

CONCERNING

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of Auckland Standards Committee 5

BETWEEN

RQ and RR

Applicants

AND

MZ

Respondent

Introduction

[1] RQ and RR have applied for a review of the determination by Auckland Standards Committee 5 to take no further action in respect of their complaints about MZ's conduct when acting for the CBE Trust (the Trust).

Background

[2] In June 2001, RQ and RR sold their property to the Trust. The trustees of the Trust were RQ's brother (RS), RR, and an accountant.

[3] The Agreement provided that the Trust was to effect a subdivision of the property and transfer the house and curtilage back to RQ and RR whilst the remainder of the land was to be amalgamated with the adjoining land owned by the Trust.

[4] RQ and RR took advice from a Whangarei lawyer who had acted for them for some time before signing the Agreement.

[5] MZ acted for the Trust. He advised RQ and RR that he expected the subdivision would be effected within a relatively short period of time and that they would have title

to their property in early 2002.

[6] Instead, title did not issue until September 2009 and was subject to a performance bond with which RQ and RR were unhappy. In addition, MZ sought a Power of Attorney from RQ and RR to ensure that a drainage easement in favour of their property would be surrendered at the time the property was connected to the storm water system due to be installed by the Council.

[7] The delays in obtaining title occurred for a number of reasons, amongst which was the fact that there was little goodwill and no communication between the parties to the Agreement. During this time, RQ and RR liaised personally with MZ because they were unable to meet the costs of engaging solicitors to assist in the process.

[8] Following the issue of title, RQ and RR instructed another lawyer to act on their behalf to assist them with regard to the issues relating to the title with which they were unhappy. However, they ultimately declined to enter into a settlement agreement as recommended by that lawyer.

[9] Proceedings were issued by the Trust seeking specific performance of the Agreement. The proceedings were resolved by settlement, but RQ and RR remained dissatisfied. They consider that the difficulties which had been encountered during the process were largely caused by MZ and it is their view that that he had a duty to them to ensure that the Trust fulfilled its obligations under the Agreement in a timely manner.

[10] In December 2010, they lodged their complaint with the New Zealand Law Society Complaints Service.

The complaint and the Standards Committee determination

[11] RQ and RR complained that:-

1. MZ did not arrange for title to their property to issue in a timely manner and in the intervening years he had presented a succession of threats, legal bullying, slanderous comments, malice and duplicity.
2. MZ lodged a Notice of Change of Ownership with the Council knowing it to be false.
3. MZ did not involve them or keep them sufficiently informed about proposed land acquisition for road widening.

4. MZ refused to do anything to remedy a malfunction in the waste water system.
5. MZ became personally involved with his client's matters.
6. MZ ran a dedicated campaign against RQ and RR by making unsolicited contact with their legal advisers and portraying them in an unflattering manner.

[12] In respect of each of these aspects of the complaint, the Committee determined as follows:

1. The Committee did not consider that there was any substance to the complaint of threats, legal bullying, slander, malice and duplicity. Taking into account the nature of the relationship between RQ and RS, the Committee considered that MZ had acted appropriately and could find no evidence of the alleged conduct.
2. The Committee did not consider there was any information which suggested that the Notice of Change of Ownership lodged with the Council was false and determined that MZ's advice to Council that a "mortgagee sale was imminent" did not give rise to any professional shortcomings on his part.
3. The Committee did not consider that MZ had any obligation to keep RQ and RR informed about the proposed road widening as he did not act for them.
4. The Committee determined that there was no obligation on MZ to do anything to remedy the waste water system malfunction. MZ was the Trust's lawyer and assumed no personal responsibility for the Trust's obligations as suggested by RQ and RR.
5. The Committee was unaware of anything that legally barred or prohibited MZ from acting for the Trust notwithstanding his personal friendship with RS.
6. The Committee considered that there was insufficient information to sustain the complaint concerning unsolicited contact with their solicitors. The Committee took into account the nature of the work that MZ was instructed to do on behalf of the Trust and the nature of the relationship between RQ and RS. The Committee did not accept the allegation that MZ ran a dedicated campaign against RQ and RR.

The application for review

[13] RQ and RR have applied for a review of that determination. They perceived that MZ had provided further evidence to the Standards Committee in person which they had not been able to respond to.

[14] They also make the following comments:

- that they had adopted a conciliatory attitude towards RS and that MZ had declined to facilitate meetings proposed by them;
- that they believed MZ had knowingly provided untrue information to the Council when forwarding the Notice of Sale, which they describe as “duplicitous conduct” by MZ;
- that they considered MZ was responsible to a large extent for the considerable delays which occurred in obtaining the resource consent and in complying with the subdivision conditions; and
- that MZ was largely responsible for the difficulties with regard to the process of transferring title to them.

[15] In the complaint to the Law Society, RQ and RR sought outcomes which were beyond the jurisdiction of the Standards Committee and, as the High Court proceedings issued by the Trust had been settled, those outcomes had in any event become irrelevant. At the review hearing, RQ and RR advised that they sought that MZ be struck off the Roll of Barristers and Solicitors and that they be compensated for their losses.

Review

[16] An Applicant-only hearing was scheduled for 28 August 2012 and was attended by RQ and RR. In addition, MZ exercised his right to be present.

[17] During the course of the hearing, RQ referred to correspondence with regard to the waste water discharge application. I requested that he forward this to me following the hearing. This correspondence, together with some additional correspondence in relation to the complaint was received and forwarded to MZ for comment.

[18] MZ has noted that most of the additional correspondence was not relevant to the

complaint but has provided a letter from RY in relation to the circumstances in which the waste water discharge resource consent application was made.

MZ's role

[19] RQ and RR refer to the longstanding friendship between MZ and RS and allege that MZ identified too closely with his client. They allege that MZ took no steps to persuade his client to fulfil his contractual obligations and further allege that MZ continued to be obstructive with regard to the transfer of title to them following RS's death.

[20] RQ and RR's view of MZ's obligations to them is perhaps best expressed by reference to a letter from them to the Standards Committee dated 28 January 2011 in which they make the following statements:

- "When the sale and purchase agreement of 2001 was signed, the whole of the title was assigned to the [CBE] Trust and we were assured that our interests, regarding all aspects of the subdivision, including full costs, would be carried out by them. We entrusted the [CBE] Trust to action the word of the agreement and [MZ] was their solicitor. It therefore follows that [MZ] had, by association, assumed the responsibility of also acting on our behalf to undertake the legal process of subdivision through to completion until the transfer back of our new title."
- "My brother refused to talk to us from shortly after the sale and purchase agreement was signed until his death. His spokesman was [MZ]. Together they held complete control over our major asset for nine years. This also meant they controlled our ability to move against them. [MZ] cannot, now, blame his client. Blaming his dead client is not enough to absolve him."
- "In essence, [MZ], as solicitor and spokesperson of the [CBE] Trust and the architect of the sale and purchase agreement which was signed in good faith by ourselves, had a responsibility to carry through the requirements of that document to the satisfaction of all parties. The agreement was never carried out nor honoured in the spirit in which it was entered into."

[21] These statements indicate that RQ and RR consider that MZ had a legal and moral obligation to ensure their interests were protected, and to ameliorate the poor

relationship that existed between them and RS. In adopting this view they disregard the fact that MZ acted for the Trust and that his duties and obligations extended primarily to the Trust.

[22] In this regard, it is helpful to refer to the Conduct and Client Care Rules¹ to provide an understanding of MZ's obligations to his client.

Rule 4.2. A lawyer who has been retained by a client must complete the regulated services required by the client

Rule 5. A lawyer must be independent and free from compromising influences or loyalties when providing services to his or her clients.

Rule 6.1. A lawyer must not act for more than one client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to one or more of the clients.

[23] I acknowledge that the Conduct and Client Care Rules apply in respect of conduct after 1 August 2008. However, they reflect similar provisions of the Rules of Professional Conduct for Barristers and Solicitors which applied up until that date and I refer to these only to give the flavour of MZ's obligations, rather than examine them specifically. In addition, some of the conduct complained of did occur after 1 August 2008.

[24] MZ was engaged by the Trust. His duties were to the Trust. It was the Trust which paid his fees. He did not owe any professional duty to RQ and RR. His obligations did not extend any further than the obligations imposed on lawyers to "conduct dealings with others, including self-represented persons, with integrity, respect and courtesy"².

[25] There is no suggestion in the complaints that MZ breached the obligations imposed on him towards persons who were not his clients, although MZ does acknowledge that he very likely expressed his view that he found RQ and RR difficult to deal with and obstructive. He notes in his letter to the Law Society dated 20 January 2011, that he "was simply being truthful in describing them as he found them".

Threats and legal bullying

[26] RQ and RR contend that MZ was guilty of threatening behaviour when he gave

¹ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

² Rule 12 Conduct and Client Care Rules.

notice of an intention to institute proceedings against them in the High Court to resolve the impasse that had arisen. They contend that because he knew of their impecunious state and the effect that his advice would have, this constituted unacceptable threatening behaviour. They consider that he should have adopted a more conciliatory approach and engaged in the meetings which they requested.

[27] MZ was engaged by the Trust as its lawyer. His duty to the Trust was to advise the Trustees of the legal options open to them. That must necessarily include an option of issuing proceedings in Court.

[28] He had no duty to consider RQ and RR's personal circumstances or how they would view advice that legal proceedings were contemplated. Contrary to their view, there is no reason why a lawyer cannot recommend to his or her client a course of action that the lawyer knows will be most effective in producing a successful outcome for his or her client even if the proposed course of action will have an adverse impact on the other party. A lawyer is not engaged by a client to consider the personal circumstances or sensitivities of the party with whom a client is in dispute.

[29] The same comments apply in respect of MZ's request for a Power of Attorney from RQ and RR prior to the transfer of title. MZ's duty was to point out to his client the potential difficulty which could arise in the future with regard to the removal of the easement and to offer advice as to how this could be avoided. He would have been failing his client if he did not do so. The proposal put forward was a legitimate proposal to avoid the potential difficulty, and if RQ and RR perceived this as "legal bullying" then that was unfortunate, but MZ was fulfilling his obligations to his client.

MZ as the "architect of the delays"

[30] This complaint arises from the mistaken view of RQ and RR that MZ had a duty to them to encourage his client to fulfil their obligations under the contract.

[31] RQ and RR entered into an Agreement with the Trust. It may be that the terms of the Agreement did not address the potential difficulties involved in a transaction of this nature, or that it did not sufficiently protect RQ and RR's interests. However, RQ and RR were legally represented when the Agreement was entered into. The fact that RQ and RR's interests may not have been properly protected by the Agreement is not a matter for which MZ can be responsible or be expected to rectify.

[32] Similarly, MZ had no duty to persuade the Trustees to act favourably towards RQ and RR. Even if the Trust had ignored its obligations and instructed MZ that it intended to do so, MZ had no duty to RQ and RR to discourage the Trust from that course of action. A lawyer's duty is to his or her client and to act in accordance with that client's instructions unless to do so would place the lawyer in breach of professional obligations. MZ had no obligations to RQ and RR.

[33] MZ's conduct does not infringe any of the obligations imposed on lawyers either by the Rules of Professional Conduct, the Conduct and Client Care Rules or otherwise.

The Notice of Sale

[34] By December 2009 title had issued and the lots in the subdivision were liable to be separately rated. In terms of the Agreement between the parties RQ and RR remained responsible for the rates on the property retained by them and the Trust was to be reimbursed when title issued.

[35] MZ wrote to the Council and advised that he was in the course of finalising the transfer of the property to RQ and RR and provided the Notice of Sale. This would have had the effect of ensuring that future rate demands would have issued to RQ and RR directly.

[36] A Notice of Sale is provided to a local authority to give notice of a change in ownership of a property. In itself, it does not alter the legal title in any way.

[37] While the Notice of Sale may have been premature in that title had not been transferred to RQ and RR, the covering letter from MZ referred to the transfer of title as being "imminent". If matters had progressed as he anticipated, that was correct. On this basis the content of the letter provided to the Council was correct.

[38] The allegation of duplicity by RQ and RR implies some ulterior motive on MZ's part to deceive the Council to the detriment of RQ and RR. It implies a knowing and intentional act of deceit.

[39] It is difficult to discern any deceit in MZ's letter to the Council. In that letter MZ advised the facts of the situation as he saw it and noted that the transfer to RQ and RR was imminent. That was his expectation. There was no detriment to RQ and RR.

[40] In summary, I concur with the decision of the Standards Committee in this regard

that, in writing to the Council, MZ's conduct is not such as would give rise to any professional shortcomings on his part.

The response to the waste water system malfunction

[41] RQ and RR allege that when notified of the problem with the waste water system, MZ made an arbitrary decision without consulting his client to refuse to do anything about it. It would seem however that, whether this allegation is correct or not, the trustees subsequently confirmed MZ's response, as the problem continued for some time.

[42] MZ advises that he considered the repair to the waste water system should be attended to by RQ and RR as the system was servicing the property in which they lived. He points out that if the original septic tank had remained in place, then it would have been their responsibility to attend to any repairs or servicing of that and he viewed responsibility for the waste water system in the same manner.

[43] This is a reasonable view to adopt and to advise his client accordingly.

The waste water discharge application

[44] To enable the subdivision consent to be obtained it was necessary to apply for a waste water discharge consent to the Regional Council. The consulting engineer engaged by the Trust to lodge the application advised MZ that it made sense for the application to be lodged in the name of RQ and RR as the ultimate owners, presumably to avoid the need to transfer the consent to them when title issued.

[45] RQ and RR made it clear to MZ through their solicitor, that they did not agree to that course of action, and that the consent application should be made in the name of the Trust.

[46] MZ suggested the matter be left in abeyance until the application was available for RQ and RR to review, and expressed the hope that they would find nothing objectionable in the application and allow it to proceed on the basis as recommended by the engineer.

[47] It would appear that instead of the application being provided to RQ and RR to review, it was lodged directly with the Council by the engineer. This has been confirmed in the recent letter received from RY. When RQ and RR became aware of

this, they insisted that it be withdrawn and relodged in the name of the Trust.

[48] A subsequent complaint by them to the Institute of Professional Engineers about the engineer was dismissed on the grounds that the engineer had “acted in good faith under the guidance of the [CBE] Trust and the Trust’s lawyer.” It further ruled that the complaint was frivolous.

[49] I am not of course privy to the material that was before the Institute. However, from the correspondence forwarded to me, it would seem that MZ had an expectation that the engineer would forward the application to him to peruse prior to it being lodged, and he intended then to forward it to RQ and RR to consider. Instead, the application was lodged directly by the engineer, following which he then provided a copy to MZ. This was described by RQ in a letter to the engineer as “deception.”

[50] RY has advised that he recalls being instructed by RS to proceed with the application in his brother’s name and that the application was sent directly to the ARC. He acknowledges that “I don’t think you had an opportunity to review or stop the application.”

[51] In the circumstances, I do not consider that MZ’s conduct can be described in the manner it has by RQ and RR.

Summary

[52] In summary, RQ and RR’s complaints against MZ originate from a mistaken view of MZ’s obligations. He had no professional obligation or duty to them and his conduct throughout was consistent with acceptable conduct in the furtherance of his client’s instructions and objectives.

Decision

[53] Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Standards Committee is confirmed.

DATED this 2nd day of October 2012

O W J Vaughan

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:

RQ and RR as the Applicants
MZ the Respondent
The Auckland Standards Committee 5
The New Zealand Law Society