

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 3 of the New Zealand Law Society

BETWEEN

H VICTOR

Applicant

AND

R STRATFORD

Respondent

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

DECISION

[1] Mr Victor complained to the New Zealand Law Society in respect of the conduct of Mr Stratford who had acted for BB Trust Limited(which is controlled by Mr Victor and other family members) in relation to a dispute with his neighbours about a water easement. In particular Mr Victor made numerous allegations about the conduct of Mr Stratford relating to the settlement of the dispute including that Mr Stratford acted without authority in settling the dispute and failed to have recourse to him when the settlement was implemented.

[2] The conduct complained of occurred in 2007 and as such the applicable standards are those found in the Law Practitioners Act 1982 and the Rules of Professional Conduct for Barristers and Solicitors, both of which have since been replaced. The Standards Committee concluded that the conduct complained was not of such a nature as to justify disciplinary action under those standards and therefore declined to consider the matter further. It did so pursuant to s 351(1) of the Lawyers and Conveyancers Act 2006. Mr Victor applied for that decision to be reviewed.

[3] The parties have consented to this matter being considered without a formal hearing and therefore in accordance with s 206(2) of the Lawyers and Conveyancers Act this matter is being determined on the material made available to this office by the parties and the Standards Committee.

[4] Mr Victor (or BB Trust Limited– I will refer to Mr Victor) was in dispute with a neighbour in respect of a water easement. The easement benefited the property occupied by Mr Victor. The neighbour wished to develop the adjoining property and to do so desired that the water easement be altered. It transpired that Mr Victor also wished to develop his property and sought certain consents from the neighbour. It appears that consents were given in return for concessions in respect of the water easement. However some time later the consents given by the neighbour in respect of Mr Victor's development were withdrawn. Mr Victor then refused to co-operate further in respect of the concessions in respect of the easements. It appears that some documentation in this regard had been signed by Mr Victor but that it was deficient in some way. Discussions ensued but no resolution was forthcoming. Proceedings were filed by the neighbour in the High Court for a variation (and later extinguishment) of the easement. These were opposed by Mr Victor.

[5] Mr Victor provided voluminous documents in this matter with commentary as to their significance. I have read all of that documentation. Mr Victor also made numerous and varied allegations regarding the conduct of Mr Stratford. I have considered all of them, but focussed on those which seemed to be the most serious and at the centre of the complaint.

Authority to Settle

[6] Mr Victor asserts that Mr Stratford was not authorised to settle the easement litigation in the way he did. All of the documentary evidence points the other way. Mr Stratford has stated that Mr Victor instructed him to settle the litigation in the way he did in the course of a telephone conversation of 13 September 2007. The material available is consistent with that assertion by Mr Stratford. While the prudence of obtaining written consents is obvious (and set out in r 8.09 of the then applicable Rules of Professional Conduct) there is no professional obligation to do so.

[7] In respect of the evidence of the instruction to settle the following can be observed:

- [a] On 24 July 2007 Mr Stratford wrote to Mr Victor indicating that a settlement proposal had been put to the other side.
- [b] On 5 September 2007 Mr Stratford wrote to Mr Victor suggesting the outline of a possible settlement (and suggesting a payment of \$4000 towards legal costs by the neighbour).
- [c] On 10 September 2007 Mr Stratford wrote to Mr Victor seeking to follow up his earlier letter and seeking to speak with Mr Victor in this regard.

- [d] On 11 September 2007 Mr Victor wrote to Mr Stratford stating that the \$4000 amount was unacceptable.
 - [e] On 13 September 2007 Mr Stratford made a file note recording a conversation with Mr Victor which stated "said happy to surrender for \$6000 payment".
 - [f] On 13 September 2007 Mr Stratford wrote to Mr Victor outlining the settlement reached which involved a payment of \$6000.
 - [g] On 30 October 2007 Mr Victor wrote to Mr Stratford stating "we settled for \$6000" but complained that in the implementation of the terms of the settlement he was being "mucked around" by the neighbours.
 - [h] In subsequent correspondence Mr Victor became increasingly dissatisfied with the delays involved and the fact that he had yet to receive the settlement sum. He indicated that he would no longer co-operate in implementing the settlement (see for example the letter from Mr Victor to Mr Stratford of 22 November 2007). While Mr Victor expressed dismay at the time the matter was taking there was never any suggestion that he had not agreed to the settlement.
- [8] I conclude that Mr Victor gave oral instructions by telephone to Mr Stratford on 13 September 2007 authorising him to settle the proceedings. Mr Stratford did not breach his professional obligations in settling the proceedings on behalf of Mr Victor.

Terms of Settlement

- [9] Mr Victor also suggested in his complaint that he at no time understood that there was to be an absolute surrender of the easement. Rather he understood that there was to be an amendment to (or replacement of) the easement. I observe that it appears that the issue of an outright surrender was discussed by telephone. A letter from Mr Stratford to Mr Victor of 5 September 2007 referred to a telephone discussion "yesterday". It stated "if your position is you are happy to accept either of the order[s] sought, however seek a contribution to your legal costs then we expect the Associate Judge would have a significant degree of sympathy..." Surrender of the easement was one of the orders sought.
- [10] I note that in an earlier letter from Mr Stratford to Mr Victor of 27 August 2007 the fact that the neighbours were seeking orders to extinguish the easement or to vary it was set out. In that letter it was noted that "it may be that you are happy with either of those proposals however you wish the plaintiffs to make a

contribution to your costs". This is consistent with dialogue having occurred in which the distinction between a surrender and a variation was clear.

- [11] I do not discount the possibility that Mr Victor may not have appreciated the significance of a surrender of the easement nor that it is possible that Mr Stratford did not make this adequately clear to him. However if such a breach occurred it is not of a kind which would warrant disciplinary action applying the standards found in the Law Practitioners Act 1982 which are applicable.
- [12] There is no evidence that Mr Stratford deceived Mr Victor as to the nature of the terms of settlement. As such the conduct of Mr Stratford in this regard did not amount to a breach of the applicable professional standards.

Implementation of settlement

- [13] I am concerned that there is a strand of this complaint which had not been properly considered by the Standards Committee. In particular, it appears that the way in which the settlement was implemented forms part of the complaint but was not been properly identified or considered by the Committee.
- [14] In his original complaint Mr Victor also stated that Mr Stratford "surrendered water easement without instructions of owners of property" and "signed all documentation without any consent, authority, or power of attorney of any of the directors of South Head Trust Ltd – had no communication whatever with the complainant from September 2007 to 23 July 2008".
- [15] Mr Victor also stated (in his letter of 11 May 2009 to the Society clarifying his complaint) that he did not see the consent memorandum or draft consent order prior to them being signed and filed. He stated also that he "has consistently opposed modification of the easement" and stated that he did not understand the significance of the matters until the water on the property was cut off.
- [16] I observe that on a number of occasions after 13 September 2007 (the date of the settlement of the court proceedings) Mr Victor expressed his intention to stop co-operating with the implementation of the settlement (and has since indicated an intention to set the consent order aside). For example:
- [a] On 30 October 2007 Mr Victor stated in a letter to Mr Stratford "if the funds are not sent to you by Friday 02 November 2007 then we shall not be signing any documentation in regard to the easement and they can re-apply to the High Court again".

- [b] On 22 November 2007 Mr Victor stated “do not ask them for the \$6000 – we are not interested in dealing with the matter anymore”.
- [c] On 7 February 2008 he stated in a letter to Mr Stratford “the settlement is to be annulled and the [neighbours] are to go back to the High Court where they wanted to be in the first place anyway”.
- [17] Mr Stratford continued to take steps to put in place the settlement agreement (and obtain the payment for Mr Victor). It appears that the order of the Court was obtained by virtue of a memorandum signed by Mr Stratford as counsel. On the basis of that order the easement was removed from the title without requiring any signature or other assent from Mr Victor. Mr Stratford has said (in his letter to the Society of 14 July 2009) that Mr Victor (or BB Trust Ltd) was aware of what was happening and consented to it and that this was evident from later reporting letters. Mr Stratford stated that he was surprised by the later questioning of the course of action adopted. Mr Victor responded to this in a letter of 21 August 2009 to the Society by (in para 14) denying that he was aware of what was going on and suggesting that Mr Stratford had not kept him informed of these matters.
- [18] There is in the circumstances a prima facie case that Mr Stratford pushed through the implementation of the settlement without the instructions, or against the instructions, of Mr Victor. If Mr Stratford implemented the settlement knowing that this was not on the instructions of his client this may amount to a professional breach in terms of the standards applicable under the Law Practitioners Act 1982.
- [19] While Mr Victor did not explicitly complain that the settlement was not only entered into but then also implemented by Mr Stratford without his authority I am satisfied that it can be properly considered part of the complaint in all of the circumstances. In particular a lay complainant cannot be expected to particularise every element of the complaint. Provided the facts upon which the complaint rests are provided, this should be enough. Having said this it is understandable that the matter was not focussed on by the Standards Committee (and not dealt with by Mr Stratford) given the volume of information provided by Mr Victor and the lack of focus of some aspects of the complaint.
- [20] As noted in *B v Canterbury District Law Society* [2002] 3 NZLR 113 at para [48] in some cases merely sending the letter of complaint will not be enough and it might be necessary to separately identify the particulars of the complaint intended to be considered. This appears to be such a case. The Society sought to do this by its

letters of 19 May 2009 to Mr Stratford and Mr Victor respectively. However it framed the problem mainly as one of settling without authority. As a result this aspect of the complaint was not clearly responded to by Mr Stratford.

[21] It is however difficult to criticise the Committee for this in light of the fact that this issue only came to light in the course of reading the papers in determining this application for review.

[22] Because the matter has only now become apparent Mr Stratford has not had an opportunity to respond to the allegation. It is therefore inappropriate that I make any determination on it. Rather it is proper that this matter be returned to the Standards Committee so that Mr Stratford can be given the opportunity to comment on this aspect of the complaint and the Committee can turn its collective mind to the issue.

Costs

[23] No adverse finding has been made against Mr Stratford. In light of this it is appropriate that no order of costs be made.

Decision

The application for review is upheld pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 and the Standards Committee is directed pursuant to s 209 to reconsider and determine the specific matter of:

Whether Mr Stratford was in breach of his professional obligations in implementing the settlement of 13 September 2007

- without the instructions of his client; or
- against the instructions of his client.

DATED this 9th day of October 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 Victor as Applicant
Mr Stratford as Respondent
Firm BB as a related party
The Auckland Standards Committee 3
The New Zealand Law Society