

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 4

BETWEEN

BG
of Auckland
Applicant

AND

YQ
of Auckland
Respondent

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

DECISION

[1] An application for review was made by Ms BG (the Applicant) for the review of a Standards Committee decision declining to uphold her complaint against Mr YQ (the Practitioner).

Background

[2] After the Applicant and her husband separated the matrimonial home was sold. They instructed the Practitioner to do the conveyance. The Practitioner took the required steps to obtain a Letter of Engagement from both of them, completed the conveyance, and in accordance with his undertaking, held the balance of funds in his Trust Account undispersed until such time as the parties reached agreement concerning division of relationship property.

[3] At that time the Practitioner was also acting for the Applicant's husband in matters arising from the separation, such as relationship property division and child-related issues. This was known to the Applicant at the time she agreed to allow the Practitioner to do the legal work on the sale. The Applicant was represented by a barrister, Ms BH, in these other matrimonial matters.

[4] The Standards Committee file that was obtained for the review contained copies of numerous exchanges between Ms BH and the Practitioner concerning relationship property and other matters involving the care of children, and also the drafting of a Section 21 agreement. The nature of the letters suggest that that the relationship break up was not amicable.

[5] The Applicant eventually filed complaints against the Practitioner. She alleged that the Practitioner (a) had a conflict of interest, (b) had lied, and (c) had failed to stick to the facts. Other general allegations were raised concerning the Practitioner's competence. The Practitioner denied all of the allegations.

[6] The Standards Committee's decision records that the Committee considered the information provided by both parties, and the comments of each party in response, before deciding that no further action was necessary. The Standards Committee resolved to take no further action pursuant to Section 138(2) of the Lawyers and Conveyancers Act 2006. This confers a discretion on a Standards Committee to take no further action if, in the course of the investigation of the complaint, it appears to the Standards Committee, having regard to all the circumstances of the case, that no further action is necessary or appropriate.

Review

[7] The Applicant sought a review on the grounds that the Committee failed to recognise that there was "*a clear case of conflict of interest*". The remainder of her review application concerned allegations of incompetence on the part of the Practitioner, in particular in relation to calculations in the financial distribution between the parties. It is not clear whether the Applicant also challenged the Standards Committee's conclusions in respect of other parts of her original complaints, but overall she is clearly dissatisfied with the outcome.

[8] Both parties have agreed that the Application may be determined without a formal hearing and therefore in accordance with section 206(2) of the Lawyers and Conveyancers Act 2006 the matter is being determined on the material made available to this office by the parties.

Considerations

[9] The Applicant has concerns about the Practitioner's conduct and the manner in which he represented her husband, and particularly insofar as that impacted on her. My review of the file includes considering the way that the Standards Committee dealt with the complaint. I shall address the principal complaints in turn.

Conflict of interest complaint

[10] The conflict of interest complaint arises in the context of the Practitioner representing both the Applicant and her husband in the sale of the matrimonial home, while at the same time representing the husband in relation to the relationship property distribution and other related matters. The Applicant perceives this to have been a conflict on the part of the Practitioner. She says she received no legal advice about this.

[11] The Lawyers: Conduct and Client Care Rules prohibits a lawyer from acting for two (or more) parties whose interests are in conflict. This is governed by Chapter 6 of the Rules which states that a lawyer must not act for more than one client on a matter in any circumstances where there is more than a negligible risk that the lawyer may be unable to discharge the obligations owed to one or more of the clients. There is a qualification which provides that the Rule does not apply when the consent of all parties concerned is obtained in advance unless it becomes apparent that the lawyer will not be able to discharge his obligations owed to all of the clients.

[12] There are several reasons why the above circumstances do not raise a conflict of interest situation for the Practitioner. First, it is clear from the above that a conflict arises only if the lawyer acts for one or more parties in respect of "a matter". The Rule clearly contemplates that it applies when the Practitioner is acting for two (or more) parties in respect of the same matter, and where those interests might conflict. This would arise for example if each of the parties sought a different outcome in respect of the matter, and in such a case the Practitioner could not advance the interests of one client except at the expense of the interests of the other party. The 'matter' in respect of which the Practitioner acted for both parties concerned the legal work to complete that sale.

[13] Second, there is nothing to suggest that the parties' interests were in conflict with regard to the sale. Both wanted the house sold. There was no disagreement about their objectives when instructing the Practitioner, namely that the house should be sold and the proceeds held by the Practitioner pending division of the relationship property. They had a common interest in selling the house.

[14] If it is the Applicant's perception that a conflict arose due to the fact that the Practitioner was also acting for the husband in other matters, this is a mistaken view of the nature of a conflict of interest. The prohibition arises only where the Practitioner acts for two or more individuals in relation to "a matter", and where the parties interests are conflicting, such that the practitioner cannot serve the interests of both parties in relation to that matter. This contemplates a lawyer acting in the *same matter* for the clients, and recognises that the

interests of both parties cannot be adequately served where there is a conflict in the interests of the clients in respect of that matter.

[15] The prohibition in Rule 6 does not apply where the Practitioner is also acting for one of the parties in a separate 'matter', even where this involves a conflict with the other party. In this case the Practitioner acted only for the husband respect of other matters such as the property distribution and child care arrangements, and the section 21 Agreement. No part of the conveyancing work impinged on these other issues.

[16] The Applicant's interests were fully protected by the undertaking given by the Practitioner to hold the proceeds in his trust Account until such time as agreement had been reached. There is no suggestion that the Practitioner failed to honour that undertaking. I have seen no evidence of any conflict that would have prevented the Practitioner in acting in these separate matters or that the interests of the clients were compromised by his having done so.

[17] It seems that the Applicant saw this somewhat differently. She alleged that because of the conflict the Practitioner was confused about whether 'relationship property' included the balance of the deposit that was paid by the real estate agent into the parties' joint account. This involved a sum of \$16,000. The Applicant had withdrawn this sum to meet expenses for the family. As part of the property division the husband sought to claim his share and was represented by the Practitioner in this matter.

[18] However, the Practitioner did not receive the balance of the deposit of \$16,000 and could not have been held accountable for it. It is difficult to see any objection to the husband claiming his share of it, or that the Practitioner should represent his interests in that regard. The Practitioner had an obligation to represent the interests of the husband, and to make such claims as he was legally entitled to make against the property. In relation to such matters the Practitioner had no duty to the Applicant. The Applicant was represented throughout by her own lawyer and no doubt received good advice about her rights and entitlements.

[19] The Applicant has not provided any evidence to show that the Practitioner's acting in the house sale adversely impacted on his ability to represent the husband or compromised her interest in regard to that sale.

[20] There was a further aspect of this allegation, namely that the Practitioner had colluded with the husband to conceal some of the husband's bank accounts, and failed to provide all relevant information. There was some indication that she had linked this to her claim to the deposit monies. However, the Applicant has provided no evidence of the Practitioner having colluded with his client to conceal information. Lawyers are generally reliant on the client to

provide the information, and are obliged to inform the client of their legal obligations surrounding disclosure, and of the consequences of a failure to do so. There is nothing to suggest that the Practitioner did not fully advise his client on these matters.

[21] There is no substance to this complaint and the Standards Committee was correct to have taken no further action.

Allegation that the Practitioner lied

[22] This complaint arose in the context of the Practitioner having agreed to prepare the first draft of the Section 21 relationship property agreement. The Applicant said that the Practitioner had agreed that he would draft the Section 21 agreement after settlement of the house which was late January 2010, but there were delays and she referred to the Practitioner having advised on more than one occasion that the draft would be available "*the following week*" but that the Agreement did not in the event materialise until late March 2010. The Applicant interpreted this as the Practitioner having lied in that he agreed to draft the document within a certain time frame and had not done so.

[23] She perceived that the lawyer had dragged the matter out for tactical reasons so as to increase the financial pressure on her. She sought compensation in the sum of \$4,000 for legal fees and also \$5,000 for loss of earnings because the Section 21 "*dragged on for months and the subsequent visits to my lawyer and I have lost income*".

[24] The Practitioner acknowledged that he had offered to prepare the initial draft agreement and that had intended to do so promptly, but that by mid-February he was confronted with unexpected demands made by another client. He said he had informed the Applicant's lawyer. The Practitioner added that he was subsequently confronting a large backlog of work and that he had invited the Applicant's counsel to submit a draft instead, but it appears that this was not done and the Practitioner eventually submitted his initial draft at the end of March.

[25] The Applicant disputed that the Practitioner had advised her lawyer and asked the Standards Committee to obtain proof of this. This is not the role of the Standards Committee however and if the Applicant believes that the Practitioner misled her lawyer, she could have sought evidence from her lawyer.

[26] The evidence shows that the Practitioner had offered to prepare a draft for the Section 21 agreement and intended to do so, but that his intentions were thwarted by other demands on his time. There was evidence that the initial draft prepared by the Practitioner resulted in a number of disputed matters being identified. The Applicant's lawyer took a month's leave soon after and appointed an agent to progress matters for her clients in her absence and

informed the Practitioner of this. The Practitioner received no communications from the agent and concluded that the Applicant had preferred to await the return of her own lawyer.

[27] An allegation of lying is a serious one, particularly for lawyers whose honesty must be above reproach. In this case no specific dates were mentioned and no undertakings were given by the Practitioner concerning preparation of the document. I cannot agree that expressing a willingness to draft a document which does not in the event materialise amounts to 'lying'.

[28] The Practitioner had submitted that it was always open to the Applicant's lawyer to submit a first draft of the document if the Applicant had concerns about the delays. In reply the Applicant said that the Practitioner had agreed to do the draft and she would have had to incur costs if her lawyer had done the draft. Be that as it may, if the question of timing had been crucial to the Applicant it is surprising that she did not try and progress the matter through with her own lawyer. That the first draft identified various contentious issues also indicated that the Agreement was unlikely to be signed very quickly. None of this evidence suggests that the Practitioner's actions were unprofessional or that they should attract disciplinary action.

[29] The Applicant also referred to other instances of the Practitioner having lied, including conveying to the Applicant's lawyer that the couple's daughter wished to live with her father. The Applicant alleged that this was not correct and had been 'fabricated' by the Practitioner who had become too emotionally involved with the case.

[30] Whatever the daughter's real intention was, there is no evidence to show that the Practitioner conveyed any information to the Applicant's lawyer that had not resulted from instructions he had been given by his client. It was not the Practitioner's role to ascertain the wishes of the daughter or to represent her interests. The Practitioner's duty was only to his client.

[31] The only evidence concerning these matters is that of the Applicant who took exception to the way the relationship property and child arrangements were managed by the Practitioner. However, he had a professional obligation to protect his client's interests. Clearly there were conflict in respect of those matters but the Practitioner had no obligation to the Applicant, and she was represented by her own lawyer. Allegations of dishonesty against a lawyer are serious, and in this case the Applicant provided no evidence of dishonesty on the part of the Practitioner. Nor is there is evidence of improper motives on the Practitioner's part concerning the progress of the section 21 Agreement. In the absence of any evidence it is right that the Standards Committee took no further action. I see no basis

for upholding any complaint of dishonesty against the Practitioner and in the circumstances the Standards Committee was correct to decide to take no further action on this matter.

Alleged failure to stick to the relevant facts

[32] The Applicant believed that the Practitioner was confused about the nature of a section 21 Agreement in that she claims he tried to bring the children into the Agreement. The Practitioner disputed this, stating that he was representing the husband in all matters and at all times was acting on his client's instructions. The nub of this complaint appears to be that the Applicant disapproved of the way that the Practitioner was handling the case for her husband. That alone is insufficient to support a complaint in the absence of clear evidence of some wrong doing.

[33] The Applicant raised further objects to the Practitioner having made a reference to the break-up of the marriage in an emails communication. She characterised this as the lawyer acting as a marriage guidance counsellor. I have read the email in question and while it may not have been necessary for the Practitioner to have made a reference in the manner that he did, I do not see this as raising a professional conduct issue.

Additional complaints alleging professional failings

[34] The Applicant also referred to errors in the Practitioner's professional work, with particular reference to emails sent by the Practitioner to her counsel on 16 June 2010. In the first email the Practitioner had written that *"it appears that all the adjustments are now agreed and you are invited to complete an updated draft settlement agreement. Please ensure that all alterations and additions are highlighted."* This email was sent at 13:51. On the same day at 14:09 the Practitioner wrote again, heading *"this email is in response to the specific matters raised in your letter of 9 June 2010"*. The remainder of the email referred to amended child care arrangements, financial adjustments and with reference to Clause 13 of the draft agreement, joint funds and preparation of a further draft. The Applicant saw these emails as conflicting, and full of mistakes, and that her lawyer had to spend time making corrections which in turn cost her money.

[35] The extent of the information provided is unlikely to tell the whole story. However, with reference to the two emails provided by the Applicant, I note the first related to an agreement concerning adjustments only. The second email concerned other matters such as child care arrangements, joint funds and the preparation of a further draft, but part of the email concerned "financial adjustments" expressed as providing clarification of certain matters raised by the Applicant's counsel's earlier letter. There is insufficient evidence to show that the emails contradict one another. Moreover, the circumstances do not support allegations of

un professional conduct. If the Applicant's lawyer was concerned about contradictory information provided by the Practitioner, no evidence of such a concern has been produced.

[36] The Applicant also referred to a miscalculation in the Practitioner's notes which she characterised as incompetence. Mistakes may arise but I cannot agree that an error in financial calculations amounts to professional wrongdoing. I reiterate that no complaint has been raised by the husband who was the Practitioner's client.

[37] I have examined all of the information on the file, particularly focusing on the information provided by the Applicant. It is clear that she is aggrieved by the Practitioner's actions. However, the Practitioner was acting for the Applicant's husband and owed no professional duty to the Applicant. No complaint has been raised by the Practitioner's client, and it must be assumed that he was not dissatisfied with the Practitioner's services. I also note that the Applicant was represented throughout by her own counsel.

[38] For reasons above, I see no basis for taking a different view to that taken by the Standards Committee. The application is declined.

Decision

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

DATED this 4th day of April 2011

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:

Ms BG as the Applicant
Mr YQ as the Respondent
The Auckland Standards Committee 4
The New Zealand Law Society