LCRO 22/2011

CONCERNING	an application for review pursuant to section193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Waikato / Bay of Plenty Standards Committee 2
BETWEEN	**GH** of Auckland Applicant
AND	**UF** of [North Island] Respondent

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

DECISION

Background

[1] GH (the Applicant) jointly owns a large piece of land which is made up of three lots comprised in one single Certificate of Title. The other owner is the O family. The Applicant and the O family decided over a long period of time to divide the property between them so that each would have a separate lot and title. It was intended that the ultimate division of land would reflect the 55% / 45% respective shareholdings of the parties, a partition based on value rather than land size.

[2] UF (the Practitioner) acted for the O family. The Applicant had his own legal representation.

[3] In September 2005 an on-site meeting took place between the Applicant, members of the O family and their lawyer, the Practitioner. The surveyor who was to undertake the division was also present. The Applicant's lawyer did not attend. Certain agreements were reached at that meeting about the division of the land and how costs

should be apportioned. These were recorded by the Practitioner in a letter he sent to the Applicant's lawyer the next day. This included reference to the agreement that the surveyor costs would be born in accordance to the ownership percentages, such that the Applicant would pay 55% of the costs and the O family would pay the remaining 45%.

[4] The surveyor commenced his work and sent his invoices to the Applicant for payment. The Applicant paid the whole amounts, and then forwarded a copy of the account to the Practitioner for reimbursement by the O family of their share calculated at 45%. This pattern did not reflect any agreement between the parties as to payment, but simply records the Applicant's description of how things occurred. It seems that by 2010 the O family had still not made payments for their share while the Applicant continued to pay the surveyor costs as they were invoiced.

[5] The survey work was more complex than initially believed which lead to delays and resulted in a considerable increase to the original costs estimates.

[6] In the intervening years there appears to have been occasional correspondence between the Practitioner and the Applicant's lawyer. Meanwhile the Applicant continued to forward the Practitioner copies of the invoices for reimbursement by the O family which remained unpaid. Some of the invoices were sent directly to the Practitioner by the Applicant and on other occasions they were forwarded by the Applicant's lawyer who continued to express concerns about the failure of the O family to pay their share of the surveyor costs. Meanwhile the surveyor was progressing with the subdivision and obtaining approval of the partition etc.

Complaints

[7] Eventually the Applicant lodged a complaint against the Practitioner with the New Zealand Law Society concerning the inaction regarding reimbursement. Although in some of his letters he suggested that the Practitioner was in breach of a contract (for non-payment), it appears that he was in fact drawing the Standards Committee's attention to the Practitioner having taken no steps to recover the costs from his client.

[8] At some stage the Practitioner had asserted that the O family had cancelled the Agreement, or that no agreement had existed. The Applicant considered that he had incurred costs in reliance on the Practitioner having represented that a contract existed between him and the O family. He was aggrieved that the Practitioner should contest the existence of an agreement. This led to the further complaint that the Practitioner had represented that a contract existed and later denied this to be the case, and that the Practitioner had misinformed (or misled) the Applicant as to the existence of a contract,

and that in reliance on the Practitioner's representation as to the existence of the contract the Applicant had incurred costs.

[9] The two essential aspects of the complaint were, therefore, that the Practitioner had failed to be sufficiently pro-active in getting payment from the O family, and the Practitioner wrongfully denied the existence of a contract or agreement that he had originally recorded as having been made between the parties. The remedy he sought was that the Practitioner should reimburse him for the unnecessary legal costs he had incurred in trying to resolve these matters, a sum of $4,000.

[10] The Applicant also complained that the Practitioner had refused to see him in his (the Practitioner's) office and had told him to not contact the O family.

Standards Committee enquiry

[11] The Practitioner responded to the complaint informing the Standards Committee that the Applicant was the client of another lawyer and then described the complexities of ownership between the Applicant and his own clients. The Practitioner informed the Committee that he had been corresponding with the Applicant's solicitor, stating that his clients were not responsible for costs incurred nor had they agreed to be responsible for them. The Practitioner disputed that the O family had a contract with the Applicant, and he submitted that despite this the Applicant had taken it upon himself to incur survey costs.

[12] He accepted that he had declined to meet directly with the Applicant, but agreed that he would meet the Applicant if his own solicitor was present.

[13] Acknowledging the Applicant's frustration, the Practitioner explained that there were problems with the ownership, there having been a few deaths of members of the O family who had died intestate. He added that any partition also had to take into account the Council's requirements. He said that despite efforts to seek clarification about these matters with the Applicant's lawyers, they have yet to be answered. In short, the Practitioner did not consider he had done anything wrong.

[14] The Standards Committee's decision noted that the Applicant was never a client of the Practitioner, but had acted for some owners of land that is jointly owned with the Applicant. The Committee's view was that the Practitioner had no personal responsibly for paying survey fees.

[15] The Committee could find no document that suggested The Practitioner had misled the Applicant. The Committee noted that a lack of any written agreement

appeared to be the basis for the Applicant not recovering any costs and there were no grounds to seek compensation from the Practitioner.

Review Application

[16] The Applicant sought a review of the Standards Committee decision. He wanted a reconsideration of the entire complaint. An Applicant-only hearing took place on 29 September 2011. This provides an opportunity to an applicant to provide any further explanation about the complaint. The Practitioner was not required to attend.

[17] The Applicant explained that the Practitioner had delayed communicating with him about whether or not his clients would pay the 45% survey costs. He referred to the Practitioner's awareness of the arrangement between himself and the O family concerning the jointly owned land, and contended that the Practitioner ought to have "formalised a proper contract" which he had not done.

[18] He said that the Practitioner was aware that he (the Applicant) was relying on the agreement reached between the parties when instructions were given to the surveyors. The Applicant expressed his disappointment that "*an agreement in a letter, which was an implied contract, from a lawyer and a reputable* [North Island] *law firm can be flouted*."

Considerations

[19] This decision is based on all of the material on the file and such additional information as was provided for the review and at the review hearing. An Applicant-only hearing may be a first step in the review process and offers the opportunity to obtain greater clarification of the issues, which will determine what, if any, further enquiry is needed. In this case it was not necessary to undertaken any further enquiry, there being sufficient information on which to conduct the review.

[20] At the review hearing the Applicant explained the background, and the current situation, in considerable detail. I have considered his views of the matters and also examined the correspondence that has been exchanged between the Applicant's solicitor and the Practitioner, or at least such of it has been provided to the Standards Committee and for the review. This is unlikely to comprise the full range of correspondence, as I note there are very large time gaps in which other communications may have occurred. However, these are unlikely to add anything further to the issues I am required to consider.

[21] On the file were copies of letters were pertinent to the arrangements between the Applicant and the O family. I noted a very early letter dated 20 April 2005 written by the Practitioner (to the Applicant's lawyer) which stated that he (the Practitioner) had been instructed by the O family in relation to their desire to reach agreements with the Applicant concerning subdivision of the land and allocation of various lots. The letter proposed that costs would be shared according to the respective ownership of the parties, and the Applicant was asked to contact his lawyer to confirm these matters. This heralded the next steps that were taken.

[22] On 19 September the Applicant and members of the O family met on site. The Practitioner (acting for the O family) was also present, as was the surveyor (as noted above). The Practitioner wrote to the Applicant's solicitor the next day, on 20 September.

[23] This is a pivotal letter on which the Applicant relies and I refer to those parts highlighted by him in particular as recording terms of an agreement between himself and the O family. The letter started in this way:

> *"Further to our meeting of 10 September 2005 we set out our understanding of that meeting for you to formulate a partition agreement between our parties. ..."*

[24] This was a letter sent by the Practitioner to the Applicant's solicitor, and it appears to anticipate that the clauses contained in the letter would be recorded in another document in referred to as a 'partition agreement' to be formulated by the Applicant's solicitor. There is no evidence that any other document was prepared by either the Practitioner or the Applicant's solicitor. Thereafter all further communications apparently proceeded on the basis of the provisions recorded in the Practitioner's 20 September letter.

[25] Among the nine points covered in the Practitioners 20 September letter was:

> *"A valuation will be carried out to assess the value or what percentage of lot 2 is to be transferred to our client in exchange for lot 3 going to your client. The costs for this valuation will be borne by the clients in the following percentages; (the Applicant) 55%; (the O family) 45%."*

Near the conclusion of the letter the Practitioner had written:

> *"We believe this sets out clearly the agreement reached yesterday in our meeting and that it is now up to the valuers and surveyors who are to be engaged through ACD to get this work carried out.*
>
> *Please advise as soon as you are able to:*
>
> *1. The advice from the valuers and/or surveyors.*

2. The position as to the partition agreement.

Thank you in anticipation."

[26] The Applicant argued that this letter evidenced a contract, and on this basis he considered the Practitioner's denial of an agreement was misleading and wrongful. However, the question of whether the above letter sufficiently evidences an enforceable contract as between the Applicant and the O family is not a decision I am required to make.

[27] The first, and significant, observation to make is that the New Zealand Law Society (and this office on review) has a disciplinary role in dealing with complaints against lawyers. This is not an alternative avenue for pursuing legal grievances. It is solely concerned with the conduct of law practitioners in a disciplinary context. The question of whether a contract existed between the Applicant and the O family is a legal issue and the Applicant has other avenues to pursue this matter. That issue cannot be considered here.

[28] It is my role to review decisions of the New Zealand Law Society's Standards Committees on an application being made. In considering the complaint, the Standards Committee perceived that the Practitioner was representing the O family throughout. It is my view that the Committee was correct in this view. The correspondence written by the Practitioner was always sent to the Applicant's lawyer. The Practitioner did not represent the Applicant and did not have direct contact with him.

[29] The Applicant had legal representation throughout. It was the responsibility of the Applicant's lawyer to protect his interests. This was not the responsibility of the Practitioner who acted for the party on the other side of a transaction. If the Practitioner subsequently advanced a position contrary to an earlier position, then it is to be assumed that this was done at the instruction of his client. It is for the Applicant to seek his own lawyer's advice on that matter and to respond accordingly.

[30] Given that the Practitioner was acting for the O family, clearly he was not himself a party to any agreement, and not incurring any personal liability for himself. On this basis, any costs incurred by the Applicant are not recoverable from the Practitioner.

[31] A further review issue is whether the Practitioner owed any duty towards the Applicant, or whether there was any part of the Practitioner's conduct that should attract an adverse disciplinary finding. The Applicant's view is that the Practitioner should bear some responsibility for the costs that the Applicant has incurred on trying to sort these matters out.

[32] It is well accepted that a lawyer's duty is first to the Court, and then to his own client to the exclusion of all others. Other than in a few exceptional situations (that do not apply here) a lawyer owes no duty to a third party who is not his client.

[33] It may well be the case that the Practitioner took no steps, or no adequate steps, to seek payment from his clients to reimburse the Applicant. However, when the O family did not respond to requests for payment of their share, or at some stage refuted the existence of a contact, the Applicant had (and has) remedies that he could have pursued to address these matters. The Practitioner had no obligation in this regard, and certainly had no professional obligation to the Applicant to chase his clients for the payments. When he received no reimbursements over the years it was up to the Applicant to take such steps as were open to him, and obtain legal advice in respect of that situation.

[34] The Applicant also sees the Practitioner as having provided misleading advice as to the existence of a contract. I have referred to the opening paragraph of the Practitioner's 20 September letter which appears to have anticipated a follow-up document that did not eventuate. Although the Applicant was critical of the Practitioner for not having created a formal contract, on the basis of the paragraph to which I have referred it may be argued that this was expected to have been formalised by the Applicant's lawyer.

[35] Be that as it may, it is open to a lawyer to advance a particular position for his clients. Whether that position is ultimately shown to be correct is another matter. In this case, whether in the overall circumstances of the matter the Applicant can demonstrate the existence of a legally enforceable contract, (whether based on the correspondence, subsequent actions of the parties, or other the evidence) is a legal issue to be determined in a legal forum. Such is the nature of the adversarial legal system.

[36] The issue to be determined in a disciplinary forum concerns the professional conduct of a lawyer. In this matter I can see no proper basis for disciplinary consequences arising for the Practitioner. The Applicant had his own representation throughout. For that reason also, it would have been inappropriate for the Practitioner to have agreed to see the Applicant on his own. Had he done so, the Practitioner would have risked breaching the professional code of conduct which prohibits lawyers from communicating directly with the client of another lawyer: (Code of Conduct and Client Care, Rule 10.2).

[37] It is nevertheless clear that the Applicant has suffered a considerable amount of stress and distress (and cost) as a result of the circumstances in which he now finds

himself. His grievances extend beyond the non-payment by the O family of survey costs however, since he also described actions they have taken of an ownership nature in respect of land that is not yet theirs. It is understood that the three lots still remain in the joint ownership of the parties. The Applicant has a difficult matter to resolve, but he cannot look for a remedy against the Practitioner in a disciplinary forum. There are legal avenues available to him to pursue these matters.

[38] In my view the Standards Committee was correct to conclude that the complaint against the Practitioner should not be upheld. The application is declined.

Decision

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

DATED this 9th day of November 2011

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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:

GH as the Applicant
UF as the Respondent
Waikato / Bay of Plenty Standards Committee 2
The New Zealand Law Society