also adjourned because Ms Walsall sought to introduce an affidavit at the hearing and the Judge considered that Mr D ought properly be given an opportunity to respond to its contents.

[9] At the 4 November adjournment it had been decided to seek certain information from Maritime NZ in respect of whether or not Mr D or his vessel was licensed or registered to operate a charter business. It was considered that this was relevant to the orders sought. Instructions were given to Mr Monmouth on 4 November to obtain the relevant information. On 13 November Mr G emailed Mr Monmouth inquiring as to progress on the matter. That email was not responded to. On 19 November Mr G prompted Mr Monmouth as to his enquiry by a further email.

[10] By letter dated 19 November Mr Monmouth responded. He stated that he had contacted Maritime NZ and spoken to some officials, however not the people who were able to provide the relevant information (although he had obtained the names of those people). On 21 November Mr Monmouth further noted (in an email) that he had left some messages with Maritime New Zealand and he was "making some progress". Mr Monmouth states (in his letter to this office of 4 September 2009) that substantive phone conversations took place with the relevant people at Maritime NZ later that day.

[11] A week later (on 28 November) Mr Monmouth sent facsimiles to Maritime New Zealand seeking a written response to certain questions regarding whether Mr D or his vessel was licensed or registered to undertake commercial work.

[12] It appears that on 4 December there had still been no response from Maritime NZ. On that date Mr Monmouth rang the relevant people which resulted in the desired facsimiles being sent and received. I observe that a further (albeit minor) delay appears to have occurred because the initial request from Mr Monmouth to Maritime New Zealand contained a spelling error in the name of the boat that the enquiry was being made about. The corrected material was provided by Maritime NZ on 5 December. I do not consider that further delay material.

[13] Late on 5 December (a Friday) the information was provided to the lawyer for Mr D (to avoid any suggestion of prejudice by its late introduction). In an email to Mr G of the same day Mr Monmouth also noted that it would be necessary to put the information in affidavit form so that it could be provided to the Court. He observed that this could be done before Court next Tuesday.

[14] Ms Walsall's complaint also touched on delays in getting the affidavit sworn. I do not consider that there is substance to this aspect of the complaint. Mr Monmouth also places some weight on the fact that the affidavit could have been sworn earlier and filed in Court. Has stated (in his letter to this office of 4 September 2009) that "it is not my fault if she had other priorities and could not swear the affidavit before the date of the Court hearing". I observe that it would have been possible to provide the Court with a draft of the affidavit with a note that a sworn copy would be provided at the hearing if difficulties in getting it sworn immediately existed. Obviously the affidavit could not have been sworn prior to the mid-afternoon of Friday 5 December when the last documents were received from Maritime NZ. In fact the unavailability of Ms Walsall to swear the affidavit on short notice on Friday afternoon, or on the Monday morning is relatively insignificant and comprises only a day or two. In the normal course of affairs such a delay would not be problematic. Here the matter was pressing due to the fact that the information had been obtained only at the last moment.

[15] Mr Monmouth states that he had made attempts to contact Maritime NZ prior to 21 November. I observe however that his time records do not show any contact with Maritime NZ prior to that date. Clearly no written communications (including emails) occurred prior to that date. In his facsimiles to Maritime NZ of 28 November Mr Monmouth refers to having spoke to the addressees "about a week ago". This is consistent with contact having been made by phone on 21 November. I observe that there is no clear reason why a week passed between making telephone contact and sending what appear to be the written requests needed to trigger a written response. I also note that in his letter dated 19 November reference is made to having spoken to officials at Maritime NZ, but not to the appropriate person. Mr Monmouth (in his letter to

this office of 4 September 2009) notes that the time records show any conversations which were “more than minor/ or mere messages left”. Mr Monmouth states in that letter that messages were left on 19 or 20 November. I infer that prior to 21 November no firm contact had been made with the correct officials at Maritime NZ. On 21 November Mr Monmouth made contact with the appropriate people at Maritime New Zealand. A week later he sent letters (by facsimile) to the appropriate people seeking a written response to his enquiries.

[16] Mr Monmouth (in a letter to the Law Society of 4 May 2009) states that in his view it was not possible to seek leave to file an affidavit until such time as the affidavit had actually been sworn on the basis that it would be a merely hypothetical issue. I do not agree with this approach. A court can clearly give leave to file an affidavit which is yet to be drafted (and may direct that it be limited to certain matters). It was also suggested (in Mr Monmouth’s letter to this office of 4 September 2009) that leave should not be sought because it was not clear that the information sought would be supportive of Ms Walsall’s position. However, it would have been possible to seek leave to file an affidavit if necessary. In any event the main thrust of the complaint was that if Mr Monmouth had acted diligently the information would have been to hand earlier. If that had been the case such an application could have been filed prior to the hearing or at the very least provided to the other party some weeks prior to the hearing.

[17] Mr Monmouth also observed that because the matter had been set down for hearing that any further affidavit would be “late” in light of the fact that a timetable had previously been set for the filing of evidence. The inference appeared to be that in light of this time was not of the essence. I observe, however, that the matter was adjourned to give Mr D an opportunity to respond to the information on the basis that he had not had such an opportunity. Had the information been made available to Mr D some weeks earlier then it is possible that the Court would have formed the view that Mr D had already had an opportunity to respond. In particular the Court was critical (in para [8] of the minute of Judge Hikaka of 9 December 2008) of the fact that Ms Walsall had waited until the day of a hearing to put new material before the Court. In paragraph [10] of the minute his honour notes that that proper course was to seek leave to file that information (presumably at the earliest possible moment) and thereby give the other party an opportunity to respond and be prepared should leave be granted. I note that the minute granted only 10 days to Mr D to respond to the material in the affidavit.

[18] It is clear that most of the delay in obtaining the necessary material from Maritime New Zealand falls at the door of Mr Monmouth. In particular he did nothing of substance between 4 November and 21 November when he spoke to the correct

people at Maritime New Zealand (despite prompts from Mr G). This is a delay of over two weeks. Once he had spoken to the appropriate people at Maritime NZ he delayed a further week before sending the letters which were required to trigger the needed written response. By comparison the responses from Maritime New Zealand of 4 and 5 December were relatively prompt.

### **The applicable standard**

[19] Section 12(a) of the Lawyers and Conveyancers Act 2006 provides that unsatisfactory conduct on the part of a lawyer includes:

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

[20] In the same vein r 3 of the Rules of Conduct and Client Care for Lawyers provide that “in providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care”.

[21] The issue is whether Mr Monmouth acted with appropriate diligence in obtaining the information from Maritime New Zealand in this case. I observe that many of the specific details of the delays in this case were not before the Standards Committee. There was exactly five weeks between the date of the two hearings. For more than two weeks Mr Monmouth did nothing. Over the next two or three days (19-21 November 2008) he spoke to the relevant people at Maritime NZ by telephone. He then did nothing for a further week until writing the necessary letters on 28 November 2008. This left only six clear working days prior to the hearing for the responses to be received and the affidavit to be prepared, sworn, served, and filed. Maritime New Zealand responded in four working days. A further day was lost due to the need to obtain the information with the name of the boat spelled correctly. This left only one clear working day (the Monday) prior to the hearing to swear, file and serve the affidavit.

[22] This is unsatisfactory in that given the time constraints imposed Mr Monmouth did not act with the diligence that Ms Walsall (or any other member of the public) is entitled to expect of a reasonably competent lawyer.

[23] I observe that while I find that this is unsatisfactory conduct in breach of s 12(a) of the Lawyers and Conveyancers Act 2006 I do not consider that any of the material put before me reflects on the professional conduct of Mr Monmouth. By virtue of the reform

of this area of the law by that Act the Standards Committee has an obligation to consider service/consumer complaints. While I agree that Mr Monmouth has acted professionally in this matter and has not engaged in any misconduct or conduct unbecoming, I depart from the Standard Committee's finding insofar as it considered that the level of professional services was acceptable.

### **Orders**

[24] A finding of unsatisfactory conduct has been made. In light of this I must consider what orders are appropriate. I have observed that the failure in this case is one of service only and as such I do not consider that any punitive orders are necessary.

[25] By s 156(1)(d) of the Lawyers and Conveyancers Act compensatory orders may be made where a person has suffered loss by reason of an act or omission of a practitioner. It is therefore appropriate that Ms Walsall be compensated for any loss she has suffered as a result of Mr Monmouth's breach. Most obviously Ms Walsall was ordered to pay costs to Mr D of \$250. It is also the case that the hearing of 9 December was wasted. Ms Walsall should not have to pay Mr Monmouth's costs in relation to that hearing. I have had the benefit of seeing Mr Monmouth's time records in this regard. I consider that an allowance of \$900 is reasonable in all of the circumstances.

[26] It was also argued that as a result of this matter Ms Walsall chose to instruct different counsel and that she incurred further costs in bringing new counsel up to speed on these matters. I do not consider that this amount is properly compensatable. Ms Walsall was of course free to cease instructing Mr Monmouth and retain a new lawyer at any time. She was motivated to do so by dissatisfaction with the level of service which has indeed found to be lacking. However, I do not consider that those fees can properly be considered to be loss *suffered by reason of* (i.e. caused by) the failures of Mr Monmouth. I observe that Ms Walsall could have continued to retain Mr Monmouth but chose not to do so. While her choice was understandable and motivated by the failure of service of Mr Monmouth, it was not a natural and inevitable consequence of it. As such the necessary causative link between the loss and the failure of Mr Monmouth is not sufficiently strong. I also observe that quantification of the amount required for the new lawyer to become familiar with the matter in the present circumstances is problematic at best.

[27] In all of the circumstances I consider that an award of \$1150 as compensation for loss suffered as a consequence of Mr Monmouth's breaches is appropriate. In the complaint Ms Walsall requested a "credit note" in respect of an invoice which was

outstanding for 3228.15. It is understood that that invoice is still outstanding. A compensatory order could be made pursuant to s 156(1)(d) of the Lawyers and Conveyancers Act. However, it is appropriate that the award of compensation be set-off against those fees. In light of this it is appropriate that the compensatory order be made under s 156(1)(e) which confers a power to reduce fees. Accordingly I order that pursuant to S 156(1)(e) of the Lawyers and Conveyancers Act 2006 Mr Monmouth's fees be reduced by \$1150.

### **Costs**

[28] Where a finding has been made against a practitioner is it appropriate that a costs order in respect of the expense of conducting the review be made against him or her. In making this costs order I take into account the Costs Guidelines published by this office. This matter had a degree of complexity, however in all of the circumstances I consider it appropriate to deal with it as a relatively straightforward review. It was conducted by a hearing in person, however, I observe that Mr Monmouth was prepared to have the matter considered on the papers. Accordingly it is appropriate to impose costs as if the matter were dealt with on the papers. In light of these matters Mr Monmouth is ordered to pay to the New Zealand Law Society \$900.00 in respect of the costs incurred in conducting this review within 30 days of the date of this decision.

### **Decision**

[29] The application for review is upheld pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 and the decision of the Standards Committee is reversed in accordance with the terms of this decision.

### **Orders**

[30] The following orders are made:

- [a] Mr Monmouth's fees are reduced by \$1150.00; and
- [b] Mr Monmouth is ordered to pay to the New Zealand Law Society \$900.00 in respect of the costs incurred in conducting this review.

**DATED** this 8<sup>th</sup> day of October 2009

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Duncan Webb  
**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:

MsWalsall as Applicant  
Mr Monmouth as Respondent  
Partnership YY as a related party  
The Auckland Standards Committee 4  
The New Zealand Law Society