

CONCERNING

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

AND

CONCERNING

a determination of the Auckland Standards Committee

BETWEEN

MR NORTH

of Auckland

Applicant

AND

MR WORKSOP

of Auckland

Respondent

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

DECISION

[1] Mr North (the Applicant) sought a review of a decision by a Standards Committee in relation to his complaint against Mr Worksop (the Practitioner). The Standards Committee had resolved, pursuant to section 138(2) of the Lawyers and Conveyancers Act, to take no further action.

[2] Following that decision the Applicant had become aware that a late letter (14 October 2009) sent by the Practitioner to the Committee had not been provided to him before the Committee determined the complaint. He described the letter as *'laden with allegations and factual inaccuracies aimed at discrediting me and I am uncertain if these allegations have prejudiced the Standards Committee decision.'* He questioned whether he had been prejudiced by not having had an opportunity to respond.

[3] For the review that Applicant provided further information in respect of the complaint, much of which had been included in earlier material he had forwarded. He also forwarded a letter prepared by the director of T & C Ltd which responded to the comments and information in the Practitioner's 14 October letter. Having considered all of the material on the file I am of the view that the allegations and counter allegations arising from that letter have no material bearing on the complaints against the Practitioner and accordingly I have not taken them into account, and do not intend to refer to them again.

[4] The remainder of the Applicant's review application was directed at clarifying parts of the Committee's decision, and he questioned whether the Committee had considered his complaint correctly.

[5] This office is able to review both the procedures of the Standards Committee and the evidence relating to the original complaint. It appeared that the Applicant sought a reconsideration of the complaint. This review has therefore considered the original complaint and accompanying material in relation to the Standards Committee decision.

[6] A review hearing was attended by the Applicant and the Practitioner. This was helpful in identifying the fundamental issues of concern to the Applicant who had the opportunity to discuss the evidence that he considered supported his main complaints against the Practitioner.

Background

[7] The Applicant was a director and shareholder in several property development companies, as was his brother (B) and a third party, T. Following a falling out between the brothers, they reached a Deed of Settlement (recorded in writing) that the Applicant would hand control of the running of the companies to B in exchange for certain payments.

[8] The Practitioner acted for the companies. The two companies that were mainly involved in the complaint are XX Ltd and YY Ltd. At all times the Applicant had his own lawyer who liaised from time to time with the Practitioner in respect of company matters.

[9] The two main transactions that gave rise to the complaints were (a) the sale by XX Ltd of a property it owned, and (b) a guarantee given by YY Ltd to support a loan obtained by the purchaser of the above property. This latter transaction was the major focus of the complaint against the Practitioner.

[10] The original complaints against the Practitioner comprised allegations about lack of communications concerning company matters, absence of notes recording company transactions, misrepresentation about company matters and that the Practitioner protected the interests of B ahead of those of the Applicant. The underlying complaint was that the Practitioner had acted 'in concert' with the other Directors to frustrate the Applicant's interests, and had greater involvement with the companies than only as solicitor.

[11] The Practitioner denied the allegations, insisting that he acted only as solicitor for the companies and performed work usually undertaken by a lawyer. In his view he acted properly in taking instructions from the directors who were running the companies, which excluded the Applicant because of the Agreement between the brothers which had transferred the running of the companies to the Applicant's brother B.

Applicable Standard

[12] The conduct complained of occurred prior to 1 August 2008 and as such the standards applicable to that part of the complaint are those found in the Law Practitioners Act 1982 and the Rules of Professional Conduct for Barristers and Solicitors, both of which have since been replaced. 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.

(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).

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

(B v Medical Council [2005] 3 NZLR 810 per Elias J at p 811).

For negligence to amount to a professional breach the standard found in s 106 and 112 of the Law Practitioners Act 1982 must be breached. That standard is that:

the negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute.

[14] Underlying the complaints against the Practitioner is the allegation that B failed to meet his obligations to the Applicant under the Deed of Settlement, that he had compromised the assets of YY Ltd by the guarantee given by that company, and as a result he had suffered loss; he alleged that the Practitioner was complicit in these actions and decisions. In order to succeed on his complaints it would be necessary for the Applicant to show that the Practitioner's conduct met the threshold applicable under the Law Practitioners Act.

[15] The Applicant's complaints focused on the particular transactions referred to above, that he considered were material evidence supporting his complaint.

Sale of property by XX Ltd.

[16] One half of the shares of XX Ltd were owned by T and the other half was jointly owned by the Applicant and B. All were directors. B and T proposed to sell property owned by the company but this was opposed by the Applicant. The shareholding above was such that there was no majority that could give effect to the Director's proposal. In the case of a deadlock (such as this) the company Constitution provided for the appointment of an independent lawyer to oversee due compliance with the company's procedures to overcome the impasse. This was done, and resulted in a resolution being passed for the sale of the property. These actions involved various exchanges of correspondence between the Practitioner and the Applicant, or rather, to his lawyer.

[17] The Practitioner said there had been two meetings and that both were attended by the Applicant. The Applicant said there had been only one meeting. The material issue is whether the Practitioner was involved in any professional wrongdoing in relation to the procedures undertaken by the Company leading to the resolution to sell the property. There is nothing in the evidence to show that there was any failure to have complied with the company's Constitution. I can see no evidence of wrongdoing by the Practitioner in relation to this process.

[18] The Applicant further alleged that the sale was not at 'arms length', and that the purchaser was known to B. The Practitioner informed the Committee that the sale was controlled by the mortgagee of the property following an unsuccessful public tender, the mortgagee having encouraged B to introduce the purchaser who was known to him, and that a sale price was agreed. The Practitioner denied having knowledge of

any particular relationship between B and the purchaser. He was unable to understand the basis of the allegation that the Practitioner had preferred the interests of B over his, noting that the sale resulted in the mortgagee suffering a loss in any event. Given the involvement of the mortgagee in the transaction, I have some difficulty in seeing that the Practitioner had, or could have had, a significant role in the matter. There was no evidence of any wrongdoing.

Guarantee provided by YY Ltd.

[19] The main complaint related to a guarantee given by YY Ltd to support the loan to the purchaser of the property sold by XX Ltd. The Applicant contended that the Practitioner had a greater role than only as the 'transacting solicitor', alleging that he was managing the business and had taken on the mantle of administrator of the company. He alleged that the Practitioner had 'procured' Director and Shareholder certificates which permitted the interests and ownership of YY Ltd and another company to be effectively secured by another party in which he had no beneficial interest, and that this was all done without his knowledge.

[20] The basic allegation was that the Practitioner acted 'in concert' with B so as to render the Practitioner responsible for actions by B that jeopardised his interests. To support this allegation it would be necessary for the Applicant to show that the involvement of the Practitioner was greater than the services normally provided by lawyers to a company client or an individual client.

[21] The evidence showed that the Practitioner had signed resolutions of YY Ltd on behalf of B as director under a power of attorney. There is no suggestion that the Practitioner was not duly authorised by B, and a certificate of non-revocation was included in the information. It is not uncommon for a lawyer to sign on behalf of a company director and that alone is not enough to support the complaint. The evidence on the file did not indicate that the Practitioner's involvement was different or greater than providing legal services usually undertaken by a lawyer in connection with the transactions that were being undertaken by a corporate client.

[22] Advancing his argument about the Practitioner's involvement, the Applicant also compared the Practitioner's communications with the Applicant in relation to the sale by XX Ltd on the one hand, with the absence of communications in relation to the YY Ltd decision concerning the guarantee on the other. That the Practitioner made no contact or effort to involve him in the latter transaction was, in the Applicant's view

support for his allegation that the Practitioner had an administrative and management role in the company affairs.

[23] The Practitioner accepted that he had communicated with the Applicant (or his lawyer) in respect of the XX Ltd decision concerning the sale, and not in the YY Ltd decision regarding the guarantee. He explained this by referring to the fact that the passing of any resolution by XX Ltd necessitated the involvement of the Applicant who, with his brother, jointly held 50% of the company shares. There had been communications exchanged which confirmed that the Applicant was unwilling to consent to the sale and this led to procedures in the Constitution being invoked to resolve the impasse; and the contact with the Applicant had been necessary to advance that matter. The Practitioner said that the passing of a resolution by YY Ltd was not so constrained. That was because the majority shareholding (75%) was held by B and T together. The Applicant's shareholding was 25% of the shares. The Practitioner said it was simply a matter of the majority shareholders having outvoted the Applicant as minority shareholder.

[24] The Practitioner has properly explained the reasons for the extent of his communications regarding the different transaction. If the Applicant considered that he was deprived of an opportunity to have exercised his shareholder rights which caused him loss, the complete answer is that he was outvoted by the majority shareholders. This does not disclose any wrongdoing by the Practitioner.

[25] The Applicant further illustrated the complaint by reference to an email sent by the Practitioner to the lawyers acting for the financier, in respect of signing of security documents by YY Ltd. The Practitioner had received an email from the financier's lawyer advising that T would not sign document, and enquiring whether they could be signed by another director, naming the Applicant. Without reference to the Applicant, the Practitioner had replied that the Applicant would not sign either. The Applicant alleged that the Practitioner's response was a misrepresentation and fraudulent advice.

[26] The Practitioner did not deny that he had written the email but said that in the light of the history of the Applicant's refusal to co-operate, he believed the statement to be correct. There was a reasonable body of evidence showing a general unwillingness on the part of the Applicant to co-operate with management decisions of the company, and in that light there was no basis for questioning the Practitioner's bona fides. While it may be advisable that such comments are avoided, it is difficult to see how this amounts to misrepresentation of a kind or degree that would reach a threshold for disciplinary action to follow.

[27] The Applicant also relied on a letter that his lawyer had sent to the Practitioner stating,

“Our client withdraws authority for you to sign any documents on his behalf as either authorizing signatory or in any other capacity. Our client expressly records that any documentation that is to be signed or actions taken in respect to companies of which he is a director or has any financial interest, beneficial or legal, are withdrawn unless he expressly agrees in writing.”

[28] The Applicant considers that this instruction ought to have applied when the Practitioner was preparing the Director’s Certificates and Special Shareholder’s resolution concerning the guarantee by YY Ltd.

[29] The Practitioner responded that he did not hold any authority for the Applicant to sign any company documents. At the time the Practitioner held signing authority for B as director. He does not deny that he exercised this authority at the instruction of B.

[30] In his letter to this office the Applicant acknowledged that *“no formal power of attorney was ever in effect for [the Practitioner] on my behalf after the Deed of Settlement with my brother was signed....”* If no such authority was held by the Practitioner for the Applicant it is difficult to see what affect, if any, his lawyer’s letter could or should have had on the Practitioner. There is nothing in the letter sent by the Applicant’s lawyer to the Practitioner that prevented the Practitioner acting on the instructions of B, particularly in the light of the Applicant having given control of the companies to B. The Practitioner could properly rely on a decision passed by the majority of shareholders, and there is no suggestion that he wrongfully exercised his signing authority on behalf of B.

[31] The Applicant had his own legal representation. If the Applicant held the view that the Practitioner had some sort of obligation to protect his interests, it is difficult to see any basis for it, and in these circumstances I have difficulty in seeing that the Practitioner had any obligation towards the Applicant.

[32] The Applicant also contended that the Practitioner ought to have ensured that a copy of the resolution should have been forwarded to him, pursuant to section 122 of the Companies Act. This section raises an obligation on a company to send a copy of a resolution to every shareholder who did not sign it. The Applicant appears to have seen this as a regulation imposed on the Practitioner. The Practitioner denied having received instructions to send a copy of the documents to the Applicant. I note that this is an obligation on a company, rather than on a lawyer acting for the company. There is no evidence showing that the Practitioner was instructed by the company in relation

to this matter. I can see no reason for holding the Practitioner responsible for any failure by the company to have complied with legislative requirements under the Companies Act.

[33] The Applicant also referred to the security documents that record the Practitioner as the solicitor on the record, and assumed that the Practitioner would have charged for those services. He described as 'preposterous' the Practitioner's explanation that his instruction (in relation to the security documents) was to return the documents to the lender, and that the Applicant should direct any complaints to his co-directors. The Practitioner said that he was not asked to provide legal advice on the guarantee and that his role was limited. It appeared that the Applicant perceived this as evidence of a greater involvement by the Practitioner than only that of a lawyer, but there is nothing to show that this was the case.

[34] It is common place that the name of the lawyer or law firm is recorded on security documents. That alone is not indicative that the lawyer has a greater role with regard to the company than acting as solicitor.

[35] I have considered all of the evidence that has been provided in relation to the complaint and the review application. I have seen nothing in the evidence that indicates the Practitioner had a larger role or different role than would normally be exercised by lawyers acting for companies. Nor is there a basis for suggesting that the Practitioner had a fiduciary responsibility towards the Applicant as he has been suggested. The Applicant was represented throughout by his own lawyer.

[36] There is no basis for taking a different view to that taken on the complaint by the Standards Committee.

Decision

Pursuant to section 211(1) of the Lawyers and Conveyancers Act 2006 I confirm the decision of the Standards Committee.

DATED this 9th day of April 2010

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:

Mr North as Applicant
Mr Worksop as Respondent
The Auckland Standards Committee
The New Zealand Law Society