

**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 1

**BETWEEN**

**UI**  
Applicant

**AND**

**OQ**  
Respondent

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

**DECISION**

**Background**

[1] The Standards Committee declined to uphold a complaint made by UI against OQ (the Practitioner). UI (the Applicant) applied for a review of that decision.

[2] The background to the complaint is somewhat detailed, but may be summarised in the following way. The Practitioner had been engaged by the Applicant to address perceived failings on the part of the Applicant's previous lawyers. (The Standards Committee noted in its decision that the Applicant's complaints against the prior lawyers had not been upheld, a decision confirmed on review by this Office.)

[3] The Applicant's dissatisfaction with his previous lawyers concerned the sale of his rural property to the local District Council. The sale and purchase Agreement allowed the Applicant to remain in occupation for a year at a peppercorn rental, and this was later extended to three years on a more commercial basis. The local Council

eventually on-sold the farm, making a large profit as a result of the land having been re-zoned. When the Applicant learned of this (the timing was at the closing stages of the lease), he consulted the Practitioner to see what could be done.

[4] The two matters in respect of which the Applicant sought the Practitioner's advice were (a) whether the Council had acted improperly in securing a zoning plan change, thereby forcing the Applicant to sell his property, and (b) whether the previous law firm was in a position of conflict when they also acted for Mr C (a personal client of the lawyers) who had been involved in progressing the Council's zoning plan that led to the Applicant's sale of his land to the Council. Another law firm acted for the Council in that transaction, but Mr C had represented the Council in the purchase.

[5] The Applicant's files were transferred to the Practitioner. When the Practitioner perceived that there were resource management issues involved, he obtained the Applicant's agreement to seek an opinion from a resource management specialist (the RM Consultant). The RM Consultant was provided with the Applicant's files for this purpose, and he provided a one and a half page Report to the Practitioner based on that information.

[6] The entirety of the Report was not forwarded to the Applicant, but the Practitioner referred to it when expressing his opinion to the Applicant that there appeared to be no procedural irregularities in the Council's rezoning processes, and no actionable conflict of interest.

[7] When some time later the Applicant obtained a copy of the Report he noted that the RM Consultant referred to a conflict of interest existing as a result of Mr C representing the Council in the purchase transaction, while at the same time that Mr C was a client of the Applicant's lawyer in personal matters. This caused the Applicant to question the advice he had received from the Practitioner, particularly in relation to the advice that there was "no actionable conflict". He was hoping to find grounds to challenge the sale Agreement.

### **The Complaints**

[8] The complaints were that the Practitioner had withheld from the Applicant a copy of the RM Consultant's opinion, and that the Practitioner knew about, and should have acted on, the conflict of interest that existed in relation to his former lawyers who acted for him in the sale of his property. This latter complaint rested on the view expressed by the RM Consultant in his Report.

[9] Other elements of the complaints identified by the Standards Committee were that the Practitioner had misrepresented the contents of the RM Consultant's Report, had failed to recognise that the District Council was in breach of the Local Government Act 2002, and that it was overall alleged that the Practitioner had failed to protect the Applicant's interests, and had been negligent in advice that was given to him. The Committee noted that the narrative supplied by the Applicant was "littered with allegations of corruption, file doctoring, negligence, an ineptitude, complicity with the former solicitors and the District Council to 'ensure the theft of our farm'" by the Council.

[10] The Practitioner denied that he had been negligent, and responded in detail to the allegations. He informed the Committee that he had advised the Applicant that he (the Applicant) had received from the former lawyers, full and proper advice on his options, and there was no basis for any form of substantive proceeding against the previous lawyers for an alleged conflict of interest. The Practitioner noted that the essence of the advice he had given was ultimately reflected in a decision of the High Court, and subsequently the Court of Appeal.

[11] The Standards Committee summarised the issues, identified the complaint and set out the reasons for declining to uphold the complaint.

### **Review Application**

[12] There were several concerns expressed by the Applicant about the administrative processes of the Complaints Service in sending mail to the wrong address. He was also critical of the fact that a non-English term had been included (*ex gratia*) and that the Committee's paragraphs were not numbered. This is not a matter that can be addressed at review, but is included to raise awareness about concerns that are expressed in the course of the review.

[13] In seeking a review of the Standards Committee's decision, the Applicant made lengthy submissions, which largely amounted to a restatement of his initial complaints. A copy of the original complaint was also included. The review application included some criticisms of the Practitioner that had not been included in his original complaints.

[14] The Applicant was particularly critical of the Practitioner for not having disclosed to him the full RM Consultant's Report. The Consultant had referred in direct terms to the existence of a conflict of interest between the Applicant and Mr C that had not referred to by the advice of the Practitioner; the Applicant contended that the Practitioner had misrepresented the contents of the Report. The Applicant said that

had he received this Report (which he described as 'crucial'), it would have alerted him to the full extent of the relationship between Mr C and his former lawyers, which was the basis for the conflict of interest allegation. His criticism of the Practitioner's failure to have told him of the true and correct connection between Mr C and his previous lawyers was assumed to be either deceitful or grossly negligent. The main complaint is that the Practitioner had not forwarded to him the copy containing the full content of the RM Consultant's opinion.

[15] A review hearing was held, attended only by the Applicant. The Practitioner had the opportunity to attend, was not required to do so, and elected not to come.

## **Considerations**

### *Applicable professional standard*

[16] 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 Conveyancers Act 2006. 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.

[17] The s 12 definition of unsatisfactory conduct includes:<sup>1</sup>

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...

[18] 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

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<sup>1</sup> Lawyers and Conveyancers Act 2006 s 12.

Solicitors, 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.

[19] Misconduct was generally considered to be conduct:<sup>2</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 standards of "competent, ethical, and responsible practitioners".<sup>3</sup> For negligence to amount to a professional breach the standard found in ss 106 and 112 of the Law Practitioners Act must be breached. That standard is that:<sup>4</sup>

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.

### *Analysis*

[20] The essential allegation is that the Practitioner's failure to provide to the Applicant a copy of the RM Consultant's Report amounted to 'gross negligence'. The first question is does this failure reach the disciplinary threshold required by section 351 of the Act.

[21] The no-conflict rule is well established and prohibits a lawyer from acting for two (or more) parties whose interests' conflict, without their prior agreement. There may be occasions where the conflict, or potential, is so great as to render one lawyer unable to service two clients with opposing interests.

[22] The professional Rule governing conflict of interest is Rule 1.04 of the Rules of Professional Conduct for Barristers and Solicitors. This states:<sup>5</sup>

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<sup>2</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.

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

<sup>4</sup> Law Practitioners Act 1982 s 112(1)(c).

<sup>5</sup> Rules of Professional Conduct for Barristers and Solicitors, Rule 1.04.

A practitioner shall not act for more than one party in the same transaction or matter without the prior informed consent of both or all parties.

[23] The Commentary on the Rule explains that a conflict of interest does not exist between parties simply because the practitioner is acting for more than one of them. The Commentary also reminds lawyers that a potential conflict of interest is a situation which, without care, could well lead a practitioner into a breach of fiduciary duty. Put simply, the essence of the rule recognises that a lawyer cannot protect the interests of two clients whose interests are incompatible or conflict.

[24] I have considered the Applicant's case, which is heavily reliant on an opinion expressed by a RM Consultant, who had referred to the significant involvement of Mr C in a particular Council development. The Consultant had written, "[i]n this case [Mr C] was directly involved and directly negotiating on behalf of [the Council] against [the Applicant] and having direct correspondence and telephone conversations with [the Applicant's former lawyers]."<sup>6</sup>

[25] With due respect to the Consultant (who is not a lawyer), the above does not disclose a conflict of interest. The Applicant's difficulty is that his former lawyers were not acting for both the Applicant and Mr C "in the same transaction". The lawyers were not acting for Mr C at all in the transaction. The District Council was the other party to the transaction, and it was the client of another law firm.

[26] There is evidence of significant correspondence between the former lawyers and the Council's solicitors. Any direct contact by Mr C with the Applicant's former lawyers during the negotiations does not demonstrate a conflict. The fact that Mr C (a councillor) was in his private capacity a client (even a valuable client) of the Applicant's former lawyers was immaterial. In relation to services provided by the lawyers to the Applicant and to Mr C, there is no evidence that there was any overlap of their interests.

[27] Materially no part of the transaction between the Applicant and the Council could be considered as part of a transaction that also involved or benefitted Mr C personally. The Applicant was unable to identify any personal benefit to Mr C, and there is nothing on the file to show that there was any benefit. There was also evidence on the file that showed that the Applicant was aware at an early stage of the sale negotiations of Mr C's personal connection with the law firm acting for him (the Applicant) in the sale (a

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<sup>6</sup> Resource Management Consultant's Report to OQ, 14 July 2006 at [5].

matter raised by Mr C himself), and that the lawyers had discussed this factor with the Applicant who had raised no objection.

[28] It was apparent from information he provided that the Applicant perceived the Council and Mr C to be one and the same, or that he had fused the roles of the Council and Mr C. This much was clear from the Applicant's references to the offer to purchase as Mr C's offer, whereas in fact it was an offer made by the Council, albeit relayed by one of its councillors, Mr C.

[29] In his review application, the Applicant described Mr C's interests in terms of his personal/public position and bias as to the price that the Applicant should receive for his farm, describing as "insulting" the Council's offers to purchase his property. The evidence tells a different story. It shows that at the time that the sale was being negotiated, independent valuations had been obtained by both the Applicant and by the Council. The Applicant was unwilling to accept the valuation he had himself obtained as it was insufficient for him to purchase and establish a replacement property. There was also evidence of a proposal for a third valuer to be appointed to resolve the difference. However, further evidence showed that the Applicant had then instructed his lawyers to inform the Council that he would sell the property to the Council for \$800,000, an offer that was accepted by the Council. This was more than double the valuation that had been obtained by the Applicant himself, and well in excess of the valuation obtained by the Council. In this light the determination of the sale price appears to have been both transparent, and dictated by the Applicant himself. This is not a case where the Applicant's land was "devalued" as he claims, but rather that the price he asked for (and got) was in excess of the land value at the time.

[30] Having carefully examined all of the information provided I do not see any basis for the contention that the Applicant was unduly pressurised into selling his land at all, or selling at a reduced price. No part of this would support an allegation of conflict.

[31] The Applicant's additional grievance was that the Practitioner had not discovered any procedural irregularities on the part of the Council in the zoning process. I noted that the RM Consultant had reported no objections to the process. The evidence also showed that the Applicant was aware of the re-zoning initiatives of the Council at the time he was negotiating the sale. This was irrelevant to the land value at the time of the sale.

[32] I return to the nub of the Applicant's grievance which is that he did not get a full copy of the RM Consultant's Report. When asked what difference that would have

made, he said that he would then have become aware of the degree of association between Mr C and his (the Applicant's) former lawyers, which he alleged affected the previous lawyers' ability to protect his interests. The Applicant clings firmly to the RM Consultant's Report which expressed a decisive view about a conflict of interest. However, the Consultant was not a lawyer and such a statement in the Report could carry little weight when put under legal scrutiny. The Applicant is, however, unwilling to accept correct legal analysis offered by other lawyers notwithstanding that their views on this issue have been reflected in decisions of the High Court and the Court of Appeal, where the Applicant subsequently pursued self-represented proceedings.

[33] It may be argued that the Practitioner should have provided a copy of the Report to the Applicant, and with hindsight it would have been prudent had he done so. However, I can find nothing sinister in the Practitioner's failure to have sent him a copy of it. The Report was obtained on the initiative of the Practitioner in order to assist his better understanding of the resource management process, as he was endeavouring to see whether there was any procedural basis for challenging the Council. That it was obtained without cost to the Applicant is immaterial. The Practitioner had a duty to carefully consider all information under his review and to advise the Applicant on the basis of that information.

[34] I accept that the Practitioner did not give the Applicant a copy of the RM Consultant's Report and did not report to the Applicant the explicit comments of the Consultant. Although the Applicant considers the RM Consultant's Report to be a piece of vital evidence, it was not perceived useful to the Practitioner in addressing whether the Applicant had a legal case to challenge the sale transaction. I do not accept that the Practitioner misrepresented the content of the Report. The Practitioner provided a correct analysis to the Applicant of his legal position. He was not required to agree with a view expressed by the RM Consultant which he knew to be wrong, and under no obligation to convey to the Applicant a legal opinion by a non-lawyer that he perceived as incorrect.

[35] Moreover, the subsequent decisions of the High Court and the Court of Appeal were in accord with advice given by the Practitioner. There is nothing whatsoever to indicate that the failure to have provided a copy of the Report to the Applicant could have altered the final outcome.

[36] Even if the Practitioner could fairly be criticised for not disclosing the entire Report, there is no part of this omission that could under any circumstances reach the high threshold required for disciplinary proceedings against him under the former Law



Practitioners Act. This means that the threshold of s 351 could not be met, and the Standards Committee had no jurisdiction to consider the matter further.

[37] In my view the Standards Committee was correct in deciding that no further action was necessary.

[38] Finally I need to acknowledge that I have not addressed each and every aspect of the review application, but have instead focused on the significant aspects of the complaint which were material to the threshold question. Notwithstanding that, I have considered all of the Applicant's information, and given careful consideration to his grievances, which are understandable, but which in my view show the extent to which his views are misguided.

### **Decision**

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

**DATED** this 8<sup>th</sup> day of March 2013

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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:

UI as the Applicant  
OQ as the Respondent  
OP as a related person or entity within the requirement of s 213 of the Act.  
The Canterbury-Westland Standards Committee 1  
The New Zealand Law Society