LCRO 29 / 09

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	A determination of the Auckland Standards Committee
BETWEEN	**CLIENT T** of Paraparaumu
	Applicant
AND	**LAWYER G** of Auckland
	Respondent

DECISION

Introduction

[1] Client T complains that he instructed Lawyer G to undertake work on his behalf and that he failed to undertake work in accordance with those instructions which resulted in considerable delays, he failed to communicate with Client T and failed to keep him informed of the progress of work. As the matter progressed the complaint was extended to include a compliant that Lawyer G had either refused to act or had ceased acted in breach of his professional obligations.

[2] Underlying this complaint is the fact that Client T wished to take action in respect of a refusal by the Wellington District Law Society to issue to him a certificate of character in respect of an application to be admitted to the bar as a barrister and solicitor. He sought Lawyer G's assistance in this regard. There is some disagreement about whether the proposed work was an action against the Wellington District Law Society or an application for admission direct to the High Court. Between April 2008 and August 2008 the matter was not progressed substantially by Lawyer G. In August Lawyer G stated he would not be pursing the matter on Client T's behalf.

[3] Client T complained to the New Zealand Law Society on 10 September 2008. The Committee considered the complaint, a response by Lawyer G and the further

comments on that response made by Client T. On 11 February 2009 the Standards Committee resolved to take no further action in the exercise of its power under s 138(2) of the Lawyers and Conveyancers Act 2006. The Committee considered that Lawyer G had made his difficulties in representing Client T clear from the outset and that his explanation that he had been unable to act due to time constraints was acceptable. They considered that there was no evidence of misconduct by Lawyer G. Client T sought a review of that decision by an application to this office made on 16 March 2009. In that application he claimed that the Standards Committee was influenced by a conflict of interest, and that they had ignored arguments of Client T as to the credibility of Lawyer G.

[4] The parties have consented to this matter being considered without a formal hearing and therefore in accordance with s 206(2) of the Lawyers and Conveyancers Act this matter is being determined on the material made available to this office by the parties and the file of the Standards Committee.

Background

[5] Client T sought to bring an action relating to the failure of the Wellington District Law Society to issue him with a certificate of character which was required in a standard application for admission to the bar. He contacted Lawyer G in April 2008 with a view to instructing him on the basis that his fee would be met by a grant of legal aid. Lawyer G indicated that he would be unable to commence work on the matter for six weeks due to other commitments. Consequent on this exchange Client T wrote to Lawyer G on 9 April 2008 outlining the background to the matter and setting out his view of the proper course of action. Client T also sought to contact Lawyer G by telephone subsequent to sending that letter but was unable to do so.

[6] Lawyer G responded to these communications by a letter of 21 April reiterating that he was unable to deal with the matter immediately and stating that he was not in a position to deal with the matter until after May. He stated in that letter that this appeared to be unacceptable to Client T and therefore returned the 9 April letter to him.

[7] Client T responded to that letter by a letter of 25 April 2008 in which he stated that it was acceptable to him that the matter be deferred until May. In May Lawyer G states (in his letter to the Society of 12 October 2008) that he “started to make some enquiries” on Client T’s behalf. On July 1 2009 Lawyer G sent to Client T by email a

case relating to admission. In response Client T, by email of 1 July 2009 indicated that he wished to argue that the Wellington District Law Society had been in breach of its administrative law obligations in refusing the certificate. Client T states (in his letter of 10 September 2008) that at this time Lawyer G indicated he would "take on" Client T's case.

[8] Subsequent to that exchange there were a number of communications in early July between Client T and the Legal Services Agency regarding the grant of aid. There appears to have been some difficulties in that this was a new proceeding from one which had been earlier contemplated (and in respect of which a grant of aid had been made in favour of Client T's previous legal advisers). Lawyer G was copied in to that exchange. Lawyer G states (in the letter of 12 October 2008) that due to his concern about the way in which Client T wished the litigation to proceed he did not make any application to the Legal Services Agency to have the grant of aid transferred to him.

[9] Client T sent an email to Lawyer G on 12 July 2008 indicating that he was happy for Lawyer G to apply for legal aid "under whatever heading seems to you most appropriate". Client T sent further emails to Lawyer G regarding his views of the substance of the action on 13 July, and 16 July. At around this time Lawyer G states that a telephone conversation occurred in which he stated that he did not agree with Client T's approach to the litigation.

[10] On 19 July 2009 Client T emailed the Legal Services Agency and indicated that Lawyer G had advised that the first step was to seek information from the Wellington District Law Society. Lawyer G was copied in to that email. On the same day (19 July) Client T also emailed Lawyer G indicating his preference to bring a claim for "*Baigent*" damages against the Wellington District Law Society. That was followed by a more extensive email in the same vein from Client T to Lawyer G of 4 August 2008. This was followed by another substantial email from Client T regarding issues in the case as he saw them on 5 August 2008.

[11] Lawyer G says that in light of the way matters were progressing a telephone meeting with Client T was scheduled and held 18 August 2008. He says that at this time he stated to Client T that he was not prepared to progress that matters by taking the courses of action he proposed and he advised Client T to instruct another lawyer. This is broadly accepted by Client T (in his letter of 10 September 2008) in which he states that Lawyer G indicated he would not be proceeding with the case.

[12] On 20 August 2008 Client T wrote an email to the Legal Services Agency complaining about the service of Lawyer G.

[13] Lawyer G states that he failed to progress the matter for Client T due to the "uncertainties arising from Client T's constant correspondence of wanting to progress matters differently". Lawyer G states that he wanted to be clear that all he was committing to do at the outset was to contact the Wellington District Law Society. Lawyer G also notes that he had substantial other commitments which prevented him from progressing the matter expeditiously.

[14] Client T argues (in his response of 20 November 2008 to Lawyer G's reply to the complaint) that Lawyer G accepted the retainer and that the question is whether he was justified in terminating it. He refers to r 1.02 of the Rules of Professional Conduct for Barristers and Solicitors. I note that as of 1 August 2008 those rules were supplanted by the Rules of Conduct and Client Care for Lawyers. Client T expressed the view that Lawyer G was motivated to terminate the retainer due to the fact of Client T's notoriety as an opponent of "the Feminist ideology that dominates the legal profession in New Zealand" and the fact that in light of this Lawyer G's "career would not be well served".

[15] Client T in his letter to the Society of 20 November 2008 asserted that the response of Lawyer G was a "tissue of lies" and invited the Committee to make a credibility finding against Lawyer G. He argued that lawyers are inherently less credible than lay people. He complained to this office that the Standards Committee did not consider this argument. I have considered it. I do not think that there is any great factual discrepancy between the accounts of Client T and Lawyer G (though there is a considerable difference in emphasis and perspective). I do not consider it necessary to make any credibility findings against Lawyer G.

[16] I also observe that Client T in his application for review to this office stated that the Standards Committee preferred Lawyer G's version of events due to a conflict of interest. No details of any specific conflict of interest was provided in support of this allegation and none are apparent. I consider that this aspect of the application for review is not well founded.

Transitional matters

[17] This review concerns conduct which in part occurred prior to 1 August 2008. New legislation came into force in respect of the regulation of the legal profession on that date. Consequently the standards applicable differ between conduct which occurred before 1 August 2008, and conduct which occurred after that date. In general terms, issues of quality of service were not considered to be matters for the professional body prior to 1 August 2008. Matters of professional service since that date may be the basis for a regulatory response by the professional body.

[18] In the present case there are two aspects to the complaint. One part generally relates to communication and the quality of service provided by Lawyer G. The second part of the complaint relates to the failure of Lawyer G to continue with the work requested by Client T.

[19] In so far as the complaint relates to delay and poor service the substantial part of that conduct occurred prior to 1 August 2008 and falls to be dealt with under the standards applicable at that time. However, in this case the parties agree that the relationship was brought to an end on 18 August 2008. Accordingly that conduct falls to be decided under the Lawyers and Conveyancers Act 2006 and the rules made under that Act (including the Rules of Conduct and Client Care) which came into force on 1 August 2008.

[20] The Standards Committee, in its decision, stated that it "could not find any evidence of misconduct". The Committee did not refer to whether it was referring to the pre 1 August standard of misconduct, or that found in the Lawyers and Conveyancers Act. I note further that the Committee did not mention the standard of unsatisfactory conduct which applied to conduct after 1 August 2008. It is not clear from the decision of the Committee whether they turned their minds to the correct professional standards in this matter.

Communication and quality of service

[21] As noted, the complaint relating to delay and poor service falls to be dealt with under the standards applicable prior to 1 August 2008. The only relevant category of conduct in respect of which discipline could follow that of negligence or incompetence under s 106(3)(c) of the Law Practitioners Act 1982. In cases of negligence or incompetence discipline will follow only where 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." This is clearly a very high threshold.

[22] In considering this question I note that Lawyer G made clear throughout to Client T that he had difficulty in finding the necessary time to undertake this work. The delay itself can only really be said to run from the end of June when Client T states that Lawyer G read the letter of 9 April and agreed to take the case. The relationship came to an end on 18 August, so the entire period was around seven weeks. In that period some work was undertaken by Lawyer G.

[23] I acknowledge that the equivocation by Lawyer G between April and the end of June left Client T somewhat in limbo and is relevant to the way in which the subsequent delay is viewed. The other complaints by Client T are closely related to the delay. They include that Lawyer G did not do what he said he would do, failed to contact Client T, and failed to keep Client T informed. These all related to poor communication and lack of service and I consider them together.

[24] In all of the circumstances Lawyer G's conduct in this matter does not reach the threshold for disciplinary intervention. The situation would have been considerably improved had Lawyer G declined the retainer at the outset due to workload (or alternatively to have undertaken the matter with expedition). However this is a matter of a lapse in service that is not of sufficient gravity to trigger disciplinary sanctions under the applicable (pre 1 August 2008) standards.

Ending of relationship

[25] The relationship between Lawyer G and Client T ended on 18 August 2008 when Lawyer G made it clear that he would not act on the matter further and that Client T should seek other counsel. Lawyer G states that this occurred "due to the pressures of work I was experiencing". However it cannot be ignored that Lawyer G also had considerable difficulties in the approach of Client T to the proposed litigation. While Lawyer G states that the difference of approach was the reason why the matter had not been progressed, it also appears from the material available that it was a matter taken into account by Lawyer G when terminating the relationship.

[26] It is also the case that in late June or early July Lawyer G had started some work on the matter. Lawyer G had done some research (in locating the *XX case*) and

made some preliminary enquiries. Client T appears to have been under the impression that this matter was in Lawyer G's hands. While Lawyer G may have intended to equivocate as regards the formation of the lawyer-client relationship, the question of whether a retainer exists is to be determined objectively. The fact that Lawyer G had personal reservations as to whether he was going to take the case are relevant only in so far as they were objectively ascertainable. The question is whether a reasonable person observing the conduct of both Lawyer G and Client T would conclude that the parties intended lawyer-client relationship to subsist between them *Day v Mead* [1987] 2 NZLR 443, 458; *Blyth v Fladgate* [1891] 1 Ch 337. See also *Giffith v Evans* [1953] 1 WLR 1424, 1428 emphasising that some responsibility on making the position of whether a retainer exists or not lies properly with the lawyer.

[27] Although the matter of payment was yet to be sorted out, this was in part due to the fact that Lawyer G "deliberately refrained" from applying for the transfer of the grant of legal aid. It appears from the correspondence between Client T and the Legal Services Agency that Client T was of the view that the legal aid would be transferred. Client T had also authorised Lawyer G on 12 July 2008 to apply for legal aid "under whatever heading seems to you most appropriate". Had the Legal Services Agency refused to transfer the legal aid then it may have been that Client T would have been unable to pay Lawyer G's fee and the retainer could have been declined or terminated on that basis. However, the fact that Lawyer G had held off from making the application for the transfer of the grant of aid due to his unease with the nature of the work Client T wanted him to undertake does not affect the existence of the retainer.

[28] It appears that most of the activity on this matter occurred in July 2008. At that time substantive conversations regarding the proposed litigation had occurred between Client T and Lawyer G. Lawyer G undertook some limited research. Preliminary enquiries had been made by Lawyer G on Client T's behalf. Client T was providing substantive views regarding the progression of the matter. Client T and Lawyer G had been communicating in relation to this matter since April 2008 and Lawyer G did nothing (after his letter of 21 April 2008) until August 2008 to make clear that he did not consider himself to be acting for Client T in a professional capacity. On the basis of the conduct of the parties I conclude that a retainer existed.

[29] I have found that a retainer between Lawyer G and Client T existed. This was terminated by Lawyer G on 18 August. The reason given for terminating the retainer was unavailability due to other work commitments. Rule 4.2 of the Rules of Conduct

and Client Care provides that a lawyer must complete the services required by the client under the retainer. The rule further provides that the lawyer is excused from that obligation where the retainer is terminated for good cause. What amounts to good cause for termination of a retainer by a lawyer is described non-exhaustively by r 4.2.1. A lack of available time is not stated to be good cause for terminating a retainer. Importantly in rule 4.1 a lack of available time is stated to be a proper ground for declining to accept a retainer.

[30] Having accepted a retainer, the fact that other work commitments are making it difficult to attend to the matters undertaken is not a legitimate ground for terminating it. An exception may exist where other commitments make the completion of the work a logistical impossibility. In particular where hearing dates conflict it is permissible for a lawyer to terminate one of the retainers. This is not the case here. Accordingly Lawyer G was not entitled to terminate the retainer with Client T due to the existence of other commitments.

[31] I note also that the fact that Client T wanted to adopt a course of action which Lawyer G considered imprudent was not relevant to whether the retainer could be properly terminated. Rule 4.2.1(e) of the Rules of Conduct and Client Care explicitly "carves out" litigation from the rule that good cause to terminate a retainer exists where the client, adopts a course of action that the lawyer believes is imprudent.

[32] Client T may have views which are not widely shared. He may also have been a demanding client who "bombarded" Lawyer G with correspondence and telephone calls. Lawyer G may also have considered that the claim against the Wellington District Law Society proposed by Client T was without merit. However, none of these matters were relevant to the acceptance or continuation of the retainer. Rules 4.1.1 and 4.2.2 make it clear that neither the personal attributes of the prospective client nor the merits of the matter upon which the lawyer is consulted are proper grounds for refusing instructions or for terminating a retainer once instructions have been accepted.

[33] I have found that Lawyer G terminated the retainer between himself and Client T in breach of the Rules of Conduct and Client Care. I note, however, that Lawyer G appears to have been of the view that until a grant of legal aid was secured no retainer existed. In this sense, he appears to have been of the view that he was not terminating a retainer, but rather declining to enter into a retainer. Had that been the case the reason for declining to enter the retainer would have been justifiable. Accordingly I

conclude that this was an inadvertent breach of the rules. By section 12(c) of the Lawyers and Conveyancers Act 2006 a contravention of rules made under the Act (which includes the Rules of Conduct and Client Care) amounts to unsatisfactory conduct. I do not consider that the conduct of Lawyer G approaches the threshold of misconduct found in s 7 of the Act.

Remedy

[34] In his original complaint the remedy sought by Client T was that he would like Lawyer G to take his case. There is no power in the Lawyers and Conveyancers Act 2006 for this office or a Standards Committee to make such an order. There is no suggestion that Client T has suffered loss caused by the actions of Lawyer G, and as such I do not consider that any remedial orders are appropriate in this case.

Submissions on penalty and costs

[35] Pursuant to 211(1)(b) of the Lawyers and Conveyancers this office may exercise any of the powers that could be exercised by a Standards Committee in the proceedings in which the decision was made. Those powers are found in s 156 of the Lawyers and Conveyancers Act. In light of the fact that I have made a finding of unsatisfactory conduct it may be appropriate to impose a sanction on Lawyer G.

[36] This may also be a case in which it would be appropriate to make an order of costs against Lawyer G in favour of the New Zealand Law Society in respect of the conduct of the proceedings before this office. Such an order would be made in accordance with s 210(3) of the Lawyers and Conveyancers Act 2006.

[37] Lawyer G is invited to make written submissions on penalty and costs within 10 working days of the date of this decision.

Publication

[38] I am of the view that the publication of this decision may be of public interest and therefore appropriate. I note that I have a power to publish decisions pursuant to s 206(4) of the Lawyers and Conveyancers Act. Should either party wish to make submissions in relation to publication they should do so within 10 working days of the date of this decision.

Decision

[39] The application for review is upheld pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act. The decision of the Auckland Standards Committee is reversed.

DATED this 21st day of April 2009

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Duncan Webb

Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act this decision is to be provided to:

Client T as applicant
Lawyer G as respondent
The Auckland Standards Committee
The New Zealand Law Society