LCRO 206/2010

CONCERNING	an application for review pursuant to section193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Auckland Standards Committee 3
BETWEEN	**GI on behalf of ACE**
	Applicant
AND	**UE**
	Respondent

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

Background

[1] GI and the firm of which he was the managing director, ACE Limited (ACE), were sued by an American company and a subsidiary Swiss company in New Zealand for breach of copyright. GI and ACG Limited were also sued in Australia for breach of patent.

[2] GI initially engaged ACF to represent him and the company on these matters.

[3] UD was interested in acquiring an interest in GI's companies through UD's company, ACH Limited, and initially instructed UE to act for him in connection with that.

[4] In November 2007 UD retained UE to advise GI and ACE in connection with the litigation. This was on the basis that UD was to be responsible for all fees payable to ACI (law firm).

[5] ACE held an insurance policy against litigation risk with ACJ Limited (ACJ). In February 2008 ACE came to an agreement with ACJ whereby ACJ agreed to make a lump sum payment to ACE based on an estimate of costs provided by UE. This estimate proved to be inaccurate. ACJ paid the settlement monies to ACE and instead of retaining the funds for future payments they were utilised by ACE to pay existing bills of costs due to ACI and ACK, who were representing ACE in Australia.

[6] UD defaulted in payment to ACI and ACK and on 4 September 2008, ACI applied to withdraw as solicitor for ACE and GI.

[7] The matters which GI complains of arise out of UE's representation of himself and GI in relation to the litigation and the ACJ settlement.

GI's complaints

[8] GI's complaint was lodged under cover of a letter dated 2 June 2010. In general terms, he complained about the conduct of UE in providing advice to him and ACE as well as the bills of costs rendered by ACI and ACK.

[9] The specific conduct complaints were as follows:

- that UE had breached an agreement to represent GI and ACE through to trial.
- That UE had grossly underestimated the costs of representing GI and ACE to ACJ.
- that UE had provided incorrect advice with regard to a counter claim to the Australian proceedings.
- That a counter claim for unjustified threats was not well founded.

- That UE had negligently encouraged GI, ACE and UD to pursue a claim for damages thereby enhancing the potential outcome of the litigation.

- That UE had failed to properly advise GI and ACE of their options against an American company ACL.

- That UE was negligent in not advising GI and ACE in relation to their rights against ACM.

- That UE was negligent in failing to manage the risk to GI and ACE by not sending a Calderbank letter to the plaintiff and in addition had failed to ensure that ACK similarly protected the position of GI and ACG.

- That UE failed to protect GI and ACE from threats of recovery action against him by ACK leading to GI making contact with the plaintiff which enabled the plaintiff to take a stronger position against him and ACE than previously had been the case.

- That UE did not assist GI and ACE to obtain its files from ACK and cooperated in an unethical manner with that firm to deny GI and ACE access to its files.

- That UE overstated his qualifications.

- That UE did not recognise the principles on which the case against GI and ACE were based, and failed to properly prepare for the forthcoming trial.

- That UE failed to provide GI and ACE with a proper explanation of the risks inherent in the litigation.

[10] GI sought recovery of the costs incurred by him in the litigation beyond the payment provided by ACJ, a revision of the bills of costs rendered by both ACI and ACK, and that ACI undergo a revision of its processes

[11] It must be noted that neither the Law Practitioners Act 1986 or the Lawyers and Conveyancers Act 2006 enables the Standards Committee to order compensation to the extent sought by GI, or the ability to make orders as sought against ACI. It seems to me that GI misunderstands the role of the disciplinary process and the powers of the Standards Committee. This comment foreshadows subsequent comments in respect of the complaint and this application for review.

[12] Having considered all aspects of the complaint, the Standards Committee determined to take no further action with regard to the complaint pursuant to section 138 (2) of the Lawyers and Conveyancers Act 2006.

The Application for Review

[13] GI has sought a review of the Standards Committee determination. He raises a number of jurisdictional issues relating to the transitional provisions of the Lawyers and Conveyancers Act and notes that the Committee has failed to provide an explanation of the basis for its decision.

[14] In general terms he seeks that the LCRO review all aspects of the complaint and all aspects of the decision.

[15] In addition, he specifically notes that the Committee had completely omitted to rule on the allegation that UE had wilfully, knowingly and deliberately induced a breach of contract.

[16] He also refers to the Committee's determination of the complaint against UE concerning his advice with regard to the ACJ settlement, and submits that there was no evidence to support the Standards Committee decision that UE had used all reasonable endeavours to make a realistic assessment of the risks in advising the parties to settle the claim.

[17] He referred to the various aspects of the complaint made by him as recorded in paragraph 9 above.

Sections 350 and 351 Lawyers and Conveyancers Act 2006

[18] GI has a particular view of the transitional provisions of the Lawyers and Conveyancers Act 2006 which require to be addressed. He correctly notes that section 350 is not intended to create a situation where any conduct prior to the commencement of the Lawyers and Conveyancers Act is to be forgiven, or prevents complaints from being submitted, or deprives complainants of their rights to natural justice.

[19] What section 350 provides, is that after 1 August 2008, all complaints fall to be dealt with under the Lawyers and Conveyancers Act. Complaints made after 1 August 2008 about conduct prior to that date fall to be dealt with according to the provisions of section 351.

[20] Section 351 provides that:

> if a lawyer...is alleged to have been guilty, before the commencement of this section, 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, after the commencement of this section, to the complaints service established under section 121 (1) by the New Zealand Law Society.

[21] GI submits that "the key part of section 351(1) is not about any preconceived notion of success of a complaint under the Law Practitioners Act 1982. He submits that the possibility, however remote, that proceedings "could" have been commenced entitles the complainant to its rights under section 351(1)". He rightly notes that the complaint is then considered under the Lawyers and Conveyancers Act, not the Law Practitioners Act.

[22] Although GI is correct when he submits that the key part of section 351 does not necessitate any preconceived notion of success, it does necessarily involve a judgement as to whether or not the conduct complained of was such that proceedings could have been commenced.

[23] The meaning of that phrase was considered by the New Zealand Law Practitioners Disciplinary Tribunal in *Waikato Bay of Plenty Standards Committee 2 v B* [2010] NZLCDT 14, which came to the view at [25] that:

> to give effect to the principles on which section 351 is based, commencement of proceedings under the Law Practitioners Act, in the context of that section, must mean the decision to lay, or the actual laying of a charge. Whether it is the determination to lay the charge, or the actual laying of the charge, is not critical to the analysis. The pivotal issue is that proceedings are not commenced until after the required initial investigation by the complaints committee has been completed and a view reached by that committee to proceed with the charges.

[24] One of the fundamental principles underlying the Lawyers and Conveyancers Act and the disciplinary process is that of natural justice. Section 142(1) of the Lawyers and Conveyancers Act specifically records that "a Standards Committee must exercise and perform its duties, powers, and functions in a way that is consistent with the rules of natural justice." The LCRO is similarly required by section 206(3) to have regard to those rules.

[25] Prior to 1 August 2008, the Complaints Committee(s) of the relevant District Law Society considered all complaints to determine whether it was appropriate to lay charges against a practitioner before either the District Disciplinary Tribunal or the New Zealand Law Practitioners Disciplinary Tribunal. In making that determination, it was necessary for the Committee to assess the evidence available and come to a preliminary view as to whether it was sufficient to support a charge or charges. This did not mean that the Committee considered the evidence was sufficient to ensure that a charge would succeed, but that there was sufficient evidence to lay the charge before the Tribunal in the first instance.

[26] To lay a charge without being satisfied that there were grounds to do so, or sufficient evidence to support such a charge, would clearly offend the principles of natural justice. Consequently, a Standards Committee is obliged to consider whether there would have been sufficient evidence to commence proceedings against a practitioner.

[27] Whether or not proceedings "could have been commenced" under the Law Practitioners Act therefore involves a consideration of the evidence and the conduct complained of. The Committee is required to be satisfied that there

would have been reasonable grounds to lay charges against a lawyer before accepting the complaint for consideration by a Standards Committee.

[28] GI, in referring to the determination of the Standards Committee, also submits that "a ruling that the complaint did not meet the threshold for unsatisfactory conduct under the Law Practitioners Act is not possible or plausible" due to the fact that the concept of "unsatisfactory conduct" did not exist under the Law Practitioner's Act. That is correct, but I consider that the Standards Committee has been imprecise in the expression of its decision, rather than being wrong in its interpretation of the transitional provisions.

[29] If, following a consideration of the facts, the Standards Committee determines that a lawyer's conduct is such that proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act, the consequences are that a complaint about that conduct may be made to the Complaints Service of the New Zealand Law Society. The complaint is then processed under the Lawyers and Conveyancers Act and the Standards Committee determines whether or not the conduct constitutes unsatisfactory conduct. Any penalty which may be imposed is restricted to penalties that could have been imposed under the Law Practitioners Act.

[30] It is this process to which the Standards Committee refers. In referring to "unsatisfactory conduct under the Law Practitioners Act", the Committee has abbreviated the process which it has followed to come to its decision. The decision it has arrived at is not wrong, but the expression of that decision could have been more precise.

Fees

[31] In his complaint to the Law Society, GI requests a review of the fees charged by ACI and ACK. With regard to the fees rendered by ACI the Committee took note of a number of factors including:

- the jurisdictional issues
- the High Court judgement of Stevens J

- the previous complaint by UD

The jurisdictional issues

[32] Section 132(2) of the Lawyers and Conveyancers Act provides that "any person who is chargeable with a bill of costs.....may complain to the appropriate complaints service about the amount of any bill of costs rendered by a practitioner...".

[33] UC submits on behalf of ACI that other than two accounts totalling approximately $10,000.00 in October 2007, GI was not the party chargeable with the bills of costs and consequently has no standing to lodge a complaint about those costs.

[34] In the High Court, Counsel for UD conceded that UD was contractually bound to pay ACI's fees. The documentary evidence establishing that obligation was referred to in the judgment of Stevens J. Acceptance of this liability was inherent in the fact that UD had lodged a complaint about ACI's fees.

[35] On 23 December 2008 UE swore an affidavit in which he stated that ACI confirmed to ACE and GI that it would not look to them for payment of legal fees. This is reinforced by the fact that neither GI nor ACE were included as defendants in the proceedings by ACI to recover its fees.

[36] This is conclusive evidence of the fact that GI is not a party chargeable with the bills of costs. He therefore has no standing to lodge a complaint pursuant to section 132(2).

[37] Notwithstanding that decision, I will comment briefly on the bills of costs rendered by ACI. In considering the complaint by UD about the same bills of costs were referred to a Costs Assessors Committee for review and report back to the Standards Committee. Costs assessors are appointed with particular experience and expertise relevant to the area of law to which the bills relate. It is usual for a single costs assessor to be appointment. In this case, a Committee of assessors was appointed, chaired by UB QC. That Committee reviewed the files and conducted a hearing which occupied a full sitting day.

That Committee's report to the Standards Committee was thorough and canvassed all of the relevant factors to be taken in to account when determining whether a fee is fair and reasonable. At [65] of its decision, the Costs Assessors Committee recorded its conclusion in the following way:

> Given the volume of work which needed to be performed once ACI received files from previous solicitors, the complexity of the litigation and the potential value of a successful outcome for ACE and UD, we do not believe that an overall assessment should produce a modification of fees arrived at by reference to the factors we have discussed.

This decision was accepted by the Standards Committee which determined to take no further action in respect of the costs complaint.

[38] GI insists that he is entitled to have the costs reviewed. I have determined that as he is not a party chargeable with the bills of costs, he does not have standing. However, even if he did, it would be unnecessary to duplicate the work of the Costs Assessors Committee. GI has not indicated anything different from the evidence that was put before that Committee by UD and I note that GI did not avail himself of the opportunity to give evidence in support of UD's complaint. There is no reason to consider that the Committee's decision would differ from that already provided, and in the circumstances, the Standards Committee would undoubtedly accept the report of the Costs Assessors Committee endorsing the fees rendered by ACI as being fair and reasonable.

[39] GI has also complained about the fees charged by ACK. As has been recorded on a number of occasions, by the Costs Assessors Committee, the Standards Committee and the High Court, the remedy in respect of ACK fees is to be exercised in New South Wales. Although ACI were instrumental in the appointment of ACK as the Australian firm to represent GI and ACE, the fees of that firm do not become part of ACI's fees. Accordingly, there is no jurisdiction to consider the fees of that firm and the decision of the Standards Committee in that regard is correct.

Negligence

[40] The majority of the general complaints made by GI comprise allegations of negligence. In some instances, he directs his complaints against the firm of ACI. ACI is not an incorporated law firm, and consequently any complaint must relate to a specific lawyer. I have therefore treated all complaints as referring to UE.

[41] Sections 106(3)(c) and 112(1)(c) of the Law Practitioners Act provided that charges may be brought against a practitioner if the practitioner had been "guilty of negligence or incompetence in his professional capacity and that negligence or incompetence had been of such a degree or so frequent as to reflect on his fitness to practice as a barrister or solicitor or as to tend to bring the profession in disrepute".

[42] Alternatively, a practitioner may be charged with conduct unbecoming pursuant to sections 106(3)(b) or 112(1)(b). Conduct unbecoming was described by *Elias J* in *B v Medical Council* [2005] 3 NZLR 810, 811 as being conduct which is unacceptable "according to the standards of competent ethical and responsible practitioners".

[43] The threshold to be reached before a complaint can be considered by the Standards Committee is therefore high. In *Complaints Committee of the Canterbury District Law Society v W* [2009] 1 NZLR 514, 533, the High Court considered that for negligence to reach the necessary threshold it must be :

> of a degree that tends to affect the good reputation and standing of the legal profession generally in the eyes of reasonable and responsible members of the public. Members of the public would regard the actions as below the standards required of a law practitioner, and to be accepted as such by responsible members of the profession. It is behaviour or actions which, if known by the public generally, would lead them to think or conclude that the law profession should not condone it, or find it to be acceptable. Acceptance by the profession that such negligence is acceptable would tend to lower the standing and reputation of the profession in the eyes of the general public.

It is impossible to see the conduct complained of by GI in these terms.

[44] It must be emphasised that the disciplinary process is not a substitute for civil proceedings. I have previously noted that the Standards Committee does not have the power to provide the outcomes sought by GI. The monetary outcome sought is an outcome which should properly be sought from the Court by way of a claim in negligence.

[45] The standard of negligence required by the Law Practitioners Act was such as would render a practitioner unfit to practice as a solicitor or as to bring the profession into disrepute to the degree referred to in *W*. Breaches of such a standard would be glaringly evident. It would not require the Committee to engage in a consideration and weighing of the evidence such as a Court would be obliged to engage in when considering whether a lawyer has been negligent or not.

[46] In any event, the Standards Committee is not the proper forum for such an examination. It is not a Court of Law. Its members do not necessarily have the same qualifications as a judge to make those decisions. In addition, a finding of negligence against a practitioner will not necessarily result in a disciplinary finding against that practitioner. The negligence must be of such a degree or so frequent as to render the practitioner unfit to practice.

[47] Even under the lesser requirements of the Lawyers and Conveyancers Act, any shortcomings are to be measured against the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer. It does not necessarily follow that a lawyer will be considered to have breached this standard by reason of the fact alone that he or she has been found to be negligent.

[48] I do not intend to engage in a detailed consideration of GI's allegations of negligence. I am neither qualified to undertake this nor is it necessary. What is necessary for any disciplinary response, is a degree of negligence or incompetence as referred to above. As noted, it is impossible to view the advice provided by UE in these terms and GI has presented nothing that would cause me to consider otherwise.

The ACJ settlement

[49] UE's role with regard to the ACJ settlement was initially to provide an estimate of the costs to resolve the litigation. He estimated between $220,000.00 and $255,000.00 + GST and disbursements. That estimate was highly qualified, including necessarily the qualification that UE could not predict how the plaintiff would conduct its claim. The estimates were also provided prior to receiving the files from ACF.

[50] The reasons why it was agreed to settle the ACJ liability at such an early stage are not entirely clear to me. To rely on the estimates of costs provided even before the files had been received from ACF seems to me to be somewhat premature. The advantages to ACE of the settlement was that it provided a sum of money which could be used to settle outstanding accounts, particularly those incurred prior to UD agreeing to meet all costs. In addition, it meant that ACE and/or UD could engage counsel of their choice, and there would be limited need to consult with ACJ as the litigation progressed. Cover remained for any payment required to settle the litigation.

[51] However, UE had been instructed primarily with regard to the litigation. His role with regard to the ACJ policy was peripheral, and extended in the main to providing the estimates of fees. From the correspondence I have seen, he acted more as a communication link between ACJ's solicitors and GI and UD. UD made much of his commercial experience and expertise, and a decision to settle the ACJ liability was not one which required significant legal advice – it was a commercial decision. In this regard I note that the Board of ACE which included a partner of ACF, were also included in the decision to accept the ACJ settlement. UE's instructions were to accept the offer.

[52] GI alleges that UE was retained to advise on the terms of the policy, and particularly the possibility that ACJ could subsequently decline the claim. He considers that he would have required ACJ to address that possibility prior to agreeing to settle the claim for costs in the manner in which it was.

[53] Such allegations are highly speculative. In addition, it is common knowledge with any insurance policy, that any falsehood on the part of the

insured will result in the policy being declined - GI should not have needed advice in that regard. It also cannot be stated with any certainty what the outcome would have been if the matter had been addressed at the beginning. ACJ may well very have declined any cover at all.

[54] It does not seem to me that GI is in any different position now than he would have been at the time - he will need to negotiate with ACJ as to the extent of its liability under the policy and whether that is done now or was done at the time, it does not seem to me that the outcome would be any different.

[55] The Standards Committee considered that UE had used all reasonable endeavours to make a realistic assessment of the risks in advising the parties to settle the claim and therefore had fulfilled his obligations to his client. My reasons for coming to the same conclusion differ to some extent, but the end result is that I concur with the Standards Committee decision.

The commitment to represent GI through to trial

[56] GI alleges that the correspondence entered into when accepting the ACJ settlement obliges UE and ACI to represent him through to the trial, and because they did not do so, they are therefore liable for the costs incurred by him. Any such obligation, would be coupled with an obligation on the part of GI that ACI fees would be paid.

[57] In this regard, GI asserts that the ACJ settlement established a fixed fee agreement to represent him through to trial. Even the most cursory of examinations of the fee estimates establishes that there was no fixed fee agreement. There is no support for this assertion at all.

[58] ACI's fees were entitled to be paid. They had no obligation to continue to represent GI and ACE.

Colluding with UA and TY

[59] This aspect of the complaint was raised at item 14 of the letter of complaint dated 2 June 2010. The allegation by GI is that UE had a responsibility to advise UD / TZ / ACN to notify them of the advice given to GI

and to outline the impact of that advice to all parties. The information that GI considers should have been imparted was that UA had indicated that ACK would look to GI for payment of its fees (because UD and TZ had not paid), and had encouraged GI to make direct contact with the plaintiff to settle. GI says that UA was supported by UE in this suggestion. GI alleges that this was a major factor in the failure of the settlement meeting.

[60] Following UD's complaint to the Law Society, UA and TY of ACK were asked to provide a response to the matters raised by UD. At paragraph 15 of a memorandum dated 7 May 2009, UA and TY stated that the settlement meeting did not go well because GI had failed to disclose to anyone that he had made a settlement offer prior to the meeting.

[61] GI says this is not correct and that he had advised UE by email on 29 March that he had had a telephone conversation with the plaintiff. I can find nowhere in the materials provided firstly what the content of the telephone conversation with the plaintiff was, and secondly that this was communicated to UE. All that the email of 29 March indicates is that he had had a telephone conversation with the plaintiff which he needed to discuss with UE. GI asserts that UA had indicated in emails dated 1 and 2 April that she too was aware of the conversations with the plaintiff. The emails I have sighted do not support this assertion.

[62] GI placed some emphasis at the hearing on providing evidence of the fact that he had called the plaintiff. That is not the issue. In any event, I am somewhat puzzled as to the relevance of these allegations. I do not understand why the primary obligation to advise of the telephone conversation (even if he were aware of it) rested with UE. Why did GI himself not advise UD and the other parties?

[63] At the review hearing, GI referred to an affidavit from UE which was filed in response to UD's complaint. GI could not locate the alleged affidavit in the documents held at this office, but indicated that ACI would have a copy. They have since advised that they are unable to locate such a document.

[64] It may be that GI refers to the response from UE to the complaint by UD which is the tabulated response to the various matters raised by UD. This document is at tab 4 of folder 8 of the folders provided. That document refers to the responses from UA and TY as an answer to the complaints by UD.

[65] The nature of this complaint by GI has changed from being a failure to advise UD of the meeting, to collusion between UA and UE. There is no evidence to support the fact that UE was advised of the content of the telephone conversation. In any event, I cannot see how a failure to advise UD of such a telephone conversation amounts to a breach of any duty to GI. If this conversation were to have such a critical impact on the settlement meeting, then it seems to me that the primary obligation to advise of the content rested with GI.

Inducing breach of contract

[66] In the letter which accompanied the review application, GI refers to an agreement entered into between UD and ACI on or about 20 August 2010, in which UD agrees not to support GI or ACE in his complaint about UE. That document post dates the date of GI's complaint and his major submissions on 11 August.

[67] GI refers to the matter in his letter of 8 September. The complaint was considered by the Standards Committee on 10 September. In his letter accompanying the application for review, GI notes that the Committee had completely omitted to rule on this matter. UC commented on the matter in her letter of 1 February 2011 to this Office. She notes that the agreement was entered into with UD with regard to his indebtedness to ACI, and the reason for the provision was to prevent him from bringing his complaint again through GI. It was an agreement which UD entered into voluntarily in return for the concessions made by ACI.

[68] GI submits that this constituted an inducement to UD to breach his contract to fund the ACE litigation. UC points out that the agreement did not prevent this, and indeed, UD did not meet his obligations to ACI or ACK.

[69] In addition, UE did not play any part in the negotiation or preparation of the document.

[70] There is no merit to GI's assertions.

Summary

[71] Contrary to GI's assertions, this complaint is largely a repeat of the complaints made by UD. In addition, it seems to me that GI is endeavouring to use the disciplinary process as a substitute for proceedings that should be brought in the Court. To that extent, it would have been open to the Standards Committee to decline to take any further action in connection with the complaint for the reason that GI had an adequate remedy elsewhere pursuant to section 138(1)(f) of the Lawyers and Conveyancers Act.

[72] However inasmuch as aspects of the complaint do not include allegations of negligence, I nevertheless agree that the Standards Committee was correct to decline to take any further action in respect of the complaints for the reasons specified here in.

[73] Finally, GI has asserted that aspects of UE's advice and representation continued after 1 August 2008. Such representation was limited to ensuring that ACE was not prejudiced in the Court by reason of ACI's resignation. GI also asserts that UE had obligations with regard to the handover of files by ACK. I do not agree that ACI retained any obligations after 1 August 2008. Although the application to withdraw as solicitor for ACE was made on 4 September 2008, ACI had ceased to act for GI and ACE well prior to this by reason of the fact that fees had not been paid.

Decision

[74] Pursuant to Section 211 (1)(a) of the Lawyers and Conveyancers Act 2006 both decisions of the Standards Committee as to conduct and costs are confirmed.

DATED this 21st day of October 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:

GI as the Applicant
UF as the Respondent
TX as Counsel for the Respondent
The Auckland Standards Committee 3
The New Zealand Law Society