

CONCERNING

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

AND

CONCERNING

a determination of the Southland Standards Committee

BETWEEN

MR GS

Of [North Island]

Applicant

AND

MR TM

of [North Island]

Respondent

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

DECISION

[1] Mr GS (the Applicant) sought a review of a Standards Committee decision that declined to uphold his complaint against Mr TM (the Practitioner).

Background

[2] The Practitioner had acted for the Applicant when he purchased a vacant section from the [North Island] City Council. The property had a post situated on the section and near to the edge of the footpath. The Certificate of Title (CT) for that property did not record any easement in relation to that pole.

[3] The Applicant wished to build a house on the site and had obtained a copy of the LIM report which he forwarded to the Practitioner's office together with the TradeMe hyperlink relating to the sale advertisement of the land. The [North Island] City Council had also provided to the Applicant a geotechnical report that he also sent on to the Practitioner's firm.

[4] The purchase file was handled by the Practitioner's legal executive, Ms P, who undertook the usual enquiries, and eventually attended to settlement of the purchase.

[5] The Applicant was subsequently advised by his architect that the post would need to be removed in order to site the garage. The Applicant made enquiries and learned that the pole supplied electricity and telecommunication lines to the neighbouring properties. He was also informed that since the pole was situated on private land that he now owned, that any costs associated with its removal were his responsibility. It seems he was also informed by the Council that had the matter been brought to the Council's attention prior to settlement, the Council would have met the costs of removing it. The cost was assessed at around \$20,000.

[6] The Applicant brought the matter to the attention of Ms P at the Practitioner's office, and sought clarification of the costs (if any) for the firm's involvement with the issue. He was given a fees estimate of not less than \$5,000.00. He informed Ms P that he was disappointed at the fee estimate and referred to the fact that no advice had been given concerning legal issues surrounding the pole. In his view the law firm had failed to identify and alert him to the absence of a legal easement and the implications for him if he purchased the land. He referred to the pole showing in the LIM report, this apparently referring to the Geotechnical report which referred to the pole in Appendix C. He considered that the law firm had an obligation to resolve the matter at their cost.

[7] He also stated that he had spoken to several lawyers who had said that the Practitioner ought to have ensured that an easement was in place at the time of his purchase.

[8] The Practitioner responded that no easement relating to the pole appeared on the CT, and that they had no knowledge of the pole or of any issues relating to its ownership. The Practitioner considered that inquiring into legal aspects of the pole was not a matter falling within the matters on which they had been instructed.

Complaint

[9] The Applicant eventually made a complaint with the New Zealand Law Society concerning the Practitioner's "poor service", in particular to the failure to have identified and alerted him to the absence of a standard legal easement for

the pole, and the implications of legal ownership for going forward. The outcome he sought was compensation in the sum of \$20,900.00 for the cost of the work to shift it.

[10] The Standards Committee declined to uphold the complaint. The Committee was of the view that the Applicant must have been aware of the existence of the pole from his own inspection of the land, but had not mentioned this to his legal advisor. The Committee noted that no legal easements or restrictions were registered against the title of the property, and the LIM itself was silent as to the existence of the pole. The Committee noted that from the outset the law firm had been very specific in advising the Applicant that the firm was not going to comment on any aspects of the Geotechnical report as it *“did not have the expertise to comment on the geotechnical report included in the LIM. You will need to refer that to an engineer for comment.”* The Committee’s view was that there were no legal issues to be explored, and there was no incompetence or negligence on the part of the Practitioner.

Review application

[11] In his review application the Applicant submitted that the Standards Committee had failed to fully consider all of the relevant information he had provided. In particular he asked that the Legal Complaints Review Officer should consider that the pole was clearly shown in the TradeMe images he had sent to the Practitioner, and the pole also appeared in a photograph on the cover of the geotechnical report section.

[12] He challenged the Committee’s observation that he had not raised the specific issue of the pole with the Practitioner. He said he was not a lawyer and did not have any legal knowledge or experience, and could not be expected to identify any legal issues. He was therefore unaware of the legal ownership issues around the work without easements. He added that he had never been asked whether there were any other matters pertaining to the property such as lines or poles. His view was that given the pole was shown in photographs, this ought to have prompted the law firm to have asked questions and investigate further.

[13] The Applicant referred to the electricity authority’s *“Information paper on ownership and maintenance of customer service lines”*. He considered that the

Practitioner ought to have identified who owned and was responsible for maintaining the works and what rights of access they had.

[14] The Practitioner's response to the review application was to refer to his letter to the Standards Committee, and confirm that it was not part of his instructions to investigate the pole or comment on it. The Practitioner considered that the Standards Committee correctly noted that the Applicant had been advised that issues in relation to the geotechnical report would not be considered by them.

[15] The Practitioner reiterated that they had been unaware of the existence of the pole, and did not consider that the electricity authority's information paper had any relevance to the matter. He added that this was not a subdivision but the purchase of a vacant section in the [North Island] City Council area. He added that the section was difficult in terms of its contour and shape, that the Applicant had inspected it on a number of occasions and was proposing to develop it, and that he was an experienced developer. In the Practitioner's view, issues relating to the suitability of the site for a proposed development were matters that were under the control of the Applicant and were not included in the ambit of legal instructions. He denied any wrong doing in the matter.

Considerations

[15] I have read all of the information in the Standards Committee file that was sent to my office and also considered the Standards Committee's reasons for its decision. I have given careful consideration to the grounds of review forwarded by the Applicant.

[16] No easement was registered on the CT and neither the Practitioner (nor Ms P) had undertaken an inspection of the site. They were unaware of the pole's existence. The pole is not mentioned in the LIM, but is mentioned in Appendix C of the Geotechnical Report that was also sent by the Council.

[17] Some of the images of the section that were part of the TradeMe hyperlink sent to Ms P showed the pole. There were also a couple of images of the section in the Geotechnical Report (at Appendix Committee), only one showing the pole. All of the images are somewhat grainy. The photos are taken from the road and indicate that the location of the pole is on the edge of the footpath. There are no boundary indicators. My impression is that the pictures alone are unlikely to have

disclosed the existence of a pole as falling within the boundary of the land as it appears to be situated on the edge of the footpath.

[18] On that matter, I might add that the cross-section of the site, as appearing in Appendix C of the Geotech report, appears to show the footpath also inside the boundary of the land. On that diagram the pole is shown to be in the edge of the footpath. This supports the visual impression from the images that the pole is on the edge of the footpath.

[19] This is a complaint that is being considered in a disciplinary context. There would need to be some professional wrong doing on the part of the Practitioner before the Applicant could seek a remedy. The question is whether the Practitioner's failure to have become aware of the pole on the land involves a professional failure on his part. This is the proper focus of the enquiry because if there is no professional failure in identifying the pole, it follows that there can be no professional failure in not having given legal advice as to its legal implications, whether as to the absence of an easement or otherwise.

[20] The Applicant's contention is that the photographs should have prompted the Practitioner to enquire further. I do not agree. A lawyer's perusal of documents or information would not in the normal course of events include downloading images from an advertisement. The extent of legal enquiry undertaken by a lawyer in advance of a purchase is generally confined to examining the legal documents associated with, or relevant to, the property, and any issues arising from these documents. (This is in addition to my observations above).

[21] A lawyer's perusal includes examining the LIM Report. In this, the Council's LIM makes no mention of the pole.

[22] The pole is referred to in Appendix C of the Geotechnical report, but the Applicant had been explicitly told that the Practitioner would not provide advice on that report and that he should obtain advice from elsewhere. It is not known whether the Applicant sought any advice from another source. But given the express exclusion, there would be little basis for criticising the Practitioner for not providing legal advice on matters arising from that report.

[23] It is difficult to see how the existence of the pole could have been discoverable by any of the usual enquiry undertaken by lawyers in relation to a client's property purchase. Lawyers seldom venture out of their offices to inspect

a property that their client wishes to purchase, and this cannot be considered a professional failing.

[24] I also make the further observation that the Applicant himself was aware of the pole but did not mention it to his lawyer. It was not until some months after settlement that he discovered that he now owned the pole, and that any costs for its removal were his. At that stage he contacted the law firm (15 October 2010) and informed Ms P that there was a post and small gold andelect box on the property about three and a half metres from the footpath, that the pole had power and telephone cable lines on it which span his property and fed above ground over two rights of way using separate sets of wires, and that there was a connection to another pole on the roadside.

[25] The Council had informed the Applicant that there was no information on their file about the history of the pole, and the Applicant's further enquiries revealed that no one knew when the pole had been installed or by whom, but the assumption was that it pre dated the Electricity Act 1992 since after that date easements or legal arrangements had to be in place. He informed Ms P that it had been suggested that an easement should have been put in place or ownership identified at the time of purchase.

[26] It was said that the Applicant is an experienced developer and if that is the case it seems most unlikely that he would not have considered the implications of building on the site before he purchased it. I noted that one of his emails (30 June 2010 - prior to purchase) referred to the challenging terrain and mentioned that an architect had investigated the site. The Applicant removes himself from any responsibility on the basis that he is not a lawyer and could not have known about the legal implications involved in moving the pole.

[27] My focus has not been on the information sent by the Applicant concerning ownership and maintenance of service lines, but rather, on the prior question of whether there has been a professional failure on the part of the Practitioner for not discovering the existence of the pole. Had the pole, from which service lines visibly spanned to neighbouring properties, presented an obvious obstruction to a proposed building on the site, it would be surprising that the Applicant would not have mentioned this to his lawyer in relation to the purchase. The above evidence suggests that he may not have perceived the pole as being located on the site he was looking to buy.

[28] This is undoubtedly an unfortunate situation for the Applicant, but for the reasons above, I do not accept that the Practitioner failed in his professional duty, as I do not see that this was a matter than was discoverable through the normal legal checks undertaken by lawyers.

Decision

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

DATED this 20th day of January 2012

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:

Mr GS as the Applicant
Mr TM as the Respondent
The Southland Standards Committee
The New Zealand Law Society