

CONCERNING

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

AND

CONCERNING

a determination of the Taranaki Standards Committee

BETWEEN

KY

Of North Island

Applicant

AND

VZ

Of North Island

Practitioner

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

REVIEW REPORT

[1] An application was made by KY (the Applicant) for review of a decision by the Standards Committee declining to uphold his complaint against VZ (the Practitioner).

[2] The Practitioner represented the Applicant in a criminal matter in the second trial after the first ended with a hung jury. He was found guilty. He later discovered information that led him to file a complaint against the Practitioner.

[3] His complaint was that the Practitioner ought not to have represented him for the reason that she was part of the law firm that had represented the Applicant's wife in a matrimonial matter. The Applicant considered that the Practitioner was conflicted, and that the conflict affected the Practitioner's advice and or representation of him.

[4] This complaint concerned conduct that had occurred in 1999, and the complaint was made but had not been concluded prior to the commencement of Lawyers and Conveyancers Act 2006. Under this Act such complaints continued to be dealt with

under the former Law Practitioners Act 1982. The Standards Committee therefore took charge of the complaint under Section 356 of the Lawyers and Conveyancers Act 2006, aware that it was acting in the role of a Complaints Committee with the powers and functions conferred by the Law Practitioners Act 1982 and its rules and regulations.

[5] The Applicant had informed the Committee that he had wanted his former wife to be a witness for him in the criminal trial, and he had told the Practitioner that was what he wanted, but that the wife was not in the event called to give evidence. He explained that the Practitioner had enquired of the lawyer (who had acted for his former wife in the matrimonial matter) whether the wife would be a witness for him, and that the Practitioner had informed the Applicant that the wife's position was that if she were called as a witness she would lie under oath and put him away for as long as she could.

[6] The Applicant attributes the failure to call the wife as witness to the Practitioner being conflicted. He states that the wife should have been compelled to give evidence at which time she could have been examined on that conversation.

[7] The Committee's decision described the circumstances that led to the Practitioner acting for the Applicant, noting that the Applicant had in October 1999 instructed that his criminal file be forwarded to the Practitioner at her firm. The Committee was of the view that despite his denial that the Applicant was aware that the Practitioner worked in the same law firm as had represented his former wife in matrimonial matters. The Committee did not accept that the Applicant could have been ignorant of this fact.

[8] The Practitioner had informed the Committee that she could not recall the file very well after such a long time, and said that if she had become aware that the firm had also acted for the Applicant wife this would have only been because he would have told her. The Practitioner noted that the Applicant had instructed her, and she was unable to perceive, in any event, how this raised a conflict and assured the Committee that she was always careful to avoid conflicts.

[9] The Committee considered the question of conflict of interest, in particular whether conflict existed by virtue of the Practitioner representing the Applicant in the above circumstances. The Committee observed that the criminal trial did not involve the Practitioner (or anyone else in her firm) acting against his former wife, as these

were proceedings brought by the Crown. The Committee did not perceive there to be any conflict.

[10] The Committee further noted that both the Applicant and the Practitioner had agreed that his former wife would not under any circumstances be likely to give evidence that was helpful to the Applicant's defence. The Committee also made the observation that there was no suggestion that the Practitioner had not conducted the defence for the Applicant with due diligence and vigour, adding that no complaint had been made against the Practitioner's conduct at the time of the trial, or in the nine years subsequent to the trial.

Procedural issue

[11] Before embarking on a discussion, it is relevant to note that the Committee ought to have made its determination pursuant to section 101 of the Law Practitioners Act 1982. By virtue of Sections 353 and 356 of the Lawyers and Conveyancers Act the Standards Committee was acting as a Complaints Committee under that Act, and obliged to consider the complaint as if the Law Practitioners Act had not been repealed.

[12] A further consequence of the complaint falling under the Law Practitioners Act is that the Applicant did not have review rights as provided for by the Lawyers and Conveyancers Act. The Applicant's right of review was as is set out in the Law Practitioners Act, which created the right of review by a Lay Observer. The role of Lay Observers has since been assumed by the Legal Complaints Review Officer (section 355 of the Lawyers and Conveyancers Act) but in performing that role the LCRO assumes the powers and functions of a Lay Observer. These are significantly narrower than those conferred on the LCRO, and are confined to examining the Law Society's treatment of a complaint.

[13] Notwithstanding the above observations, the errors and oversights by the Committee have not been detrimental to the Applicant and have not, in my view, adversely impacted on the Committee's investigative process.

[14] The Applicant was also given the opportunity to be heard on his review application, and a review hearing was held on 11 August 2011, attended by the Applicant and his counsel, KZ.

Review

[15] The Applicant sought reconsideration of his complaint, expressing the view that a conflict arose from the fact that his wife's former lawyer acting in the matrimonial matter

was in the same law firm as the Practitioner who represented him in his criminal trial. He particularly referred to the conversation between the Practitioner and the lawyer acting for the wife. His view was that the wife had not been called as a witness and examined about that conversation because *“it then would have obviously have shown to the Court there was an obvious conflict arising and I should have been independently advised and in writing of the conflict which I wasn’t ...”*. He added that he didn’t know at the time of the trial what a conflict of interest was.

[16] At the review there was some discussion about the circumstances that usually create a conflict of interest, noting that the rule against conflict recognises that it is not possible to serve the interests of two clients whose interests do not align. This normally involves a “matter” which is common to the parties, and a conflict is not obvious where a lawyer (or a firm) acts for two parties in unrelated matters.

[17] KZ agreed that there was no conflict in that sense. However, he submitted that lawyers are obliged to conduct their representation of a client with total independence and in the absence of any other conflicts. He argued that in this case the Practitioner had, or may have had, divided loyalties.

[18] This was explained on the basis that the Practitioner was a member of the firm that acted for the wife, who had been unwilling to be a witness for the Applicant. He argued that it may have been perceived by the Practitioner that it was not in the interests of the firm to compel one of its own clients to be a witness when that client was reluctant to do so. To upset a client could have a detrimental impact on the firm. The submission that the Practitioner had not (or may not have) acted independently and freely with undivided loyalties was based on the larger interests of the firm. It was suggested that this concern about upsetting or alienating an existing client would have been sufficient reason for the Practitioner to have not pursued the Applicant’s request that his former wife should give evidence at his trial.

[19] KZ referred to *Thurlow v Clements* [2010] NZFLR, 767 where the court concluded that a solicitor was precluded, by reason of his current sexual relationship with his client, from making an objective and dispassionate assessment of the case where the background to the litigation related to the prior relationship between the plaintiff and defendant and involved issues of credibility. This finding was made notwithstanding that the solicitor had instructed a barrister in the court proceeding.

[20] The Applicant had not framed his complaint in this way (which is not surprising as he is not a lawyer) and therefore this was not considered by the Standards Committee. It is nevertheless an argument that can be advanced in appropriate circumstances.

Considerations

[21] The review question is whether the Standards Committee was in error in the way it dealt with the complaint of conflict and its decision to not uphold it.

[22] The information on the Committee's investigation file, and on the file of a related complaint against the lawyer who represented the Applicant in the first trial, showed that at the first trial the Applicant's former wife had been called by the defence to give evidence at the depositions and that it had been agreed between the Applicant and his then counsel that her evidence would not be helpful. The file included a record of some concern by the defence counsel that the wife might be called as witness for the Crown but it seems she exercised her right to not be a Crown witness, and it was also noted that she was reluctant to be a witness for the Applicant.

[23] The Applicant did not deny that his wife was reluctant to give evidence, but he nevertheless felt that the Practitioner ought to have compelled her to be a witness. As noted, he considered the Practitioner's failing to have taken this step in the second trial was due to "divided loyalties".

[24] The professional obligations of lawyers require them to act independently and free of any other considerations in advancing the interests of their client. The obligation of lawyers to maintain independence underpins all professional conduct and reference is made to this obligation in Rule 11.10 of the Rules of Professional Conduct for Barristers and Solicitors. This finds expression more recently in Rule 13.5 of the Conduct and Client Care Rules.

[25] I have considered the information before the Standards Committee and the submissions made by KZ for the Applicant. The personal relationship complexities arising in *Thurlow* did not exist in the present case. That should not rule out that the possibility that there may be circumstances where a lawyer cannot fulfil his or her duties to a client by virtue of having divided loyalties, whether to the firm or another client of the firm, which may impact on the lawyer's independence and prevent the lawyer from acting in a client's best interests.

[26] The Committee was aware from the information on the file that the question of whether the wife should be called was revisited when the Practitioner represented the Applicant at the second trial. The information indicated that in material respects the wife's evidence would not have been helpful to the Applicant's case. The Committee also had available to it notes from the original criminal trial file showing that calling the wife as a witness in that trial had been considered and that it had been agreed between the Applicant and his counsel that she should not be called. Indeed concerns had been expressed about the Crown calling her as a witness.

[27] In my view there was sufficient evidence on the file to have satisfied the Committee that there was no basis for criticising the way that the Practitioner had represented the Applicant. The Applicant may have wanted his wife to give evidence and his evidence suggests that there was some discussion about this with the Practitioner. There was also evidence suggesting that there had been agreement that it was to the advantage of the Applicant that his wife should not give evidence. This would very likely have involved the professional judgment of the Practitioner about how the Applicant's defence might best be pursued, as was her professional responsibility. Such assessments are routinely made by criminal counsel. There is nothing on the file to have indicated that the Applicant had instructed the Practitioner to call the wife.

[28] KZ properly argued the principles applicable to independence of the bar but the submissions were not supported by evidence. All of these matters were discussed with the Applicant and KZ at the review hearing, at which time I also informed them that I could see no basis for criticising the Standards Committee's decision. The application is declined.

Decision

Pursuant to section 355 of the Lawyers and Conveyancers Act 2006 and section 97 of the Law Practitioners Act 1982 I confirm the decision of the Standards Committee declining to uphold the complaint, which decision should be amended to record that it is made pursuant to section 101 of the Law Practitioners Act.

DATED this 29th day of September 2011

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:

KY as the Applicant
VZ as the Respondent
KZ as Counsel for the Applicant
The Taranaki Standards Committee
The New Zealand Law Society
The Secretary for Justice (with Applicant's details anonymised)