

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of the Waikato - Bay of Plenty Standards Committee 2

**BETWEEN**

**MS CA**

Applicant

**AND**

**MR XU**

Respondent

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

**DECISION AS TO PUBLICATION**

[1] On 18 May 2011, I issued a decision on the substantive issues involved in this review in which I found that the respondent's conduct constituted unsatisfactory conduct and penalties were imposed.

[2] A question arose as to whether there should be publication of the decision, both as to the facts and the name of the respondent. Both parties were requested to provide submissions having due regard to the previous LCRO decision (*Austell v Somerset* LCRO 76/2009) and the LCRO Guidelines.

[3] Both parties have responded, but unfortunately not to the extent that might have been hoped for. However, I suspect that the applicant in particular, may not wish to incur further costs. Her counsel has advised that she does not seek publication of the respondent's name.

[4] The respondent submitted that neither his name nor the name of his firm should be published for the following reasons:

1. The respondent, the applicant, and associated third parties all live in a very small and close-knit community and it would not be in the interests of any of the parties to have details published which may lead to identification of the parties involved. Coupled with this is the fact that the matter arose some time ago in circumstances which are unlikely to be repeated.
2. The matter in large part revolved about the issue of informed consent which the respondent believed he had taken all appropriate steps to obtain.
3. The decision will have no general application to clients of the firm, but may cause unnecessary alarm in circumstances where there has been no criticism of other areas of work or advice provided by either the respondent or the respondent's firm.
4. That publication of the name of the respondent or the respondent's firm may have a substantial negative impact on the firm, staff members, and the firm's business.

### **The LCRO Guidelines**

[5] The issues for consideration are whether there is to be publication (and if so, in what form) of (a) the facts of the case; and/or (b) the name of the respondent; and/or (c) the name of the respondent's firm.

[6] Subject to this, there will be no publication of the names or any identifying details of the applicant, her counsel, or any other person referred to in the decision.

[7] The parties were referred to the LCRO publication guidelines and the decision referred to in paragraph [2] above. As noted in paragraph 1 of the Guidelines, decisions of the LCRO with identifying details removed, are routinely published. This is effected by publication on the LCRO website. Publication in that manner in the form ordered under this decision will be effected.

[8] In addition, I consider that the discussion relating to informed consent is particularly important and there will be an order (subject to other orders to be made hereunder) that the decision or a summary of this decision be published in *LawTalk*.

[9] The matters to be considered when determining whether it is in the public interest to publish a decision with identifying details of the respondent are set out in the Guidelines. These are as follows:-

1. the extent to which publication would provide protection to the public including consumers of legal and conveyancing services;
2. the extent to which publication will enhance public confidence in the provision of legal and conveyancing services;
3. the impact of publication on the interests and privacy of –

- (a) the complainant;
  - (b) the practitioner;
  - (c) any other person.
4. the seriousness of any professional breaches.
  5. whether the practitioner has previously been found to have breached professional standards.

[10] The respondent has identified that the matter in large part revolved around the issue of informed consent and the particular aspects of this case. I accept there is minimal reason to support publication on this basis.

[11] The issues referred to in the decision which are more relevant to the question of publication or not are the matters referred to in paragraphs [56] to [67] with regard to the advice provided by the respondent.

[12] The respondent held to the view, and continued to hold to this at the hearing, that the applicant retained an “interest” in the property, which gave her the ability to exercise rights against the property in the event of default, and that the director of the company was personally liable to her, notwithstanding that no guarantee had been provided by him.

[13] I have described these in the prior decision in respect of this matter as “gaps in the state of the respondent’s knowledge”. These gaps led the respondent to fail to appreciate what the applicant needed to be aware of when being asked whether she consented to the respondent acting for both parties, and in addition, to the failure to provide the applicant with adequate remedies in the documentation.

[14] These are matters which raise questions as to the competence of the respondent. In this regard, it could be considered that it is important that the public is aware of the facts of this case and the identity of the practitioner.

[15] When the respondent states in paragraph [6] of his submissions that “there has been no criticism of other areas of work or advice provided by either the respondent or the respondent’s firm”, he is presumably referring to criticism by other clients, or to his advice in respect of matters other than this. He has hopefully not failed to acknowledge the comments made in the earlier decision as to the quality of advice provided in this instance.

[16] It is also somewhat surprising that there has been no criticism from other persons, particularly given the respondent's advice that his practice is conveyancing based. It would be understandable if he had strayed into an area of the law in which he did not usually practice.

[17] The applicant will not be without remedies if the consequences of the respondent's shortcomings result in loss to her. This may not be the case for others, and again, there is some strength in the view that the public does need to be aware of the identity, at least of the respondent, to protect members of the public from suffering loss through other instances of incorrect advice, or a failure to recognise where advice and assistance is required.

[18] The objectives of the Lawyers and Conveyancers Act 2006 are also relevant to these considerations. Section 3(1) of the Act provides that "the purposes of the Act are –

- [a] To maintain public confidence in the provision of legal services and conveyancing services;
- [b] To protect the consumers of legal services and conveyancing services."

[19] All of these points lead to the conclusion that the respondent's name should be published.

[20] Balanced against this, however, is the fact that undoubtedly, the respondent's practice will be affected if publication is ordered, although one would expect that the practice of a lawyer who does not provide competent advice would be affected in any event. In the small rural town where the respondent practices, this could be quite marked. However, it is likely that the Respondent's practice will be affected in any event if he has previously, or continues to provide, poor advice.

[21] This is a finely balanced decision. The fact that the applicant does not seek publication is of limited relevance. In the end, I am driven by the following considerations:-

1. the effect of publication could be significant.
2. publication would call the respondent's overall competence into question which may be unfair
3. lack of competence will become known in an area such as the respondent practices in without publication
4. the respondent's statement that there has been no other instances of criticism of other areas of his work or advice.

[22] In the circumstances, there will be no publication order of either the name of the respondent or the firm in which he is a partner.

**Order**

Pursuant to s.206(4) of the Lawyers and Conveyancers Act 2006 the decision, or a summary of the decision, is to be published in LawTalk with all identifying details removed.

**DATED** this 15<sup>th</sup> day of June 2011

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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:

Ms CA as the Applicant  
Mr CC as Counsel for the Applicant  
Mr XU as the Respondent  
The Standards Committee  
The New Zealand Law Society