LCRO 189/2011

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Canterbury-Westland Standards Committee 1
BETWEEN	**MR RH** Practitioner
AND	**MR LV** Complainant

DECISION

Introduction

[1] Just days before Christmas in 2007 the Practitioner, Mr RH, was approached by Mr LV (the Applicant) and asked for assistance in matters connected with the unexpected death of his wife. The Applicant had been a long standing client of the Practitioner (about 25 years) in his general law practice. At the time in issue the Practitioner had been some months in practice as a barrister.

[2] The Practitioner had quoted a fee of $3,000 but ended up charging the Complainant $3,900 which he paid. However, his dissatisfaction with the added charge was raised when the Applicant instructed a new lawyer (Mr S) some two years later. Mr S advised the Applicant that a costs complaint was out of time, but he assisted the Applicant to formulate other complaints against the Practitioner (Mr RH) to the New Zealand Law Society.

[3] The complaints received by the Complaints Service included allegations that the Practitioner had no instructing solicitor when he provided services to the Applicant, and with reference to a draft Statement of Claim found on the file, that the Practitioner had in effect "made a meal" of rather "sparse facts" for which the Applicant had been charged, and which *"clearly accounted for much of the fees."*

[4] Since these events preceded the Lawyers and Conveyancers Act 2006, the Standards Committee was required to consider whether the conduct reached the threshold of section 351. The Committee found the Practitioner guilty of unsatisfactory conduct by virtue of conduct unbecoming, having concluded that the Practitioner had chosen to ignore the non-intervention rule in taking instructions directly from a client and not having an instructing solicitor.

[5] The Standards Committee also made an adverse comment about the Practitioner in relation to certain steps he had taken for the Complainant which were described as "ill conceived", although no adverse finding was made in relation to that.

[6] The Practitioner sought a review of that decision. A review hearing was held, attended by the Practitioner, and also by the Applicant and his counsel Mr S.

Background

[7] Prior to commencing practice as a barrister (some months prior to the above events) the Practitioner had practiced as a solicitor. The Applicant had been a client of the Practitioner for about 25 years.

[8] The Practitioner sold his practice to law firm R (which was located nearby) and transferred to that firm all files of consenting clients (which included the Applicant's file). The transfer of his business involved a cross referral arrangement whereby the Practitioner would not go into competition with that firm in relation to general matters, and the firm would brief him in terms of its litigation requirements.

[9] Just before Christmas 2007 the Applicant's wife committed suicide. The Applicant had concerns and questions about the circumstances of the death, and whether unlawful conduct may have been involved. In mid January he contacted the Practitioner for legal advice in relation to several concerns, including his concerns about whether there had been any criminal wrongdoing. The information provided by the Applicant led the Practitioner to make some preliminary enquiries, which included contacting the police who appeared not to have taken any investigatory steps.

[10] The Practitioner also addressed several other issues raised by the Applicant, and sought a legal opinion (from another lawyer who had experience in those areas) about the Applicant's possible ACC entitlements, employment law matters, and whether a claim was available against the wife's employer. Among steps taken, the Practitioner had started working on a Statement of Claim.

[11] By mid March 2007 the Applicant decided that he did not wish to pursue matters any further, terminated the retainer, and settled up the bill after some protest that it was higher than had been quoted. His dissatisfaction about this was raised with another solicitor some two years later, and led to the complaints referred to above.

The Standards Committee decision

[12] The Committee's decision described the complaint as alleging that the Practitioner had advised the Applicant to take legal proceedings when there was no evidence to support such proceedings, and at a time when the Applicant was vulnerable, and there being no instructing solicitor.

[13] There were two parts to the Committee's decision.

[14] The first dealt with the steps taken by the Practitioner, the Committee being particularly concerned about the proceeding. The Committee opined that such an action was misconceived as it was far too early to contemplate any sort of legal action as the facts were not yet known. However, the Committee concluded 'by a narrow margin' that the conduct did not reach the threshold required for misconduct or conduct unbecoming, and made no adverse finding in relation to this part of the complaint.

[15] The second part of the Committee's decision dealt with the failure of the Practitioner to have had an instructing solicitor. The Committee was not impressed by the various explanations offered by the Practitioner for not having arranged an instructing solicitor, and found the Practitioner's responses entirely unconvincing. The Committee considered that this conduct reached the section 351 jurisdictional threshold. At paragraph 7, the Committee wrote:

> The Committee finds that [the Practitioner] is guilty of conduct unbecoming in that although being aware of the requirements of the intervention rule and that the rule clearly applied to him, [the Practitioner] chose to ignore the rule and take instructions directly from a client. Despite not being entitled to act, [the Practitioner] embarked on an ill-conceived adventure of the kind against which the intervention rule is designed to protect.

[16] The Committee considered that the failure reached the section 351 threshold, and there followed a finding that the Practitioner was guilty of unsatisfactory conduct.

Review application

[17] The two main grounds for the Practitioner's review application were (a) that the Standards Committee failed to correctly apply the threshold test in this case (he denied any wrongdoing in relation to the extent or quality of his services to the Applicant), and

(b) that the Committee may have been biased in its decision (providing information to support this submission).

[18] At the review hearing there was a lengthy discussion about the circumstances leading to the Applicant seeking the assistance of the Practitioner, and about the background to the steps taken by the Practitioner in relation to the Statement of Claim.

[19] The Practitioner admitted that during the time of providing services he took no steps to seek formal instruction from a solicitor. At the time that the Applicant contacted him, the Practitioner said that he had explained his new role (as barrister) to the Applicant (the Applicant confirmed that he knew the Practitioner was *"lawyering in a different way"*), but agreed that the significance of this may not have been fully understood by the Applicant. He described the emotional state of the Applicant at the time, and that in light of their long standing professional relationship he was not surprised that the Applicant had turned to him for help.

[20] The Practitioner's view was that the Standards Committee took the most negative view possible of the matter. He submitted that the conduct was incapable of reaching the threshold required by section 351 of the Lawyers and Conveyancers Act. He questioned the impartiality of the Committee, and in particular raised an allegation of bias against one of the Committee Members.

Considerations

Applicable standard

[21] The conduct complained of occurred prior to 1 August 2008. Section 351 of the Lawyers and Conveyancers Act 2006 provides that a Standards Committee does not have jurisdiction to consider complaints about conduct that occurred prior to the commencement of this Act, unless the conduct complained of could have led to disciplinary proceedings being taken against the Practitioner under the former Law Practitioners Act. Once the threshold of s 351 is met the Committee may then turn to consider whether a determination against the practitioner ought to be made.

[22] The pre 1 August 2008 standards are found in ss 106 and 112 of the Law Practitioners Act 1982. The threshold for disciplinary intervention under the Law Practitioners Act 1982 was relatively high and may include findings of misconduct or conduct unbecoming. Misconduct was generally considered to be conduct:

> ...of sufficient gravity to be termed 'reprehensible' (or 'inexcusable', 'disgraceful' or 'deplorable' or 'dishonourable') or if the default can be said to arise from

> negligence such negligence must be either reprehensible or be of such a degree or so frequent as to reflect on his fitness to practise.[1]

[23] 'Conduct unbecoming' could relate to conduct both in the capacity as a lawyer, and also as a private citizen. The test is whether the conduct is acceptable according to the standards of "competent, ethical, and responsible practitioners"[2].

Discussion

[24] Despite strong criticism of the Practitioner, I note the Standards Committee made no adverse finding in relation to the steps taken by the Practitioner for his client. The Committee nevertheless referred to that action when considering the Practitioner's breach of the intervention rule, when it wrote that the Practitioner *"chose to ignore the rule and take instructions direct from the client*", and that *"[d]espite not being entitled to act,* [the Practitioner] *embarked on an ill-conceived adventure of a kind against which the intervention rule was designed to protect."*

[25] The finding of 'conduct unbecoming' was based on the Committee's conclusion that the Practitioner had wilfully disregarded (*"chosen to ignore"*) the non-intervention rule. It is material to note this because under the Law Practitioners Act a breach of the intervention rule would not necessarily lead to disciplinary proceedings against a Practitioner (although it may lead to a finding of unsatisfactory conduct under the Lawyers and Conveyancers Act 2006). In *Ethics, Professional Responsibility and the Lawyer*, Professor Webb wrote (with reference to the professional rules under the Law Practitioners Act) that the disciplinary threshold could be met if a practitioner's failure to appoint an instructing solicitor was a deliberate and calculated act[3].

[26] It is evident from its decision that the Committee's perception that the Practitioner had embarked on an ill-conceived adventure was relevant to its conclusion that the practitioner had 'chosen to ignore' the intervention rule. Its reference to the protective function of that rule implied that had there been an instructing solicitor such a step would not have been taken. Of particular concern to the Committee was that this conduct related to a draft Statement of Claim found on the Practitioners file. The Committee noted that it was far too early to contemplate any legal action and that a coroner's report was yet to be obtained. The Practitioner's file had no statements or witness information that could have supported, or explained, any such a step.

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[1] *Atkinson v Auckland District Law Society* NZLPDT, 15 August 1990, *Complaints Committee No 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105.
[2] *B v Medical Council* [2005] 3 NZLR 810 per Elias J at p 811.
[3] Duncan Webb, *Ethics, Professional Responsibility and the Lawyer* (2nd ed, LexisNexis, 2006).

[27] In reaching this conclusion the Committee made certain assumptions about the Practitioner's conduct. The first assumption was that the steps taken by the Practitioner were ill-conceived. The Committee's stated that the intervention rule was designed to protect against lawyers embarking on ill conceived adventures implied a further assumption that steps taken would not have had the approval of an instructing solicitor.

[28] The Practitioner disagreed that the steps taken were ill-conceived. He acknowledged that he was aware the Applicant was vulnerable and was of the view that he had responded to matters of concern raised by the Applicant at the time. He referred to the Applicant's particular concern that no enquiry was being made by the police and had wanted the Practitioner to contact the police which he did. Advice was sought about the deceased's estate, and he added that he had followed up on enquires involving ACC and the Department of Labour.

[29] The Practitioner said that the possibility of litigation had been raised, but that no proceeding was filed, nor had he been instructed to do so, and that the work he undertook was essentially of an exploratory and investigative nature. He explained that he utilised the Statement of Claim as a 'working template', as this was a useful method for ongoing evaluation of the strength of any possible claim, and rejected that there was no support for any possible action. He said that such notes and information he had gathered at the time had been destroyed at the Applicant's request, after the Applicant decided he did not wish to pursue matters any further (not denied by the Applicant).

[30] The Applicant had raised concerns about criminal activity and the possibility of third party accountability. The legal opinion he obtained included advice about taking legal action and outlined causes of action that could be pursued, but that more information was required. There is on the file the evidence of a letter that the Practitioner sent to the Applicant that the file was 'parked up' until the police and Coroner's reports were available.

[31] While the possibility of a proceeding was undoubtedly discussed, there was nothing to indicate that the claim would have been filed unless there was sufficient evidential basis. In these circumstances I have some doubts about the soundness of the implied assumption that the presence of an instructing solicitor would have led the Practitioner to take a different pathway.

[32] The second assumption made by the Committee was that the Practitioner's failure to arrange for an instructing solicitor was deliberate. The Practitioner rejected this, and denied any intention to avoid arranging for an instructing solicitor. At the review hearing the Practitioner was unable to provide any explanation for the failure, and was only able to recall that matters were already winding down not far into the retainer. He admitted that he had been lax about the formality.

[33] The Standards Committee was unimpressed with the various explanations offered by the Practitioner for not arranging an instructing solicitor. The Practitioner acknowledged that the various explanations he had forwarded to the Standards Committee were not helpful.

[34] Having heard from the Practitioner and considered all of the evidence now before me, I am far from persuaded that the Practitioner's failure to arrange for an instructing solicitor was a calculated act, or for any nefarious purpose. There are a number of reasons for the views I have formed after careful consideration.

[35] The initial contact by the Applicant was within a short time after his wife's death. The Applicant had acted for the Applicant for some 25 years and it cannot have been unexpected that in such circumstances the Applicant would turn to the Practitioner for advice. Some of the steps then taken by the Practitioner were required to be taken expeditiously (e.g. preserving evidence), and I accept that in his distraught state at the time the Applicant was seeking answers, and that he was particularly concerned to preserve any forensic evidence. Law firms were then closed over summer. The fact that the Practitioner assisted a former client in these circumstances without arranging an instructing solicitor does not, in my view, reach the threshold required by section 351.

[36] The disciplinary enquiry ought rather to have focused on the Practitioner's failure to have arranged for an instructing solicitor after the initial contact, when law firms were again operational, there having been ample time to have made such arrangements. The Practitioner acknowledged that he had approached this matter more 'informally' than he ought to have, but recalled things were already scaling down within a short time. He accepts that he ought nevertheless to have arranged an instructing solicitor.

[37] In this case the Standards Committee concluded that the Practitioner's failure to arrange for an instructing solicitor was wilful, an assumption that appeared to have arisen from its view that the steps taken by the Practitioner (regarding the potential

claim) amounted to an "*ill-conceived adventure*", with the implication that would not have happened had there been an instructing solicitor.

[38] The burden of proof is on the balance of probabilities. In this case the Standards Committee's conclusions are based on assumptions. The Committee appears to have made a connection between the Practitioner having *'embarked on an ill-conceived adventure'*, with his wilful failure to get an instructing solicitor.

[39] It is not altogether clear whether the Committee's concern arose from a perception that there was no possible cause of action, or whether it was concerned that the Practitioner was about to file a proceeding before there was a sufficient evidential basis to support an action. The legal opinion reflected the various matters that the Applicant sought information about, but I have seen no evidence that a Claim would have been filed before all evidence and information was to hand. The absence of such information on the file appears to have caused suspicion, but as noted, the information that had been gathered was destroyed by the Practitioner at the Applicant's request. I do not see that the existence of the Statement of Claim is, alone, a sufficient basis for assuming that the proceeding would have been filed without there being a sound basis for such action. Nor is there any sound basis for an assumption that different steps would have been taken by the Practitioner if there had been an instructing solicitor.

[40] The Committee's conclusion that the Practitioner's failure to arrange for an instructing solicitor was wilful, was an assumption that seems to have arisen from its view that the Practitioner had embarked upon an ill-conceived adventure that would not have occurred if there had been an instructing solicitor. There is a clear suggestion that the Practitioner chose to ignore the intervention rule for that reason.

[41] Having considered all matters my view is that the Standards Committee decision rests on a number of assumptions, which do not seem to me to be well supported. I am of the further view that there was no sufficient basis for concluding that the Practitioner 'chose' to ignore the intervention rule, a suggestion that the omission was a calculated act. I have found no evidence to support such a view, and therefore do not agree that the threshold required for disciplinary proceedings to have been commenced against the Practitioner was met in this case.

Allegation of possible bias- grounds for recusal

[42] The Practitioner questioned whether there had been bias on the part of the Standards Committee. He submitted that the Committee had taken the most negative view possible of his conduct, and that its decision was tainted, or may have been

tainted, by one particular Member of the Standards Committee who, the Practitioner claimed, held negative views about him such as may have influenced the Committee in viewing the Practitioner's conduct negatively. The information provided by the Practitioner to support the claim was detailed, and outlined their previous connections. His view was that the Member should have recused himself 'without question'.

[43] The Member of the Standards Committee was given the opportunity to comment, and did so. He disputed any bias and did not agree with the Practitioner's interpretation of events. A response was also sent by the Convenor who did not agree that there existed any basis for recusal of the Member.

[44] The test for recusal for bias has been articulated by the Supreme Court in *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd*[4] referring to *Ebner v Official Trustee in Bankruptcy*[5]. The test involves a two step analysis:-

- first, the identification of what it is said might lead a judge to decide a case other than on its legal and factual merits; and
- secondly, there must be "an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits".

[45] With greater clarity, *Ebner* added that the question was whether "*a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge was required to decide*".

[46] In *Siemer v Heron* the Saxmere test was articulated in the following way:

> It is well-established that apparent bias arises only if a fair-minded and informed lay observer might reasonably apprehend that there is a real and not remote possibility that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.[6]

[47] In its decision making role Standards Committees are acting in a judicial capacity. The rules of natural justice therefore apply, one of the cornerstones being that the decision maker(s) should be wholly independent, and free of any influences that may impact on the decision to be made.

[48] This test clearly does not require bias to have been established in fact, it being sufficient that bias could have played a part in the decision making. The test for bias

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[4] [2010] 1 NZLR 35.
[5] (2000) 205 CLR 337 at [6] per Gleeson CJ, McHugh, Gummow and Hayne JJ.
[6] [2011] NZSC 116 at 11.

contemplates the view of a "*fair-minded and informed lay observer*", and asks whether such an individual "*might reasonably apprehend that there is a real and not remote possibility*" that an adjudicator might not bring an impartial mind to the issue to be decided. The Practitioner considered that the *Saxmere* test was met in this case.

[49] It is not necessary to set out the details underpinning the allegations. Except in one instance, the details of the incidents referred to by the Practitioner were not denied by the Member. The main difference between them is the perceptions each takes about the impact or significance of those incidents, in this case as they relate to the question of grounds for recusal.

[50] In respect of the second stage of the *Saxmere* test it is in essence alleged that there is '*long history of conflict'* between the Practitioner's firm and the partners of the Member's firm, the Practitioner claiming that he has been *"the subject of the most vitriolic telephone abuse that I have ever received in my professional life*..." from the Member. (This concerned an action to recover money from the Member's firm, in the course of which the Practitioner said he had questioned the firm's honesty with regard to missing money and alleged that misrepresentations had been made, in turn having had his own honesty challenged.)

[51] The Practitioner contended that acting as counsel for the plaintiff required him to "*make serious allegations of misconduct against* [the Member's] *firm and against* [the Member] *personally*."

[52] The Practitioner also referred to a complaint he had made against the Member in relation to the will of an elderly testatrix. He included a copy of his letter of complaint to the New Zealand Law Society (dated July 2008) against the Member (and another lawyer). His complaint alleged that the Member had acted unethically ('befriended an old lady') in connection with being named as the sole beneficiary of the estate of a testatrix that the Practitioner described as being mentally and physically infirm, the core of the allegation being that the Practitioner had secured the estate for himself.

[53] The Practitioner advised that the complaints had not been upheld, adding that the member was the chair of the complaints section when that complaint was put to the Law Society. The Practitioner added that the Legal Standards Officer was aware of this history, and ought to have brought it to the attention of the convenor.

[54] In reply the Member did not accept that there had been a long history of conflict with the partners of his firm. His view was that the Practitioner was carrying out his duty as counsel for his client. He had no recollection of the abusive telephone calls

that the Practitioner had described. The Member *'resisted getting into detail on other paragraphs of* [the Practitioner's] *submissions'* which he referred to as '*incomplete*', but noted that the professional conduct complaint was not upheld. He denied that he was at the time the Chairman of the complaints section. In concluding comments the Member referred to another transaction between their firms that had proceeded smoothly. He closed by referring to the inevitability of lawyers acting opposite one another in a small population, that there was no suggestion that other Members should recuse themselves, and that the Practitioner's representation for clients against his firm was no different.

[55] The second element of the Saxmere test requires there to be a '*logical connection*' between the matter under consideration and the '*feared deviation*' about it being decided on its merits. The Practitioner's allegations against the Member rests on prior complaints he has made against the Member, in connection with Court proceedings and in the disciplinary forum. The '*logical connection*' is understood to be that both involve professional conduct issues, insofar as the Practitioner has previously made a number of very serious allegations about the Member's professional conduct, and that Member now sits in judgement on a complaint about the Practitioner's professional conduct. The fact that complaints or allegations may not have been upheld is not necessarily material as it is not disputed that serious allegations were made.

[56] The hypothetical "*fair-minded and informed lay observer"* is presumed to be intelligent and to view matters objectively. Having considered all of the information it is my view that a "*fair-minded and informed lay observer"* in possession of all of the information to which I have referred, would have noted that in both number and degree of seriousness, the allegations that the Practitioner had made against the Member were of a nature that could give rise to a reasonable apprehension about whether the Member would, or could, consider the complaints against the Practitioner with full impartially. This is enough to satisfy the Saxmere test.

[57] In this particular case the circumstances for recusal were clear enough, and it is my view that the Member ought to have recused himself from the decision making process.

[58] Standards Committee members are expected to be aware of, and adhere to conflict policies and to be alert to circumstances that ought to lead to a recusal. Where there may be some doubt, this should be discussed and advice sought.

[59] In this present case the Practitioner was also critical of the response of the Legal Standards Officer, who had responded that the allegation of bias was not accepted by the Standards Committee as the matter was determined by seven Members of the Committee which included two lay Members.

[60] I do not accept this argument. Had the issue of numbers of adjudicators been relevant, this would no doubt have been considered a relevant factor in *Saxmere* and other cases that have considered this question. Moreover, this approach would very likely render a conflict policy nugatory where the possibility of bias that exists for one member does not apply to other members. Nor does it take into account the influence of senior Committee members on the decision making process. There is no suggestion that other Members of the Standards Committee were aware of the background history between the Practitioner and the Member.

[61] My conclusion that that there was a proper ground for the Member's recusal is confined to the question of whether there was a proper basis for the Member to have recused himself in this particular case. It is not a finding that the Committee's decision was tainted by bias. The obligation to recuse does not depend on actual bias, it being sufficient that there is a real perception of the possibility of bias occurring.

[62] It appears to me that the Committee's conclusion was likely to have been influenced by what was perceived as evasive answers from the Practitioner to explain the failure to observe the intervention rule. The Practitioner certainly did not assist his cause in the manner of his responses.

Overall result

[63] In terms of the Committee's substantive decision, I have concluded that there was insufficient evidence for the Committee to have made the assumptions that led it to determine that the Practitioner's conduct reached the threshold required by s 351.

[64] I contemplated whether there should be an order redirecting the matter back to a Standards Committee for reconsideration, with a recommendation that the conduct be considered by another Standards Committee. Such a step is in line with the scheme of the Lawyers and Conveyancers Act 2006 which intends that decisions are made in the first instance by the lawyer's peers.

[65] However, I have not taken that step for the reason that I have had the benefit of hearing from the Practitioner personally (an advantage not often afforded Standards Committees) and I do not think that there would be much purpose in redirecting a

Committee to undertake further investigation when, in my view, the available evidence does not support, and is unlikely to support, a degree of wrongdoing that would be sufficient to satisfy the threshold test of s 351.

[66] This is patently a decision pertaining to the jurisdictional threshold, and does not in any way condone the Practitioner's failure to have arranged for an instructing solicitor at the earliest opportunity.

[67] The concern raised by this case is the apparent lack of a proper understanding of what circumstances should lead a member to recuse himself or herself from the decision making process. The basis for a recusal in this case was, in my view, obvious, and I need to express both my surprise and concern that the Member thought otherwise. Of equal surprise was that the Legal Standards Officer supported the Member's view.

Concluding comment

[68] This case raises a question about whether the New Zealand Law Society may need to consider whether further education about recusal should be given to those who are involved in the disciplinary processes. Allegations of bias are by no means rare, particularly in relation to complaints that are considered in smaller centres where there is greater inter-connection between individuals than exists in larger centres. Oftentimes the parties to a complaint remain unaware of the identity of Committee members, making it all the more necessary that there is sound and transparent self-monitoring by those individuals.

Decision

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

DATED this 25th day of September 2012

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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:

RH as the Applicant
LV as the Respondent
LU as Representative of the Respondent
Canterbury-Westland Standards Committee 1
The New Zealand Law Society