

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of the Canterbury-Westland Standards Committee

**BETWEEN**

**MR VN**

Applicant

**AND**

**MR AG**

Respondent

**DECISION**

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

**Background**

[1] Mr VN (the Applicant) sought a review of a Standards Committee decision declining to uphold his complaints against law practitioner AG (the Practitioner). Mr AG was the third lawyer that the Applicant had complained about in relation to the same transaction. His prior complaints (against his original lawyer and the second lawyer who acted for him) were also not upheld by the New Zealand Law Society, decisions that were confirmed on review by this Office.

[2] The background to the complaint is that the Applicant sold his rural property to the local District Council; the sale and purchase Agreement allowed the Applicant to remain on the land for a year for a peppercorn rental. On the expiry of that year the Applicant entered into a commercial rental arrangement with the Council with the lease being extended for a three year period. When he was asked to leave the property at the expiry of the lease, he objected, having meanwhile discovered that the Council had rezoned the land and sold part of it for a substantial profit.

[3] He approached the Practitioner at the time that the Council sought to have him removed. One of the several matters he wanted the Practitioner to explore was whether there was a basis for challenging the original sale of the land to the Council. One of the grounds he wished to pursue was whether there had been a conflict of interest on the part of the solicitors who had acted for him on that sale. He alleged that there was a conflict on the basis that the same lawyer also acted for an individual (a property developer) who was one of the Councillors, and who had, on behalf of the Council, fronted the negotiations and sale involving the Applicant's land. The Applicant's view was that the lawyer had failed to protect his interests. He also alleged irregularities with the Council's rezoning processes.

[4] Before approaching the Practitioner, the Applicant had explored these same issues with another lawyer. That lawyer had analysed the information, and obtained a report from a Resource Management Consultant about the Applicant's concerns. The lawyer advised the Applicant that there was no conflict of interest, and (relying on the Consultant's Report) also advised that there had been no irregularities in the rezoning process.

[5] Dissatisfied with this, the Applicant then approached the Practitioner. By this time the Applicant was under the threat of forcible removal from the land. The Practitioner was asked to consider whether there was a basis for challenging the entire sale transaction. After consideration of all information (which included a copy of the original sale file) the Practitioner could find no basis for challenging the sale transaction, thus essentially confirming earlier advice that had been given to the Applicant by the previous lawyer.

[6] After the Applicant terminated his relationship with the Practitioner, he filed a proceeding in the High Court where he was self represented. He was unsuccessful in that action, and a subsequent appeal also failed. The Applicant feels much aggrieved by what has happened. He has filed complaints against all lawyers involved at various times. This review decision deals with the complaints against the Practitioner.

### *Complaints*

[7] The Applicant's complaints against the Practitioner broadly covered the following areas:

- negligence;
- unprofessional behaviour; and

- obstructing the client's interest in failing to protect and advance those interests.

[8] When these complaints were notified to him, the Practitioner also discerned allegations of criminal behaviour and vitriol, and his response to the complaints covered those additional areas as well.

[9] After considering the information the Standards Committee declined to uphold any of the complaints. The Applicant sought a review of the Committee's decision.

### **Review Application**

[10] The Applicant's review application was a lengthy and detailed explanation of what he perceived the Standards Committee's failures to be. His submissions were lengthy and detailed, much of it asserting a legal basis for his claim to have the land returned to him. In that context he contended, in broad terms, that the Standards Committee had failed to comprehend or recognise his legal rights to the land, or the lack of strategy on the part of the Practitioner to have achieved the outcomes he sought.

[11] I will enlarge on this further so that the Applicant will know that I am aware of the grounds for his review application. It was apparent that the Applicant had approached the Practitioner with an expectation that the Practitioner would be able to achieve an outcome that would allow him to remain on the property, notwithstanding the expiration of the lease and the threat of forcible removal. This was a high priority for the Applicant who wrote, "[w]e were still in occupation of the property and stressed it was crucial we stay in occupation of this property as we had no other place to house our horses."<sup>1</sup>

[12] The Applicant claimed the Committee failed to take into account the Practitioner's lack of strategy, and had used his position of dominance when giving him dogmatic advice. The Applicant restated his views about his legal position. He submitted that the Standards Committee failed to understand or accept the link between the sale of the property and the occupation Agreement. He restated the earlier grievance relating to the sale of land by the Council at a profit, and the circumstances under which they had originally sold it to the Council.

[13] It was clear from the review application that the Applicant's view was that the Practitioner had given erroneous advice to them, a view based on the Applicant's own

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<sup>1</sup> Letter from Mr VN to LCRO, 5 October 2011.

perception of the legal position. He was critical of the Practitioner's failure to have acknowledged the existence of a conflict of interest on the part of the lawyers who handled the sale, because this contradicted the opinion of the Resource Management Consultant who had stated otherwise. He was critical of the Standards Committee for failing to have realised that the Practitioner's refusal to accept that there was any conflict was inconsistent with that Report. It is fair to say that a significant portion of his criticism of the Standards Committee related to its failure to notice the contradiction between the advice of the Practitioner on the one hand, and the opinion stated in the Report prepared by the Resource Management Consultant. He further alleged that the Practitioner had misrepresented that Report and that the Committee had failed to note the Practitioner's error in suggesting that the Report had no bearing on the situation.

[14] The Applicant further alleged that the Standards Committee had failed to understand the Council's statutory obligation in relation to the way it conducted its business (providing details as to how the Council had failed in this regard). He further noted that the Committee had not commented on the Practitioner's "excuse"<sup>2</sup> for not forwarding such evidence to him.

[15] The Applicant explained that the reason he engaged the Practitioner was to prevent the Council from "illegally evicting"<sup>3</sup> them, but the Practitioner had taken no steps to do so, having advised them that they had no case.

[16] Finally he referred to the Practitioner's fee exceeding the amount quoted.

[17] The Practitioner was content to rely on submissions he had previously forwarded to the Standards Committee.

[18] A review hearing took place on 24 August 2012 at which time I met with the Applicant and had extensive discussions with him about his complaints and the background to them.

## **Considerations**

### *Applicable legal standard*

[19] The complaint concerns conduct that occurred in 2005/06. Where a review concerns conduct which occurred prior to 1 August 2008, the jurisdiction of a Standards Committee to consider it is determined by s 351 of the Lawyers and

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<sup>2</sup> As at n 1.

<sup>3</sup> As at n 1.

Conveyancers Act 2006 (the Act). This provides that a complaint about conduct that occurred prior to 1 August 2008 may only be considered by the Committee if it could have led to disciplinary proceedings against the lawyer under the (former) Law Practitioners Act 1982. If the Committee concluded that the conduct does reach that threshold it may then turn to consider whether a disciplinary finding of unsatisfactory conduct should be made against the practitioner under s 12 of the Lawyers and Conveyancers Act.

[20] The s 12 definition of unsatisfactory conduct includes:<sup>4</sup>

(a) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including—

(i) conduct unbecoming a lawyer or an incorporated law firm; or

(ii) unprofessional conduct...

[21] The starting question is therefore whether the Practitioner breached the professional standards that applied at the time of the conduct and if so, whether it was of a degree of seriousness that could have led to disciplinary proceedings against him under the Law Practitioners Act. The standards are set out in ss 106 and 112 of the Law Practitioners Act and the Rules of Professional Conduct for Barristers and Solicitors,<sup>5</sup> both of which were replaced (on 1 August 2008) by the Lawyers and Conveyancers Act. The threshold for disciplinary intervention under the Law Practitioners Act was relatively high and may include findings of misconduct or conduct unbecoming.

[22] Misconduct was generally considered to be conduct:<sup>6</sup>

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.

Conduct unbecoming could relate to conduct both in the capacity as a lawyer, and also as a private citizen. The test is whether the conduct is acceptable according to the

<sup>4</sup> Lawyers and Conveyancers Act 2006, s 12.

<sup>5</sup> Rules of Professional Conduct for Barristers and Solicitors (7<sup>th</sup> ed).

<sup>6</sup> *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.

standards of "competent, ethical, and responsible practitioners".<sup>7</sup> For negligence to amount to a professional breach the standard found in ss 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.

### **Considerations**

[23] The Applicant contacted the Practitioner when he was confronted with an eviction order. For some time he had held the belief that there had been irregularities in the sale of his land to the Council, and in the Council's procedures in rezoning that land. He had received previous advice about this but was unwilling to accept that advice. The Applicant placed considerable emphasis and reliance on his belief that the lawyers originally acting for him in the sale had been in a conflicted position and as a result had failed to protect his interests, resulting in (the Applicant's view) that the Council had been able to obtain his land at a significantly reduced price, and had been able to on-sell it at a significant profit at a later stage, after having rezoned the property as industrial. He provided the Practitioner with a detailed explanation of events as they had occurred up to that time.

[24] I have examined all of the information on the file which is extensive. It is clear from the file that on receiving instructions the Practitioner undertook a thorough examination of historical matters relating to these transactions. The Practitioner had obtained the original files relating to the sale and purchase transaction, and was able to provide to the Standards Committee a significant volume of correspondence exchanged between the original lawyer and the solicitors then acting for the Council which was purchasing the Applicant's property. It is not necessary for me to itemise all this correspondence, noting from the file that it was all provided to the Applicant who can refer to it in the event that he should wish to check my following observations.

[25] It is clear from the correspondence that the Practitioner provided to the Applicant a full report of his findings and analysis. The report was prepared under a number of headings, which covered the concerns about conflict of interest, wrong valuations, zoning issues, pressure and independent advice issues, relocation costs, and a final heading which referred to the prior lawyer who had been engaged by the

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<sup>7</sup> *B v Medical Council* [2005] 3 NZLR 810 per Elias J at p 811.

Practitioner, and who had also undertaken a review of a number of these matters for the Applicant.

*Conflict of interest*

[26] The conflict allegation rested on the fact that the lawyers who acted in the sale of the Applicant's land also acted for the Councillor in his personal capacity. The Councillor was, in respect of the land purchase, representing the Council.

[27] The Practitioner informed the Applicant that he had come to the view that the original lawyers probably did not have a conflict, noting that there was evidence to show that the issue of a 'potential' for a conflict was raised by the Councillor himself in 2003 (early at the commencement of the sale negotiations). The Practitioner referred to the evidence on the original lawyer's file. He also explained what was required for an actionable conflict of interest. The Practitioner finally concluded "[f]or these reasons we must discount any prospect of you bringing an action against [the original lawyer] for damages in these circumstances."<sup>8</sup> Having considered the information and the Practitioner's analysis, I can find no fault with it.

[28] I noted that the Applicant relies heavily on a statement in the Report written by the Resource Management Consultant who had stated, in unequivocal terms, his opinion that there was a conflict of interest when the original lawyer acted for the Applicant while at the same time being a lawyer for the Councillor who led the negotiations process. The Report writer is not a lawyer, and not surprisingly the basis for legally actionable conflict was neither considered nor explored in that Report.

[29] I also note that this matter was thoroughly canvassed in the High Court which rejected the Applicant's assertion as to the existence of a conflict of interest, as did the Court of Appeal. The Court of Appeal's decision stated it in this way:<sup>9</sup>

The main issue raised before us was in relation to an alleged conflict of interest on the part of the [Applicant's] solicitors, [the original lawyer]. [The original lawyer] has not at any time acted for the Council. However, it acts for one of the [District Court] councillors, Mr C, in his personal capacity, although one matter on which they had acted for him did relate to his work with the Council. It was, however, totally unrelated to these transactions or these negotiations.

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<sup>8</sup> Letter from Mr AG to Mr VN, 24 May 2007, at p 4.

<sup>9</sup> NZCA case.

[30] In making these comments, the Court of Appeal clearly reflected the basic elements required if a conflict of interest situation were to exist, captured by Rule 1.01 of the Rules for Lawyers under the Law Practitioners Act 1982.

[31] The concept of actionable conflict of interest has been explained to the Applicant but it is not clear whether he has not yet understood, or whether he is simply unwilling to let go of his grievance. Materially, there was nothing wrong with the Practitioner's analysis or advice, and there can be no criticism of the Standards Committee for having found no wrong doing.

### *Zoning and Valuation*

[32] The Practitioner had noted that when the sale of the Applicant's land was being negotiated, the Applicant and the Council had each obtained their own valuation. The Applicant's valuation came to \$300,000. In his advice the Practitioner pointed out to the Applicant that there had been discussion about how a third valuer might be approached to resolve the discrepancy between the Applicant's valuation and that of the Council, but he reminded the Applicant that:<sup>10</sup>

late in this process you gave instructions to [the original lawyer] that you would sell the property for \$800,000 exclusive of GST and that proposition was relayed to the [District Council]. The [District Council] decided to accept that proposition and so the sale of the property came about as a result of an 'offer' and 'acceptance'. It did not result from a valuation figure being imposed upon the transaction. Therefore, there is no ground for arguing that the valuation was unfair simply because in the final analysis the valuation had no bearing on the final purchase price.

The Practitioner concluded that there were:<sup>11</sup>

no circumstances here which show that you were incapacitated and were not able to make the mental judgement required to enter into a contract of this type ... To the contrary the evidence all points the other way and suggests that you freely and willingly entered into an agreement at a price which you yourselves suggested.

[33] In advising the Applicant, the Practitioner was relying on evidence that he had gleaned from the file of the original lawyer, and my own review of that material supports the advice he gave to the Applicant. I can see no basis for any argument that the

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<sup>10</sup> As at n 8, at p 5.

<sup>11</sup> As at n 10.



Applicant was pressed into selling the property, or that the Council determined the sale price. The contrary appears to be the case. The fact that the Council was later able to rezone the land and sell it at a profit is immaterial. This was not an outcome that the Practitioner could have benefitted from, because the land value at the time of sale was linked to the zoning then applicable.

[34] On the issue of zoning, the Practitioner also responded to the Applicant's concerns that the change of zoning may have adversely affected the Agreement for sale and purchase. The Practitioner noted that there was evidence of the Applicant having had full knowledge as to the zoning at the time of the Agreement for sale and purchase, noting that the Resource Management Consultant had referred to the position with zoning changes having been relayed to the original lawyer, and that the position was "sufficiently clear for you [the Applicant] to make a proper judgement, when determining the sale price for the land."<sup>12</sup> The Practitioner noted that in the absence of any evidence of fraud or conspiracy, the Applicant was in a position where any zoning change after the Agreement for sale and purchase was entered into would not be viewed as relevant to the Agreement, adding that any Court viewing the position now would be likely to be of the opinion that the burden was on the Applicant to assess the possible impact of any zoning issues. The Resource Management Consultant also found no error or flaw in the processes followed by the Council.

[35] On the suggestions that pressure had been exerted by the original lawyer and a lack of independent advice, the Practitioner noted there was no evidence of pressure being applied to the Applicant to accept the deal being put forward by the Council, but rather the evidence went the other way, and illustrated that the Applicant was becoming "sick and tired of the whole negotiation process and wanted to bring it to a head."<sup>13</sup> The Practitioner observed (again from the original file) that this was the reason the Applicant had instructed the original lawyer to make an offer that the property be sold for \$800,000, there being no evidence that this figure was forced upon the Applicant. He added that there was no requirement for the original lawyer to suggest the Applicant obtain independent advice because in the Practitioner's view there was no subsisting conflict between the Firm of the original lawyer and the Applicant or the other party, obliging it to do so.

[36] The Practitioner dealt separately with the relocation costs, having negotiated with the Council an alternative proposition for the Applicant to consider.

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<sup>12</sup> As at n 10.

<sup>13</sup> As at n 8, at p 6.

[37] And finally, the Practitioner informed the Applicant that having been through the file of the second lawyer (having also carefully examined the file of the original lawyer), he could find nothing to show that there was any conflict or any evidence that the Practitioner was influenced either by the original lawyer or by the Council.

[38] I have read all of the correspondence that was available to the Practitioner upon which that advice was based. All of this material was available to the Standards Committee, and like the Committee I can find no basis for criticism of the Practitioner in the advice he gave.

[39] I also make the observation that the Practitioner appeared fully aware of the strongly-held views of the Applicant in relation to the above matters, concluding his letter with “[a]gain, it is the essence of our role that we provide you with the advice that you need to hear as opposed to supplying you with the advice you want to hear.”<sup>14</sup>

[40] It may be that the Applicant assumed that by going to the Practitioner he would succeed in his objective of remaining in occupation of the land. While it is the function of lawyers to assist their clients to the best of their ability, ultimately a lawyer has the duty of providing sound legal advice to his or her client, and if that advice is correct then there is no basis for any professional criticism of it. A lawyer cannot guarantee to achieve the outcome desired by the client.

[41] The Applicant has been unwilling to accept that he has no remedy in law. However, his position has been carefully considered by two lawyers and also in the High Court and Court of Appeal, all essentially coming to the same view.

[42] Having found no professional failure on the part of the Practitioner, it was unnecessary to consider whether the s 351 threshold was met.

### **Decision**

Pursuant to s 211(1) of the Lawyers and Conveyancers Act the Standards committee decision is confirmed.

**DATED** this 17<sup>th</sup> day of May 2013

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<sup>14</sup> As at n 8, at p 8.

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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:

Mr VN as the Applicant  
Mr AG as the Respondent  
The Canterbury-Westland Standards Committee  
The New Zealand Law Society