

CONCERNING

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

AND

CONCERNING

a determination of the Whanganui Standards Committee

BETWEEN

BK

of [North Island]
Applicant

AND

YM

of [North Island]
Respondent

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

DECISION

Background

[1] Early in 2003 the Respondent received instructions from long-time clients Mr and Mrs YL with regard to the sale of two pieces of land owned by AAU Ltd (AAU), a company of which they were the Directors.

[2] The two pieces of land were to be sold to their daughters and their respective husbands who occupied dwellings on the properties.

[3] The Applicant was married to one of Mr and Mrs YL's daughters.

[4] The instructions received by the Respondent were that the properties were to be sold at current market value as ascertained by independent valuations. Each couple were to pay \$80,000 of the purchase price in cash, with the balance being left by way of vendor advance. In each case, the vendor loan arrangements were to be fully recorded within the Agreements for Sale and Purchase, documented in loan agreements, and secured by way of second mortgages. The instructions from Mr and Mrs YL were that those mortgages were to be held unregistered at the outset.

[5] The Respondent prepared the agreements as instructed and in each case the purchasers were to apply to their respective banks for loans to provide the cash payment due to the vendor. The Respondent was not involved with the loan applications.

[6] Some weeks after receiving instructions from Mr and Mrs YL on behalf of AAU, the agreements were uplifted by them for signature. It was at that stage that it became clear to the Respondent that Mr and Mrs YL were expecting that she would act for both purchasing couples.

[7] On or about 6 March 2003, the Respondent received instructions from the National Bank of New Zealand as lender to the Applicant and his wife (Ms YL). The Respondent wrote to the Applicant and Ms YL requesting them to make an appointment to sign the loan and security documents required by the bank and by AAU.

[8] On 10 March 2003, the Applicant and Ms YL attended at the Respondent's office for that purpose. They brought with them the Agreement for Sale and Purchase which had already been signed and dated 3 March 2003.

[9] The Respondent advises that when she first met the Applicant and Ms YL she made a point of advising them that because she was acting for the vendor and the lenders, that they were entitled to seek independent advice regarding their entry into the loan and security documents. The invitation to do so was declined by the Applicant and Ms YL and they confirmed that the Respondent was to act for them notwithstanding any potential conflict of interest.

[10] In December 2007 the Respondent was instructed by Mr YL to register the mortgage which had been signed by the Applicant and Ms YL, as he (Mr YL) and his wife were concerned at the precarious state of the marriage between the Applicant and Ms YL.

[11] The marriage subsequently failed and in September 2008 the Respondent received instructions from Mr and Mrs YL on behalf of AAU to make demand for payment of the loan. By that time, the Applicant had instructed an alternative solicitor to act on his behalf.

[12] The Applicant's solicitor objected to the Respondent acting for AAU to call up the loan, as she considered that the Respondent was conflicted. Accordingly, another firm was engaged by AAU to undertake and complete the enforcement process.

[13] Family and District Court proceedings ensued between the Applicant and Ms YL, and between the Applicant and AAU. In each case the Applicant alleged that the funds provided by AAU to him and Ms YL were intended to be a gift, notwithstanding that the Agreement for Sale and Purchase, the loan agreement, and the mortgage all recorded that the funds were to be provided by way of a loan.

[14] The Applicant was unsuccessful in these proceedings and the property was subsequently sold resulting in a loss by the Applicant of the funds which he had invested in the property.

[15] The Respondent provided affidavit evidence in each of the Court proceedings at the request of Counsel instructed by AAU and Ms YL, in which she gave evidence as to the instructions received by her from Mr YL, and as to the form and structure of the transaction. She also deposed that the documentation reflected what she considered would have been Mr and Mrs YL's approach towards providing for their daughters and recorded comments made to her by the YLs as to the state of the relationship between the Applicant and Ms YL.

The complaint

[16] Following the unsuccessful outcomes of the Court proceedings, the Applicant lodged a complaint with the Complaints Service of the New Zealand Law Society against the Respondent. He complained that:

1. The Respondent was conflicted by reason of the fact that she acted for him and Ms YL, as well as the vendor/lender. In addition, when so acting, the Respondent was in possession of information provided to her by Mr YL which she failed to reveal to the Applicant and Ms YL;
2. The Respondent provided affidavit evidence at the behest of Counsel for Ms YL and AAU without seeking the Applicant's consent to do so, thereby breaching privilege and confidence; and
3. In making the decision to provide evidence, the Respondent took advice only from counsel for Ms YL and AAU, and did not seek the views of the Applicant or his Counsel.

Standards Committee Decision

[17] The Standards Committee decision focused on the complaint relating to the provision of affidavit evidence by the Respondent. In this regard the Committee took note of rule 13.7 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client

Care Rules) 2008 (the Client Care Rules) which provides that a lawyer must not be obstructive when approached to give evidence in Court proceedings.

[18] The Committee considered that the Respondent was not in breach of the Client Care Rules, did not breach the duty of confidence, or disclose privileged information.

[19] Although the Committee refers to the complaint by the Applicant that the Respondent had information from Mr and Mrs YL that she should have shared with him, it does not specifically address the Respondent's conflict of interest.

[20] The Committee determined that there was no evidence of unsatisfactory conduct on the part of the Respondent and resolved pursuant to s138(2) of the Lawyers and Conveyancers Act 2006 to take no further action on the complaint.

Application for review

[21] In his letter accompanying the application for review, the Applicant sought an "appeal" of the Standards Committee decision.

[22] He identified in a somewhat more definitive manner the nature of his complaint.

1. That the Respondent acted for the Applicant and Ms YL in a transaction where the Respondent was also acting for the vendor / lender, i.e. in a conflicted situation. In this capacity, she also held certain adverse information as to the views of Mr and Mrs YL as to the state of his marriage to their daughter. He considers that this information should have been provided to him.
2. That the Respondent gave evidence in injunction proceedings instituted by him to prevent AAU enforcing its security and subsequently in Family Court proceedings between the Applicant and Ms YL, without his consent and without him waiving privilege.
3. That the Respondent took advice only from Counsel for AAU and Ms YL as to whether or not evidence should be provided by her, and did not seek consent from the Applicant, nor seek advice from his Counsel.

The applicable law

[23] Prior to 1 August 2008, regulation of the legal profession was governed by the Law Practitioners Act 1982.

[24] That Act was repealed, and replaced with the Lawyers and Conveyancers Act 2006, which became effective as at 1 August 2008.

[25] Section 351(1) of the Lawyers and Conveyancers Act provides that if a lawyer is alleged to have been guilty of conduct in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982, a complaint about that conduct may be made to the Complaints Service established by the New Zealand Law Society under the Lawyers and Conveyancers Act.

[26] Section 112 of the Law Practitioners Act 1982 provided that complaints could be made in respect of conduct that was either –

- (a) misconduct;
- (b) conduct unbecoming; or
- (c) negligent or incompetent to such a degree as to reflect on a practitioner's fitness to practice

The other elements of s112 are not applicable and do not warrant consideration.

[27] Misconduct involves a serious failure of professional standards. The High Court has described misconduct as involving “a range of conduct ...from actual dishonesty through to serious negligence of a type that evidences an indifference to and an abuse of the privileges which accompany registration as a legal practitioner” (Complaints Committee No.1 of the Auckland District Law Society v C, 29 April 2008, High Court, Auckland, Randerson J, Williams J, Winkleman J, CIV 2007-404-4646 at paragraph 33). The definition in s7 of the Lawyers and Conveyancers Act also reflects the law as it stood prior to that Act and defines misconduct as conduct “that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable”. The conduct under consideration here does not approach that degree of failure of professional standards.

[28] Conduct unbecoming in the professional disciplinary arena was discussed in B v Medical Council [2005] 3 NZLR 810. In that case, Elias J stated:

It needs to be recognised that conduct which attracts professional discipline, even at the lower end of the scale, much be conduct which departs from acceptable professional standards. That departure must be significant enough to attract sanction for the purposes of protecting the public ... I accept the submissions of Mr [W] that a finding of conduct unbecoming is not required in every case where error is shown. To require the wisdom available with hindsight would impose a standard which is unfair to impose.

[29] It is against these comments that the actions of the Respondent in 2003 are to be measured.

[30] The Lawyers and Conveyancers Act 2006 introduced a new category of unsatisfactory conduct. By virtue of the definition provided in s12(c) of the Act, a lawyer's conduct will be considered to be unsatisfactory conduct if he or she has breached any of the rules made under the Act. One of the series of rules made pursuant to the provisions of the Act is the Client Care Rules. The conduct of the Respondent in providing the affidavit evidence, therefore falls to be considered under that provision.

Review

[31] The review proceeded with a hearing in [North Island] attended by both parties on 5 April 2011. The Respondent was represented by Mr YK.

Scope of Review

[32] The function of the LCRO is to review all of the material before the Standards Committee and the decision arrived at by the Committee. Section 211(1) of the Lawyers and Conveyancers Act provides that the LCRO may confirm, modify, or reverse any decision of a Standards Committee as well as exercising any of the powers that could have been exercised by the Standards Committees in the proceedings in which the decision was made.

[33] The review is therefore broader than an "appeal" as referred to by the Applicant. I make this comment merely to ensure that the concept of the review as "an appeal" does not develop any further.

[34] It is important to recognise, however, that the LCRO may only review matters raised in the initial complaint with the Standards Committee. No new complaints may be made at the review stage.

The Review

[35] The Standards Committee decision did not address the Applicant's complaint relating to the conflict of interest and the non-disclosure of the information held by the Respondent. These matters were raised in the original complaint where the Applicant states that had he known of the doubts of his parents in law as to the state of his marriage it was clear in his mind that he would have sought alternative legal advice as to the nature of what he was signing and what the future could hold. He referred to this aspect more definitively in the letter accompanying the application for review. This matter constitutes the most important aspect of the complaint. Before addressing that however, it is necessary to deal with the evidence provided by Mr YL for this hearing.

Mr YL's affidavit

[36] The Respondent had sworn affidavits in the Family and District Court proceedings which included the following statements:-

One point that [Mr YL] and [Mrs YL] made very clear and raised more than once with me was that they wanted the company's (and therefore their own) position protected in the event that either of their daughters' marriages broke up. They expressed reservations even at that early stage in 2003 as to the stability of [Ms YL] and [BK's] marriage, predicated for the most part as I recall, on their reserved view of [BK's] ability to provide for his family.

[37] On 25 March 2011, this Office received affidavits sworn by each of Mr YL and Ms YL. The affidavit of Mr YL is particularly important and I record here paragraphs 9, 10 and 11 in full. Mr YL deposes:-

9. Mrs [YM's] recollection, as expressed in her evidence, is correct as to the reservations expressed about [BK's] ability to provide for his family but it is defective as to who expressed the specific reservations, and when. I expressed the reservations referred to by Mrs [YM] in clause 6 of her affidavit, not my wife, [Mrs YL]. The conversation which I had with Mrs [YM] in which I expressed the reservations took place in late 2007, at the time that I asked Mrs [YM] to register [AAU]'s mortgage security against [Ms YL] and [BK]'s title, and not in early 2003 when the sale and purchase transaction was initiated and completed. I am aware of the significance of the time at which I expressed my reservations as far as one aspect of [BK]'s complaint against Mrs [YM] is concerned.

10. The reason that I am sure about the timing of my comments is that the discussion related to [BK]'s ability to provide for his family. His twin sons were not born until September 2004 and it was long after their birth that I began to entertain serious concerns about my son-in-law's ability to provide, and the state of his marriage, given the financial strain that he and [Ms YL] were under with only one income and increased borrowings.

11. There is no possibility that I would have made that, or any similar statement, as early as 2003 because, as stated above, I did not entertain those concerns when the property was sold as both [Ms YL] and [BK] were working, and they did not have children of their own.

[38] The Respondent had not discussed her affidavit in the Court proceedings with Mr YL prior to this. Mr YL volunteered this information after he became aware of this application for review.

[39] Clearly the information provided by Mr YL is in conflict with the affidavits provided by the Respondent in the Court proceedings. She states that she made an error as to when she received the information.

[40] The Respondent and her Counsel had arranged for Mr YL to be able to give evidence in person and I requested that he do so. He confirmed to me that he had made the comment to the Respondent as to the state of his daughter's marriage to the Applicant when he rang to ask her to register the mortgage. That is in fact recorded by the Respondent in paragraph 11 of her affidavit dated 2 June 2009 where she states:

I can recall that in late 2007 [Mr YL] instructed me that he and [Mrs YL] had become very concerned about the state of [Ms YL] and [BK]'s marriage. They were nervous about the extent to which [AAU] may be exposed because its security had not been registered. They instructed me to register the mortgage so that there could be no dealings with the property without the [AAU] loan being repaid.

[41] Mr YL says that prior to that he had no reason to be concerned as to the ability of the Applicant to provide for Ms YL, as both parties were working. He says that he only became concerned after the birth of their twins when his daughter ceased to work. Renovations to the house were incomplete and he observed stresses appearing in the marriage.

[42] The effect of Mr YL's affidavit is that the Respondent was not in possession of information relating to the state of the Applicant's marriage at the time she was acting for him, contrary to the statements made by her in her affidavits provided for the Court hearings.

[43] Mr YK conceded that if the Respondent was possessed of that information at the time she was acting for the Applicant, then it is arguable that she had a duty to divulge that information to the Applicant.

[44] The Respondent also stated that if she had this information, then she would have considered herself obliged to convey this to the Applicant.

[45] These statements are at odds with the statement made by the Respondent in her letter of 9 June 2009 to the Lawyers Complaints Service, where she says in the third paragraph on page 4 of that letter:-

I did not consider then, and do not consider now, that comments passed by Mr and Mrs [YL] amounted to information which I should have disclosed to Mr [BK] or to [Ms YL] and I do not accept that those comments were the reason that the vendor advance was to be recorded as a loan and able to be secured. Furthermore, those comments were made well ahead of me meeting Mr [BK] or having been instructed by him, and were never perceived by me as being relevant to the joint nature of the instructions.

This view is repeated by her with some vigour in paragraph 2 of her letter dated 23 June 2010.

[46] Her view of her obligations has therefore changed from the time when she thought she was in possession of this information to now, having received Mr YL's affidavit. It is my view that the Respondent's original position is the correct one. The information she thought she had was information that belonged to Mr and Mrs YL and was not information that she was at liberty to disclose to the Applicant. That was also the view of the Standards Committee.

[47] However, whether Mr YL is correct, or whether the Respondent is correct in the affidavits she swore in the Court proceedings, does not affect the outcome of this review for the following reasons:-

- (a) If Mr YL is correct, and the Respondent did not have the information referred to, then clearly the Respondent was not in receipt of any information which the Applicant alleges should have been revealed to him.
- (b) If, however, the Respondent was in receipt of the information which she initially deposed to, then to have revealed that information would have been a breach of her obligation of confidence to Mr and Mrs YL.

[48] The question that then arises was whether or not the advice proffered by the Respondent at the initial meeting with the Applicant and Ms YL was adequate or whether the Respondent was so conflicted that she should have declined to act for them, or either of them.

The conflict of interest

[49] It is important at this stage, to recall the circumstances in which this matter arose. The Respondent was instructed by Mr and Mrs YL to prepare the Agreement for Sale and Purchase and security documents. The Agreement was collected from her office by them. Following receipt of instructions from the first mortgagee on 6 March 2003 she wrote to the Applicant and Ms YL asking them to come in and sign the various documents.

[50] They attended at her offices on 10 March, at which time she states that she made a point of advising them that they were entitled to seek independent advice. That is reinforced by Ms YL in her affidavit dated 22 March 2011 in which she deposes that:

....at our meeting, Mrs [YM] explained to both [BK] and me that as she was acting for [AAU] as vendor and lender, the National Bank as lender, and for us as buyers and borrowers, she had a conflict of interest and offered us the opportunity to obtain separate legal representation, prior to our entry into the loan and security documentation with both the Bank and with [AAU]. I understood from what Mrs [YM] said that [AAU], the Bank and ourselves potentially had opposing interests in the transaction and that could of course have an impact on the way [X] was able to act in relation to each of us. After receiving Mrs [YM]'s explanation, I declined the opportunity for separate representation and said I was happy for Mrs [YM] to act for us. I turned to [BK] and enquired whether he was also happy for Mrs [YM] to act for us. Again, I was well aware that he needed to be comfortable with Mrs [YM]'s involvement as our solicitor as well as her being the solicitor for the vendor and lenders, and in being so would hold converse positions for each client due to their opposing interests within the same transaction. I say that, as it was a matter of concern to me, that [BK] participated equally with me throughout the entire

transaction. [BK] declined the opportunity to obtain separate legal advice and representation, in my presence, and did not raise any query that indicated he did not understand Mrs [YM]'s explanation of her position in relation to each client she was representing in the matter.

[51] The Applicant says that he cannot recall any discussion of this nature. He had not had any experience in purchasing property, either here or in Canada, and it is highly likely that he would not have been aware of the relevance or the significance of what the Respondent was saying.

[52] In circumstances such as this, the opportunity to take independent advice sometimes presents as an illusory option. A party can often feel pressured not to delay matters by exercising the option presented, notwithstanding a preference to do so. In the present circumstances, matters had reached the stage where all that was required was to execute the documents, and the transaction could then be completed. A lawyer cannot be expected to know all of the dynamics which are at play in a family transaction like this, but needs to be alert to signs that a party may be a reluctant participant.

[53] In some circumstances therefore, a lawyer needs to facilitate a decision to take independent advice, by declining to act for a party. The Respondent here did not do so. Her response to a question from me at the hearing as to whether she had considered this option was that she did not consider that was necessary in the circumstances. It is my view that it would have been the preferable option.

[54] In considering whether the Respondent should have done so however, it is important to consider the factors which were present in this case.

[55] The agreement had already been signed by the Applicant and Ms YL when they attended at the Respondent's office. It is dated 3 March 2003. The contract was therefore legally enforceable, although it is moot whether the vendors would have insisted upon specific performance had the Applicant expressed an unwillingness to proceed.

[56] Nevertheless, this was a factor that the Respondent was entitled to take into account. In addition, she raised the possibility of independent advice which was declined. From her perspective, therefore, all that she was really doing was completing what could be described as "mechanical aspects" of conveyancing.

[57] The situation in which the Applicant has found himself would have been reasonably predictable at the time and could also have arisen in circumstances in which he and Ms YL as mortgagors found themselves in disagreement with Mr and Mrs

YL. The total purchase price of the property had been borrowed and in the event of a forced sale, the property would not have realised sufficient to repay all borrowing until the value of the property had increased considerably beyond the purchase price. This is something however that does not necessarily require a legal mind to recognise or point out to a purchaser, and although it may have been something which an independent lawyer would have raised it would be unreasonable to hold that a lawyer would have an obligation to do so.

[58] I have expressed the view that the preferred course of action would have been to have declined to act for the Applicant and Ms YL – or at least the Applicant. However, that is a view expressed with the benefit of hindsight, and the benefit of being able to consider the situation objectively and without the pressures of everyday practice. This matter does, however, highlight the need for practitioners to be extremely cautious when considering requests to act for more than one party to a transaction.

[59] I refer to my comments in paragraphs [23] to [29] above as to the applicable law. For an adverse decision to be made against the Respondent in connection with this particular matter, it would be necessary for the conduct to be such as to constitute conduct unbecoming. I do not consider that the Respondent's failure to decline to act for the Applicant could in any sense reach the threshold of conduct unbecoming.

[60] Consequently, although these matters were not specifically addressed by the Committee, its decision not to take any further action in connection with this matter is not thereby affected.

The Respondent's evidence

[61] The second aspect of the Applicant's complaint relates to the fact that the Respondent gave evidence in the Court proceedings without his consent.

[62] The Applicant acknowledges in his letter dated 30 August 2010 accompanying the review application, that rule 13.7 of the Client Care Rules probably applies, in that the Respondent had an obligation to provide evidence to the Court. I think this is the proper view. There was little point in the Respondent declining to provide evidence in any event, as it was indicated to her that she would have been subpoenaed if she had refused to do so. She would then have been exposed to an allegation that she had breached the obligations imposed on her by that rule.

[63] The Applicant points out that the obligations imposed by rule 13.7 are still subject to the rules of privilege and the duty of confidence.

[64] In the main, it appears that the Applicant objects to the Respondent providing evidence as to what (she thought) she had been told by Mr and Mrs YL as to their view of the Applicant's marriage to their daughter.

[65] That information was confidential information provided by and belonging to Mr and Mrs YL. Consequently, it was from them, not the Respondent, that the Respondent needed to seek consent or waiver of privilege and this obviously occurred.

[66] The other part of the Respondent's affidavits to which the Applicant objects, is the opinions expressed in paragraph [5] of her affidavit dated 2 June 2009. In this regard, I accept the submission made by Mr YK that privilege does not attach to an opinion made by a lawyer. A lawyer is entitled to express her or his opinion as to what their client would have done based on their knowledge of their client acquired over a period of time and there was no obligation to seek consent from the Respondent before doing so.

[67] For the reasons indicated above therefore, I do not consider that the Respondent has breached the provisions of the Client Care Rules, and therefore her conduct cannot be considered to be unsatisfactory conduct in terms of the Lawyers and Conveyancers Act.

Mr BL's advice

[68] The third aspect of the Applicant's complaint as set out in his letter of 30 August 2010, relates to the fact that the Respondent took advice only from Mr BL, Counsel for the opposing parties, as to whether or not she could provide evidence.

[69] I do not consider that this aspect of the complaint is able to be sustained for the following reasons.

[70] Mr BL was acting for AAU in the injunction proceedings brought by the Applicant. He approached the Respondent to provide evidence on behalf of AAU. Her initial response was that she could not do so without first obtaining the permission of AAU, the Applicant, and Ms YL.

[71] Mr BL met with the Respondent in mid-May 2009 and offered his views as to why he thought she was wrong in this response and referred her to authorities.

[72] It was incumbent on the Respondent to come to a view as to whether she could provide evidence or not. If her decision was wrong, she would be the one to bear the consequences of that. It was therefore her decision alone as to whose advice she took. In this regard, she considered that she was able to rely on the opinion of Mr BL,

as a senior and highly regarded barrister. She had no duty or obligation to consult with any other person. She did, however, need to satisfy herself that she was not in breach of any rules of professional conduct or any other duty by providing evidence. She made that decision and neither the Standards Committee nor myself consider that decision was incorrect.

[73] In passing, it is also noted that the evidence provided by the Respondent was accepted by both the Family Court and District Court judges and although they would not necessarily have considered whether the Respondent was in breach of any professional obligations by providing evidence, one would have expected adverse comment from the judges if they had considered this to be the case.

[74] It is pertinent to note here that the Applicant advises that he had not previously seen a copy of the letter dated 21 July 2010 from Mr BL to the Law Society and I can find no evidence on the Standards Committee file that it was forwarded to him. Nevertheless, the information provided in that letter was known in some manner by the Applicant as it was raised by him in his letter to the Law Society on 3 August 2010. In any event, a copy was attached to Mr YK's submissions and I do not consider that the Applicant was disadvantaged in any way by this.

Summary

In summary therefore, although the Standards Committee did not address the Respondent's conflict of interest, I consider that, having regard to all circumstances of the case, further action is unnecessary or inappropriate in connection with that aspect of the complaint. In addition, I concur with the Standards Committee when it determined that there had been no breach of the Client Care Rules with regard to the evidence provided by the Respondent, and again, further action is unnecessary or inappropriate.

Decision

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

DATED this 14th day of April 2011

Owen 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:

BK as the Applicant
YM as the Respondent
The Whanganui Standards Committee
The New Zealand Law Society