LCRO 113/2011

CONCERNING	an application for review pursuant to section193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Auckland Standards Committee
BETWEEN	**GC** of [South Island] Applicant
AND	**OTAGO STANDARDS COMMITTEE** of South Island Respondent

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

DECISION

[1] UJ and UI filed a complaint with the New Zealand Law Society in April 2010 about GC, (the Practitioner) who is a partner in a law firm that provided legal services to them. It was alleged that the Practitioner had terminated his retainer with the firm before the work was complete, and had taken on the client that he was suing and thus acting in a conflict of interest.

[2] On 15 April 2011 the Otago Standards Committee determined that a complaint should be considered by the Disciplinary Tribunal under Section 152 (2)(a) of the Lawyers and Conveyancers Act 2006 (the Act).

[3] UJ and UI became clients of the law firm in April 2009. The letter of engagement sent to them stated, "*The work we are to perform is to represent you in the (-) District Court in relation to Order for Examination of a Judgement Debtor".* Other standard clauses in the Letter of Engagement informed them that the "*aim was to protect your*

interests at all times", and that they would be kept informed of the work and advised it was completed.

[4] A staff solicitor, GD, acted for UJ and UI. GD appeared for her clients on several occasions. An examination on 13 May 2009 was adjourned and another was held on 17 June 2009 which GE failed to attend, leading to a warrant for his arrest. A few days later GD wrote to her clients outlining a number of options open to them if GE continued to default on payments, including a Distress Warrant.

[5] An agreement was reached at a further examination on 23 June which GE defaulted on. Thereafter GD applied for a Distress Warrant over GE's vehicle, but did not then send out a new Letter of Engagement. UJ and UI were very satisfied with GD's services.

[6] The last letter sent from the firm was dated 23 September 2009 when GD wrote to inform UJ and UI that GD was due for sentence in the District Court on 25 September, that the bailiffs were aware of this and would seize his vehicle if it was in the courthouse vicinity. GD wrote, "*at this point it is a matter of waiting until his vehicle is located. ...".* The letter continued, *"should the vehicle not be located you may apply for another order of examination."* The letter was accompanied by an invoice for services.

[7] On 11 November 2009 the Court informed UJ and UI that the distress warrant was unable to be executed.

[8] On or about 19 November 2009 UJ received a telephone call from GD informing him that the law firm could no longer take any future instructions from him involving GE. There is a dispute about the extent of information she disclosed to UJ at that time. However, UJ later learned that the law firm had accepted GE as a client. The Practitioner, who was a partner in the firm, was acting for him.

[9] UJ's view is that he was a client of the firm that was providing him legal services in relation to suing GE, that his retainer was current, and that the firm was in a conflict situation in taking on GE as a client, and terminating its professional relationship with him. His correspondence with the firm on this matter failed to satisfy him, and he forwarded his complaints to the New Zealand Law Society.

[10] The Practitioner responded to the complaint, informing the Standards Committee that in November 2009 she had been approached by GE to act for him in relation to an "unrelated matter", and that the position of the firm was that it could no longer act for

UJ in matters involving GE. The Practitioner explained that the work performed for UJ had been by then been completed and the retainer was at an end, and that the call to UJ was made out of courtesy. She denied any wrong doing.

[11] The Standards Committee undertook an investigation and a number of specific questions were put to the Practitioner in relation to these matters. The Committee noted that there was some conflict between UJ and the Practitioner concerning these matters and also some variance in the responses provided by the Practitioner.

[12] The Standards Committee considered the question of whether or not the retainer had been completed. The position of the complainant and that of the Practitioner were in conflict on this issue. After considering all of the information the Standards Committee took the view that in all of the circumstances there was an ongoing retainer to recover the debt owed to UJ and UI by GE and that the work was not yet completed when UJ and UI were informed that the law firm could no longer act for them in relation to any matter concerning GE. The Committee found that *"this refusal was in all the circumstances capable of being considered a device to enable (the Practitioner) to take instructions from* [GE] *in relation to his (locally known to be more complex and lucrative appeal) matter instead*."

[13] The Standards Committee was of the view that Practitioner's conduct was capable of reaching the threshold of 'misconduct' under Section 7 (1)(a)(i) of the Act, and for this reason decided that the matter should be referred to the Lawyers and Conveyancers Disciplinary Tribunal.

Review

[14] The Practitioner filed an application for review, contending that the Standards Committee's decision could not be sustained on the facts. She set out the supporting reasons for the review in fifteen paragraphs. These set out the background matters and largely focused on the Practitioner's submissions supporting of her view that the form's retainer had ended by the time she took on GE as a client.

[15] The Practitioner submitted in the alternative that if conflict was found to exist (which was denied), there was no damage to the interests of UJ and UI. I was invited to consider the reasons for the existence of the conflict rule, which the Practitioner defined as existing to ensure that a Practitioner does not use information obtained from one party against its interests when acting for another.

Considerations

[16] This is an application to review a determination of the Standards Committee to prosecute the Practitioner. This office has taken the view that it would be unusual for a statutory power to review the exercise of a prosecutorial discretion to exist. The very limited nature of the power to review a prosecutorial decision has been canvassed in a number of decisions by this office, the reasons having been fully analysed in *Poole v Yorkshire* LCRO 133/09.

[17] The cases in which a decision to prosecute will be reversed on review are limited. The following grounds have been identified as raising circumstances in which such a decision might be revisited. They include where the prosecutorial decision has been:

a) Significantly influenced by irrelevant considerations;

b) Exercised for collateral purposes unrelated to the objectives of the statue in question (and therefore an abuse of process);

c) Exercised in a discriminatory manner;

d) Exercised capriciously, in bad faith or will malice.

[18] The main ground of review is the Practitioner's disagreement with the Committee's conclusion that an ongoing retainer existed. There is clearly a difference between the view of the Practitioner and that taken by the Standards Committee on whether the retainer had ended. I observe that the Standards Committee decision to refer the matter to the Disciplinary Tribunal materially rests on the Committee's conclusion that the retainer had not ended and remained current at the time that the Practitioner took on GE as a client and ended its professional relationship with UJ and UI. The reasons for taking this view are set out at some length in the Committee's decision.

[19] The only issue I am required to consider is whether there is any proper basis for interfering with the Standards Committee decision. If there were grounds for doing so, the matter would then need to be returned to the Standards Committee for further consideration of the substantive issues since I am mindful that the referral of the complaint to the Disciplinary Tribunal means that the Standards Committee has not itself made a decision on the substantive complaint.

[20] A Standards Committee cannot make a finding of misconduct, which can only be made by the Disciplinary Tribunal. Such a referral could properly be made if the conduct complained of was of a kind that was capable of reaching the threshold of 'misconduct' as defined in the Lawyers and Conveyancers Act 2006. There may also be other justification for such a referral, which may include conflict of material evidence such that is best resolved in the judicial processes available to the Tribunal.

[21] The Lawyers and Conveyancers Act 2006, by section 152 (2), confers a discretionary power on a Standards Committees to refer a complaint to the Disciplinary Tribunal. A review of such a decision is essentially a review of the Committee's exercise of its power.

[22] A proper question for the review is whether the conduct in question could, if proven, be capable of reaching a threshold of misconduct, or alternatively whether the referral is justified for other reasons. If a complaint under the Committee's consideration was of a nature that could not, on any reasonable view of the matters, reach a threshold of misconduct, or did not involve material conflict of evidence, a referral to the Tribunal could be considered an improper exercise of the Standards Committee's powers to prosecute the Practitioner in relation to that conduct.

[23] In the present case the Committee's decision to prosecute was materially based on its view that there was a current retainer with UJ and UI. In this light the Committee perceived that the Practitioner's conduct, in relation to the firm terminating the retainer with UJ and taking on GE as a client, was capable of reaching a threshold of 'misconduct'.

[24] 'Misconduct' is defined by section 7 of the Act. It is not necessary to set out that section in full, it being sufficient to observe in a general way that it includes conduct "*that could reasonably be regarded by lawyers of good standing as disgraceful or dishonourable"*.

[25] I have considered all of the material on the Standards Committee's file and that provided for the review. Notwithstanding that the Practitioner saw the issue differently, in my view there was sufficient evidence before the Committee to justify its interpretation of the evidence in the way that it did, and to exercise its discretion in the manner that it did. I therefore conclude that the decision to refer the matter to the Tribunal was one that was properly open to the Standards Committee. Moreover, the Tribunal is an appropriate forum for testing conflicting evidence concerning any of the

issues and will avail to the Practitioner of an opportunity to fully present her case. I see no basis for altering the decision made by the Standards Committee in this case.

[26] The application is declined.

Decision

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

DATED this 2nd day of November 2011

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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:

GC as the Applicant
Otago Standards Committee as the Respondent
The New Zealand Law Society