

LCRO 110/2009

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 No 4

BETWEEN

MR MORPETH of Auckland

Applicant

AND

MR RAMSEY of Auckland

Respondent

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

DECISION

[1] A complaint was made against Mr Morpeth on behalf of Mr Ramsey. The complaint was linked to another complaint by Mr Ramsey against Ms Driffield (an associate of Mr Morpeth who works in the same firm). The complaint was considered by the Auckland Standards Committee which determined to take no further action in respect of a number of matters in the complaint. Those matters need not be considered here. However, the Committee considered that Mr Morpeth had engaged in unsatisfactory conduct when he provided certain information to the New Zealand Immigration Service about Mr Ramsey in the course of two telephone conversations. Mr Morpeth sought a review of that aspect of the decision. A hearing of the review was conducted on 4 November 2009 at which Mr Morpeth attended. Mr Ramsey had indicated that he did not wish to be heard on the matter.

Background

[2] Mr Morpeth acted in and around 2002 for Mr Ramsey in respect of certain immigration matters and also in respect of police matters. At a later time he also assisted Mr Ramsey with other residency matters. Mr Morpeth states that in respect of this later work he was not acting as a lawyer but as an immigration consultant through a company known as Firm XX. In 2007 Mr Morpeth ceased assisting Mr Ramsey.

[3] It appears that Ms Driffield had an ongoing relationship with both professional and personal dimensions with Mr Ramsey. That relationship turned sour. In his application for

review to this office Mr Morpeth alleges disgraceful conduct by Mr Ramsey against Ms Driffield (including violent incidents). Mr Morpeth states that he sought to assist Ms Driffield in these matters and this resulted in this complaint being laid.

[4] At some time prior to the complaint being laid Mr Morpeth telephoned the New Zealand Immigration Service. He states that the call was made in response to a message and he was returning a missed call. The notes from the file of Immigration New Zealand provide a record of that call. They say:

Phone call from Mr Morpeth regarding Ramsey. He advised that Ramsey had recently assaulted Ms Driffield and he had fears for her safety. I advised him that the correct authority for this was the Police.

At a later date Mr Morpeth called Immigration New Zealand again. The file note of that conversation records:

Further phone call from Michael Morpeth to advise that the police had arrested him [Ramsey] and he was in custody. He requested that I talked to the Police regarding INZ case and bail application.

[5] Mr Morpeth was informed that the complaint had been made by a letter from the New Zealand Law Society of 16 October 2008. He responded very briefly by letter dated November 5 2008 which did not address the substance of the complaint. A more substantial response to the complaint was made by Mr Morpeth by a letter of 20 June 2009.

[6] On a number of occasions Mr Morpeth has stated that he has never seen the file note of the telephone conversation (including stating this at the hearing of the matter on review). This is not tenable. The note was forwarded to Mr Morpeth on 16 October 2008 by the New Zealand Law Society along with a copy of the original complaint. The Society also provided a full copy of its file to Mr Morpeth on 7 May 2009 at his request. That would have included the file note. On 12 August 2009 in a letter to this office Mr Morpeth stated he had not seen the note. It was forwarded to him for the third time under cover of a letter dated 18 August 2009. In denying that he has seen the note previously Mr Morpeth is either being obstructive or is hopelessly disorganised.

[7] In his response to the complaint, and in his submission on review Mr Morpeth denied that he was motivated by malice in communicating with Immigration New Zealand. He states that he has been approached to give evidence against Mr Ramsey in respect of prosecutions relating to immigration matters. He states that he will give that evidence if summonsed and directed to answer questions by the Court.

[8] At the hearing of the matter Mr Morpeth suggested that he was motivated to make the disclosures he did out of a concern for Ms Driffield.

The Standards Committee Decision

[9] In reaching its decision the Standard's Committee noted the paucity of information regarding the timing of the telephone calls. The Committee assumed that the telephone calls occurred after Mr Ramsey had ceased instructing Mr Morpeth. It also assumed that the information disclosed came into Mr Morpeth's hands after Mr Ramsey had ceased instructing him. The Committee considered that Mr Morpeth was aware of the fact that Mr Ramsey had dealings with Immigration New Zealand due to his professional relationship. It also considered that Mr Morpeth had no duty or interest in making such communications. The Committee concluded that a finding of conduct unbecoming could be made in relation to conduct both in the capacity of a lawyer and a private citizen. While this is an accurate statement of the standard applicable prior to 1 August 2008 an issue arises as to whether the conduct in this case was undertaken in the capacity of Mr Morpeth as a lawyer or a private citizen. If it was the latter the further issue arises as to whether the Standards Committee has jurisdiction to make any orders in respect of such conduct.

[10] The Committee concluded that the conduct of Mr Morpeth in communicating this information to Immigration New Zealand was conduct which fell short of the standard of conduct considered 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) and was therefor conduct unbecoming. Mr Morpeth was fined and ordered to pay costs.

Applicable Standard

[11] This review concerns conduct which occurred prior to 1 August 2008. Pursuant to s 351 of the Lawyers and Conveyancers Act 2006 a complaint against a practitioner in respect of conduct which occurred prior to 1 August 2008 may only be considered by the Committee if it would have justified disciplinary action on the basis of the standards applicable at that time. The Committee properly directed itself as to the nature of that Standard.

[12] Once the threshold of s 351 is met the Committee may then turn to consider whether a determination against the practitioner ought to be made. The Committee may only make those determinations set out in s 152(2) of the Lawyers and Conveyancers Act. The only adverse finding that the Committee may make is a finding of unsatisfactory conduct. A finding of unsatisfactory conduct can be made if the standards set out in s12 of the Act are breached. That section encompasses in subsection (b):

Conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including—

- (i) conduct unbecoming a lawyer or an incorporated law firm; or
- (ii) unprofessional conduct...

[13] It is therefore necessary to determine whether the conduct in this matter falls within s 12(b) of the Lawyers and Conveyancers Act.

Conduct at a time when the lawyer is providing regulated services

[14] I observe that it is not open to the Committee to make a finding of unsatisfactory conduct (or therefore a finding of conduct unbecoming) in respect of conduct which occurs outside of the course of providing regulated services. Conduct outside of the provision of regulated services is dealt with by s7(1)(b)(i) of the Lawyers and Conveyancers Act which states that a finding of misconduct may be made where there has been conduct which is:

Conduct of the lawyer or incorporated law firm which is unconnected with the provision of regulated services by the lawyer or incorporated law firm but which would justify a finding that the lawyer or incorporated law firm is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer or an incorporated law firm.

That finding may only be made by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

[15] In light of this I must consider whether the conduct of Mr Morpeth is conduct “that occurs at a time when he or she or it is providing regulated services” under s 12 or whether it is conduct “which is unconnected with the provision of regulated services” under s 7 of the Act. On the plain English meaning of the words there is some space between conduct of a lawyer which is “unconnected with the provision of regulated services” and conduct “that occurs at a time when [the lawyer] is providing regulated services”. However, I consider that those two phrases must be interpreted as covering all possible instances of conduct – there can be no intermediate category of conduct.

[16] In undertaking this interpretative task it is proper to look both at the text of the legislation and its purpose (s 5 Interpretation Act 1999). A central purpose of the Lawyers and Conveyancers Act 2006 is to protect the consumers of legal services and conveyancing services (s 3). In seeking to attain that purpose s 3(2) proceeds to state that it intends to provide a more responsive regulatory regime in relation to lawyers and conveyancers. I also observe that s120 of the Act sets out the purpose of Part 7 of the Act (Complaints and

Discipline). One of the purposes outlined in s 120(2)(b) is that complaints “may be processed and resolved expeditiously...”. The Act in s 4 also affirms the fundamental obligation of a lawyer to act in accordance with all fiduciary duties and duties of care owed to clients. It is therefore appropriate to interpret the respective provisions in a way which is consistent with the protection of consumers of legal services, and the provision of a responsive and expeditious complaints process.

[17] Both s 7(1)(b)(ii) and s 12 refer to the provision of “regulated services”. In relation to a lawyer that term is defined in s 6 of the Act as legal services, conveyancing services, and services that a lawyer provides by undertaking the work of a real estate agent. Legal services is in turn defined as “services that a person provides by carrying out legal work for any other person”. Legal work is then defined to include:

- (a) the reserved areas of work:
- (b) advice in relation to any legal or equitable rights or obligations:
- (c) the preparation or review of any document that—
 - (i) creates, or provides evidence of, legal or equitable rights or obligations; or
 - (ii) creates, varies, transfers, extinguishes, mortgages, or charges any legal or equitable title in any property:
- (d) mediation, conciliation, or arbitration services:
- (e) any work that is incidental to any of the work described in paragraphs (a) to (d).

[18] Accordingly any of the activities above which are provided by a lawyer are regulated. It should be noted that reserved areas of work referred is defined by the Act to mean the work carried out by a person—

- (a) in giving legal advice to any other person in relation to the direction or management of—
 - (i) any proceedings that the other person is considering bringing, or has decided to bring, before any New Zealand court or New Zealand tribunal; or
 - (ii) any proceedings before any New Zealand court or New Zealand tribunal to which the other person is a party or is likely to become a party; or
- (b) in appearing as an advocate for any other person before any New Zealand court or New Zealand tribunal; or
- (c) in representing any other person involved in any proceedings before any New Zealand court or New Zealand tribunal; or
- (d) in giving legal advice or in carrying out any other action that, by section 21F of the Property (Relationships) Act 1976 or by any provision of any other enactment, is required to be carried out by a lawyer

[19] I also take note of the parallel legislation from Australian jurisdictions. For example, section 4.4.2 of the Legal Profession Act 2004 (Vic) defines unsatisfactory professional conduct to include:

conduct of an Australian legal practitioner *occurring in connection with the practice of law* that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

A substantially identical provision is found in s 496 of the Legal Profession Act 2004 (NSW) and s 418 of the Legal Profession Act 2007(Qld). The use of the phrase “occurring in connection with the practice of law” fits with the provisions of those Acts dealing with misconduct which may include conduct “whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law” (see for example s 419 of the Legal Profession Act 2007(Qld)).

[20] I am of the view that the words of s 12 of the Lawyers and Conveyancers Act 2006 that the conduct in question must be “conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services” must be construed broadly and consistently with the wider purposes of the legislation to include any conduct which occurs in connection with the practice of law.

[21] I must now consider whether the conduct in this case can properly be considered to be conduct which occurred in connection with the practice of law. One of the difficulties in this matter is that Mr Morpeth appears to have adopted several roles. He has acted as lawyer and as an immigration consultant for Mr Ramsey. He has also stated that he has had some social interaction with Mr Ramsey. Mr Morpeth has argued that his conduct falls outside of the regulatory reach of the Law Society because he was not acting as a lawyer at the relevant time. Where there are overlapping roles there is a strong policy reason for presuming that the professional duties of a lawyer attach if there is any doubt. In an analogous context in *Sims v Craig Bell & Bond* [1991] 3 NZLR 535, 545 (CA) Richardson J stated:

It would be disruptive of the solicitor-client relation, undermining of the principles underlying that fiduciary relationship and contrary to the public interest to allow the solicitor to opt out of that professional duty by pleading that acting in a different capacity he had discharged the different responsibilities attaching to that other relationship. There is every reason to require the solicitor who has two roles to play to discharge the fiduciary responsibilities attaching to each.

In the same case Hardie Boys J made a similar observation when he said:

The distinct, and more stringent, obligations imposed on the solicitor-client relationship cannot be diminished by virtue of another kind of relationship which may

exist between the parties; if only for the reason that those obligations are inter alia for the protection of clients with whom there is just such another kind of relationship.

There is therefore a strong presumption that a lawyer who occupies more than one role must adhere to his professional obligations as a lawyer at all times. In a different context see *Davis v Witten-Hannah* (3/6/94, Cartwright J, HC Auckland CPI 1389/90) where a lawyer was found to have breached fiduciary duties to a woman whom he both acted for professionally and had a relationship with (reported on appeal *Witten-Hannah v Davis* [1995] 2 NZLR 141; (1996) ANZ ConvR 65).

[22] I also observe that Mr Morpeth accepted that Immigration New Zealand were interested in speaking to him because he was Mr Ramsey's former lawyer and he had dealt with Mr Ramsey's immigration matters. It appears therefore that the telephone calls which are the subject of this review were connected with Mr Morpeth's provision of legal services to Mr Ramsey previously. In light of the foregoing I consider that Mr Morpeth's conduct was connected with the provision of regulated services and therefore it can properly be considered whether or not it amounted to unsatisfactory professional conduct.

Conduct unbecoming

[23] I turn to the question of whether the conduct complained of can properly be considered "conduct unbecoming" in terms of s 12(b) of the Lawyers and Conveyancers Act 2006.

[24] Mr Morpeth has stated that the information he disclosed to Immigration New Zealand was not confidential. He also stated that it was learned by virtue of his relationship with Ms Driffield and not the product of any lawyer-client relationship he had with Mr Ramsey. On this basis he states that there was no breach of confidence. Rule 1.08 of the Rules of Professional Conduct of Barristers and Solicitors (which were in force at the time the conduct in question occurred) provided that "a practitioner has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship".

[25] The Standard's Committee considered that the breach of Mr Morpeth flowed from the fact that he would not have acted as he did had he not had knowledge of the immigration matters of Mr Ramsey. The Standards Committee concluded that the relevant knowledge was acquired in the course of his professional relationship with Mr Ramsey.

[26] Rule 1.05 of the Rules of Professional Conduct for Barristers and Solicitors also provided that that a lawyer was prohibited from acting against a former client when "through prior knowledge of the former client of his or her affairs which may be relevant to the matter, to so act would be or would have the potential to be to the detriment of the former client...".

That rule reflected that fact that while there is not generally an ongoing duty of loyalty on the part of a lawyer to a former client, there is an ongoing duty of confidence. The duty extends not only to not disclosing the confidential information, but also to not using that information to the detriment of the former client, or the benefit of another party.

[27] Mr Morpeth contends that the knowledge of Mr Ramsey's affairs acquired in the course of his acting as a lawyer were not relevant at all to the disclosures he made to Immigration New Zealand. He states that he also acted for Mr Ramsey as an immigration agent in respect of an application for residency on the grounds of marriage. I observe that it does not appear that Mr Ramsey was aware of the difference between the roles that Mr Morpeth purported to hold. Mr Morpeth argument is the duties and obligations attaching to his status as a lawyer do not attach to him due to his adoption of a different role. I observe that the question of whether the professional obligations of a lawyer attach to any particular conduct does not depend on the niceties of particular business structure through which the service is being provided or the formalities of the role the provider purports to occupy. Rather it is necessary to consider objectively whether a reasonable person in the shoes of the client would consider that he was obtaining legal services. It was stated by Mummery LJ in *Longstaff v Birtles* [2002] 1 WLR 470, 471 that:

a duty may endure beyond the termination of the retainer which initially formed the professional relationship of [lawyer] and client ... The source of the duty is not the retainer itself but all the circumstances (including the retainer) creating a relationship of trust and confidence, from which flow obligations of loyalty and transparency.

[28] Where a lawyer claims that obligations do not attach to him due to his occupying a different role it is appropriate that a heavy onus be placed on that lawyer to show that the conduct complained of did not have a connection with his status as a lawyer and the client could not reasonably have thought he was acting as a lawyer. Mr Morpeth has not discharged that onus. It was reasonable for the Standards Committee to conclude that Mr Morpeth was in breach of his obligation as a lawyer not to use confidential information held to the detriment of Mr Ramsey.

[29] I also observe that it is not necessary to tie a finding of unsatisfactory conduct (or conduct unbecoming) to a breach of a particular rule. In this instance r 1.05 of the Rules of Professional Conduct of Barristers and Solicitors itself was not breached. That rule deals with when lawyers are prohibited from acting against former clients and Mr Morpeth did not act against Mr Ramsey. However, that rule is also indicative of the professional duty not to use confidential information to the detriment of a former client more generally. That more general obligation is affirmed by r 8.7 of the Rules of Conduct and Client Care which provides that "A lawyer must not use information that is confidential to a client (including a

former client) for the benefit of any other person or of the lawyer". The fact that it is a professional duty of a lawyer to respect confidences obtained in other contexts is also affirmed by r 8.8 of the Rules of Conduct and Client Care which provide that

A lawyer must not breach or risk breaching a duty of confidence owed by the lawyer that has arisen outside a lawyer–client relationship, whether to benefit the lawyer, a client, or otherwise.

I note that those rules were not in force at the time that Mr Morpeth engaged in the conduct complained of, however, they are indicative of the applicable professional standards.

[30] In this regard the question is a global one of whether when all of the circumstances are taken into account the conduct of Mr Morpeth was such as to be "conduct that would be regarded by lawyers of good standing as being unacceptable" whether as "conduct unbecoming a lawyer" or "unprofessional conduct". The Standards Committee concluded that Mr Morpeth inappropriately used his knowledge of Mr Ramsey's affairs. The use of that knowledge was obviously likely to be to the detriment of Mr Ramsey who had ongoing issues with the New Zealand Immigration Service. The Committee did not make a finding as to whether that conduct was motivated by malice towards Mr Ramsey or concern for Ms Driffield. However, it did make a finding that the conduct was unacceptable and therefore amounted to conduct unbecoming.

[31] Standards Committees are comprised of experienced legal practitioners and lay observers. It would be with considerable reluctance that I would depart from the judgement of such a Committee on a question of what amounts to acceptable conduct. There is no basis for departing from the decision of the Standards Committee in this case.

[32] The application for review is declined and the decision of the Standards Committee is upheld.

Costs

[33] Where a finding of unsatisfactory conduct is upheld against a practitioner on review it is usual that a costs order will be imposed. I see no reason to depart from that principle in this case. I consider that this case has been of average complexity (and contained some difficult questions of interpretation). The Costs Orders Guidelines of this office indicate that in such cases an order of \$1800 would usually be made.

[34] I observe that there was some considerable difficulty in the scheduling of the review. The difficulties flowed in part from Mr Morpeth's involvement in a lengthy trial. The Guidelines for Parties to Review of this office (which were provided to Mr Morpeth) set out the manner in which a request for an adjournment ought to be made in paragraphs 24 to 27. Those guidelines were not adhered to. This review was initially set down for 29 September

2009 with Mr Morpeth's agreement. Late on the afternoon of 28 September Mr Morpeth telephoned this office and indicated he would be unavailable for the hearing scheduled for the next day and sought that it be rescheduled. He was required to put that request in writing which he did by email. The hearing was duly rescheduled for 16 October 2009 with the agreement of Mr Morpeth. Mr Morpeth was informed that costs issues would be addressed at the hearing. Mr Morpeth failed to attend that hearing. He stated that he had not received the notice of hearing. The matter was rescheduled for 21 October 2009. On 20 October Mr Morpeth left a telephone message stating that he was not able to attend on 21 October. This office attempted to contact Mr Morpeth to arrange a later suitable date but he did not respond to those efforts. The matter was set down again for 10 November 2009 and Mr Morpeth was informed that this was a final date and the hearing would not be postponed further. On 2 November Mr Morpeth indicated that he was to be overseas on that date and would not be able to attend. He was informed that the hearing would not be postponed beyond that date although it may be possible to hear the matter earlier. On 4 November Mr Morpeth requested that the hearing proceed that afternoon. In light of the difficulties in securing Mr Morpeth's attendance at a hearing that request was granted and that matter proceeded on that date with Mr Morpeth attending in person. Initially Mr Morpeth requested that the matter be further adjourned, but he subsequently consented to the matter being substantively heard at that time.

[35] It is accepted that there will be difficulties when parties to review have conflicting engagements and that a lawyer's pre-existing obligations in Court must take precedence over hearings in this jurisdiction. However I am bound to observe that Mr Morpeth's conduct in respect of the need to postpone the hearing of this matter on several occasions was unacceptable. The dates set were set with his express consent (with the exception of the date of 10 November). When he sought that the matter be postponed he repeatedly did so at the last moment, sometimes by leaving telephone messages which were cursory. When seeking that a scheduled hearing be adjourned it is usual to do so in writing with reasons. Mr Morpeth proved difficult to communicate with to arrange later dates and failed to respond to communications in a timely way. On 16 October he simply failed to attend the scheduled hearing. He stated that he was not aware that that date had been sent. This was notwithstanding that the date had been arranged with him by telephone and the notice of hearing sent to him by post and by email. He stated that the address to which the notice was sent (which he had supplied and which all other correspondence had been sent to) was a street address and not a postal address. Even if he had not received the posted copy of the notice this was due to his own failure. I take into account the Costs Orders Guidelines of this office and in particular in paragraph 6 which states:

Where the practitioner has acted vexatiously, frivolously, improperly or unreasonably in the conduct of the review; or the practitioner has ignored or disobeyed an order or direction of the LCRO or breached an undertaking given to the LCRO or another party the award of costs may be increased.

[36] I consider that Mr Morpeth's conduct was unreasonable in repeatedly seeking postponements at the last moment, doing so on occasion by the leaving of telephone messages rather than more formal communication, failing to respond to communications from this office and the failing to attend a scheduled hearing. In light of Mr Morpeth's conduct in this regard the costs order against him should be increased.

[37] Under the scale of costs set out in the Costs Orders Guidelines of this office the usual costs of a hearing in person of a matter that is of average complexity would be \$1800 which is half of the estimated actual costs of conducting such a hearing. In all of the circumstances I consider it appropriate to increase those costs to \$2700.

Decision

[38] The application for review is declined. Pursuant to s 209(1)(a) of the Lawyers and Conveyancers Act the application for review is declined and the decision of the Standards Committee is upheld.

Order

[39] Mr Morpeth is to pay \$2700.00 in respect of the costs incurred in conducting this review pursuant to s 210 of the Lawyers and Conveyancers Act 2006. Those costs are to be paid to the New Zealand Law Society within 30 days of the date of this decision.

DATED this 12th day of November 2009

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:

Mr Morpeth as applicant

Mr Ramsey as respondent

A related party

The Auckland Standards Committee 4

The New Zealand Law Society