LCRO 221/2010

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	**MR CJ** of Auckland Applicant
AND	**MS XL** of Hamilton Respondent

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

DECISION

Introduction

[1] This review can be disposed of readily with regard to the conduct complained of. However, in the course of conducting this review, issues with regard to the procedures followed by the Standards Committee and the Respondent's assertions of privilege and confidentiality raise matters which deserve some detailed comment.

Background

[2] The Applicant was the sole director of ABE. That company entered into a distribution agreement with ABF, under which that company was to purchase product, cut it to size, package it and supply the packaged product to customers. ABE held the supply contracts, and the business was made available to ABF through ABE. The agreement between the parties was that the gross profits were to be shared equally between ABE and ABF.

[3] ABF failed to account to ABE for any of the profits, and when pressed, counter-claimed. Part of the counter-claim related to goods which ABF had acquired at the direction of ABE to supply to a customer, but that supply contract did not eventuate.

[4] Proceedings requiring ABF to account for its profits and for a determination of the amount due to ABE were commenced..

[5] The Respondent acted for ABF.

[6] The complaints relate to the conduct of the Respondent in the course of these proceedings.

The complaints

[7] The Applicant complained about two issues:

Stock

[8] Part of the counter-claim by ABF related to stock which ABF had purchased at the direction of ABE. This stock was to be supplied to a customer who at that time was being supplied by a third party. ABE expected that third party to discontinue to supply the customer. Instead, the third party determined to continue the supply, and the stock purchased by ABF became superfluous.

[9] A Judicial Settlement Conference took place on 10 November 2008. The Conference proceeded on the basis that the total amount of the stock was in the possession of ABF, and an arrangement was entered into whereby the parties would work together to dispose of the stock.

[10] It was subsequently arranged that the Applicant was to visit the ABF premises for the purpose of viewing the stock.

[11] On 20 November 2008, the Respondent wrote to Ms CK, Counsel for the Applicant, and advised as follows:-

> Mr XK [the director of ABF] has been making substantial efforts to dispose of the X products. He is now satisfied that he has secured an arrangement whereby ABF can dispose of about $^{7}/_{8}$ of the product. ABF continues to endeavour to dispose of the balance.

[12] The meeting to view the stock took place at the premises of ABF on 10 December 2008. At that meeting, documentation was provided to the Applicant, amongst which was a "counter sales invoice" which showed that $^{7}/_{8}$ of the stock had been disposed of in February 2008, well before the Judicial Settlement Conference.

[13] The Applicant's complaint is that the Respondent was aware of this at the time of the Settlement Conference, and therefore had misled the Judge and the Applicant. He also complains that she was subsequently untruthful in advising Ms CK of the

arrangements to dispose of $^{7}/_{8}$ of the product, and also alleges that she tried to persuade the Court to abandon the need for inspection of the goods to avoid this fact being discovered.

[14] Subsequently, as the dispute progressed towards Trial, all briefs of evidence referred to the fact that $^{7}/_{8}$ of the stock had been sold, and the matter proceeded on that basis.

The emails

[15] The second aspect of the Respondent's conduct about which the Applicant complains, relates to the evidence that was produced at the Trial.

[16] On 13 September 2007 at 4.01 p.m., the Applicant had written by email to Mr XK advising that "*I am cancelling the distribution agreement I have with [ABF] Ltd, effective* 15 *October 2007*." This email was copied to Ms CL, who was acting for the Applicant at the time, and to Ms XJ at ABG, who was acting for ABF.

[17] At 4.13 p.m., on the same day, Ms XJ sent an email to Ms CK which contained the following:-

> Our client …asks that Mr [CJ] reconsider his notice of cancellation.

[18] Ms CL responded on the following day, and advised that *"[ABE] Limited is not prepared* to *reconsider its cancellation of the agreement. However, it is prepared to consider entering into a new written agreement with [ABF] Ltd."*

[19] She then proposed that the parties should meet to discuss the terms of the new agreement and concluded her email by stating *"...if the meeting is to take place on the above basis, [ABE] Limited will defer advising third parties of the cancellation of the previous agreement until after the meeting, as a sign of its good faith."*

[20] In the course of preparation of the agreed Bundle of documents to be produced at the Trial the Respondent objected to the inclusion of the emails of 13 and 14 September which followed the Applicant's initial email. The Respondent objected to these being included, on the grounds that they constituted correspondence made in the course of attempts to settle the dispute, and therefore were privileged pursuant to section 57 of the Evidence Act.

[21] Whether the agreement was cancelled or not was a crucial question, and the Applicant contends that the emails of 13 and 14 September which followed the

Applicant's initial email on 13 September, clearly indicate that cancellation had not been effected, and that by excluding them the Respondent misled the Court.

The Standards Committee decision

[22] The determination of the Standards Committee on each of the matters is recorded as follows:-

> Stock
>
> …
> From a careful perusal of all the confidential paperwork that was made available by the practitioner, it was clear that the moment Ms [XL] became aware of the sale of some of the stock, the correct stock amounts were included in the proceedings and the final result reflected that, with no disadvantage to the complainant. The Standards Committee was only concerned with the actions of the practitioner and there was absolutely no evidence that Ms [XL] misled the Court.
> …
>
> Emails
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> The two emails that were alleged to have been withheld by the practitioner were not placed before the Court by the plaintiff as evidence nor was that contested at any stage. The complainant was represented by Counsel throughout and the Committee noted that it was not the practitioner's job nor appropriate for her to ensure that the complainant had all the appropriate evidence available to the Court for any hearing. The emails in question related to termination of a contract and after discussion on those, the plaintiff (through his Counsel) did not raise any issue in respect of the consequences of any such emails being available or otherwise. The Committee believes the complainant had ample opportunity to make argument both before and during the Court hearing to have those two emails admitted if he was seeking to rely on them. He was represented by competent legal Counsel and the onus was on him to ensure this took place, not on the practitioner acting for the opposing party. As a result, the Committee does not believe that the practitioner was breaching her duty to the Court or misleading or deceiving the Court in any way.

Review

The Standards Committee procedure

[23] The complaint by the Applicant is dated 31 October 2009 and was lodged with the Auckland Branch of the New Zealand Law Society. On 3 November, the Auckland Branch forwarded the complaint to the Hamilton Branch of the Complaints Service. This was received on 9 November. Receipt of the complaint was acknowledged on 11 November by Ms R, whose position was that of Branch Manager. On the same day, Ms R sent the complaint to the Respondent with a request for her to provide any response that she desired to make within ten days of the letter.

[24] The Respondent replied to Ms R on 18 November.

[25] Mr D is the sole Legal Standards Officer for the Hamilton Branch of the Complaints Service. He is engaged by the Complaints Service on a part-time basis and at the time of the complaint was a partner in the firm of ABG, the firm in which the Respondent was also a partner.

[26] On 23 November, Mr D wrote to Mr XI, the Chair of the Standards Committee 2. His letter stated: *"I enclose a copy of my file in this matter for allocation and reporting in due course. The response from the practitioner has been sent to the complainant. If any further comment is received (as it undoubtedly will be) I will forward it to you."*

[27] It is to be noted that Mr D anticipated in this letter, that he would have an ongoing connection with the file, notwithstanding that it involved one of his partners.

[28] Ms R, however, continued to direct correspondence, to and from the parties.

[29] Mr D's involvement remained however, as can be seen from the fact that he sent a letter on 18 December 2009 to the practitioner who had been asked to provide a report on the matter. This letter stated: *"I enclose a copy of a letter received from [XL] to follow my file for a report to the Standards Committee in January."* It is clear that he had not distanced himself at this stage from the file as he still refers to it as "my" file.

[30] It appears, that despite the Chairman's assertion in a letter to this Office that he assumed responsibility for some procedural/administrative matters that would otherwise have been attended to by Mr D, Mr D did in fact retain some administrative responsibility for the file. I note in particular, the memorandum dated 14 September 2010 from him in which he forwarded a draft of the decision to the Committee for approval prior to sign-off. It is not clear who prepared the draft decision.

[31] I raise these matters to highlight the issue that Mr XI refers to in his letter of 1 February 2011 to this office, when he notes that with the merger of two of the larger firms in the Waikato area, the potential for conflict, or at least perceived conflict, will only be exacerbated.

[32] I must also record some concerns with the correspondence sent by Mr XI to this Office. On 19 January 2011, this Office wrote to the Standards Committee and enclosed a copy of the letter from the Applicant which accompanied the Application for Review. The Committee was requested to comment on that part of the application for review which related to the complaints process.

[33] The Chairman of the committee responded on 1 February and in that offered comment about the Committee's view of the Applicant. He noted: *"The unanimous*

view of my Committee throughout was *that Mr [CJ] was determined to use the complaints process to his advantage in litigation between his company and Ms [XL]'s client. He wanted to obtain information and documents that are clearly privileged as between Ms [XL] and her client."* This comment was unsolicited and any views which the Committee took into account when coming to its decision, should have been recorded in the determination.

[34] The comments made in the letter by Mr XI are viewed by the Applicant as an attempt to influence my decision, and he justifiably takes issue with the view of the Committee as recorded in that letter. He notes that it is the statutory obligation of a Standards Committee to review submissions provided by both complainant and solicitor impartially and to rule on that. He also notes that there is no explanation as to how or why the Committee arrived at their opinion that the Committee held a particular opinion "throughout" that he was determined to use the complaints process to his advantage in litigation.

[35] I consider that the Applicant's comments are justified. One option open to the LCRO is to refer the matter back to the Complaints Service with a recommendation that the matter be reconsidered by a different Standards Committee. That may in itself present difficulties given the concerns expressed by Mr XI and referred to in para [31] above. I have not considered that necessary or appropriate in the present circumstances and reassure the Applicant that my views have not been influenced in any way by Mr XI's letter.

Privilege/Confidentiality

[36] The claims of privilege and confidentiality have been a feature of this complaint.

[37] In the first instance, in her response to the Standards Committee following receipt of the complaint, the Respondent referred to her letters of 16 and 23 October 2009 to Ms CK. In those letters of 16 and 23 October, the Respondent replied to the allegations made by Ms CK which form the subject matter of this complaint.

[38] In the letter of 16 October, the Respondent advised that to respond to the allegations relating to the stock, would cause her to breach Rule 8 of the Lawyers and Conveyancers (Lawyers: Conduct and Client Care) Rules 2008. This Rule states that *"a lawyer has a duty* to *protect and to hold in strict confidence all information concerning a client, the retainer, and the client's business and affairs acquired in the course of the professional relationship."*

[39] To defend herself against the charge, it would have been necessary for the Respondent to provide Ms CK with copies of correspondence between herself and her client, and potentially other communications. These communications constituted privileged communications between solicitor and client, and the client did not waive privilege.

[40] I consider that the Respondent acted appropriately in this regard even though it meant that she was unable to provide evidence to Ms CK that would answer the allegations.

[41] In her letter of 23 October, the Respondent sets out the reasons why she objected to the emails of 13 and 14 September being excluded from the Bundle. This objection was based on the provisions of section 57 of the Evidence Act, on the grounds that the emails were communications "made in connection with an attempt to settle or mediate" a dispute. The correctness of that claim is a decision properly to be made by the Court and it is not necessary for me to form any view for the purposes of this review.

[42] The other issue with regard to privilege which has been raised in the course of the complaint, and now this review, relates to the ability of a practitioner to claim privilege against the Standards Committee or the LCRO. In this regard, the Standards Committee referred the Respondent to the decision of the LCRO in *Appleby Building Ltd v Alva,* LCRO 117/09, in which it was held that a practitioner could not claim privilege against an investigative body such as the Standards Committee or the LCRO and object to providing any files, records or other documentary evidence required by the investigating body in the course of its investigation.

[43] As a result of that, the Respondent forwarded all of her files to the Standards Committee and requested that the Committee exercise its discretion not to disclose any of the privileged materials in those files to the Applicant.

[44] The same issue as to the disclosure of any of the contents of the Respondent's files arose in the course of the conduct of this review.

[45] On 21 January 2011, the Respondent forwarded her files to this Office and advised that her client did not waive privilege in respect thereof. The files were therefore forwarded by her on the basis that the LCRO made an order that all records of communications between the Respondent and her client were not to be disclosed to the Applicant or to any other person. This is a discretion which reposes in the LCRO pursuant to section 208(2) of the Lawyers and Conveyancers Act.

[46] A telephone conference was convened and the following orders were made:

1. There shall be a presumption that all records of communication between the Respondent and her client will not be disclosed to the Applicant or any other person for the reason that such communications are privileged.

2. In the event the LCRO considers it necessary to disclose any such record or the content thereof to the Applicant or any other person in conjunction with this review, whether in the decision itself or otherwise, the LCRO will advise the Respondent of his intention to do so.

3. The Respondent will then have 48 hours within which to make submissions in respect of the proposed disclosure. The period of 48 hours will be extended to 96 hours if the Respondent's client is absent from New Zealand.

[47] Having viewed the material, and completed this review, I record that I do not consider it necessary to disclose any such record or the content thereof. The Applicant will need to accept the veracity of my comments as to what the communications in the file establish.

Stock

[48] The complaint with regard to the stock is that the Respondent misled the Judge, the Applicant and his Counsel at the settlement conference, by not revealing that $^{7}/_{8}$ of the stock which had been purchased by ABF at the instigation of ABE, had already been sold some nine months prior to the Conference.

[49] Having viewed the material on the files it is absolutely clear that the Respondent did not have the knowledge that the Applicant alleges she had.

[50] From the time the information became known to her, which was at the same time as it became known to the Applicant, all communications sent and documents prepared by the Respondent referred to the correct stock levels.

[51] There is nothing further that needs to, or can be, stated in connection with this matter.

The emails

[52] The Applicant contends that the Respondent had a duty to place before the Court the two emails which followed his email of 13 September in which he gave notice of cancellation of the distribution agreement.

[53] He contends that these two emails support his view that the agreement was not terminated.

[54] The Respondent states that she objected to these two emails being included in the Bundle as they were made in connection with attempts to settle the dispute, and were therefore privileged by reason of section 57 of the Evidence Act. They were therefore excluded from the Bundle.

[55] Ms CK had the opportunity during the course of the hearing to argue that those emails should be produced as evidence, and the Court would have made its ruling following argument from counsel. That did not occur.

[56] Whilst the Respondent has an overriding duty not to mislead the Court, her next duty is to her client. It was not for her to make out the Applicant's claim, and she considered that she had valid reasons for objecting to these emails being in evidence. Notwithstanding this, my observation is that the emails in question do not support the Applicant's contention that the agreement was not terminated, and on those grounds alone, it is difficult to see that the Respondent had any obligation to ensure that they were before the Court to prevent it being misled.

[57] On this issue therefore, I can see no basis on which the Respondent could be considered to have misled the Court, and the Applicant had the opportunity to argue that the emails should be in evidence through his counsel if that is the position they wished to adopt.

[58] For these reasons therefore, the decision of the Standards Committee will be confirmed, subject to the minor modification next referred to.

[59] The Respondent has pointed out that the decision of the Standards Committee contains an error in point (1)(b) of the decision in that the word "not" has been omitted. The decision of the Committee will be modified to correct this.

Decision

[60] Pursuant to Section 211(1)(b) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed, save that point (1)(b) on page 1 of the decision is to be modified so that it reads as follows:

> That the practitioner misled the Court during a Judicial Settlement Conference by claiming stock had not been sold by her client when she knew this to be untrue.

Costs

[61] The Respondent has sought that costs be awarded to her in the event that this review confirms the Standards Committee decision. The basis on which costs are awarded by the LCRO are set out in the Costs Orders Guidelines, and in paragraph 11, it is noted that awards of costs as between Applicant and Practitioner will only be exercised sparingly.

[62] Section 193 of the Lawyers and Conveyancers Act provides an absolute right to apply for a review of a Standards Committee decision. That right builds on the right to complain about the conduct or service of a lawyer provided by section 130, and reinforces the consumer protection provisions of the Act.

[63] It is important that the rights of consumers of legal services are not restricted or diminished by costs awards. It is for that reason that costs will only be awarded sparingly by the LCRO against complainants.

[64] Costs will generally only be awarded against an Applicant where that party has acted vexatiously, frivolously, improperly or unreasonably in bringing or continuing the review. I do not consider that the Applicant has so acted, and therefore costs will lie where they fall.

DATED this 1st day of July 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:

Mr CJ as the Applicant
Ms XL as the Respondent
The Waikato Bay of Plenty Standards Committee 2
The New Zealand Law Society