LCRO 42/2010

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	**THE TRUSTEES OF THE GRANGEMOUTH FAMILY TRUST** of North Island Applicant
AND	**MR WESTON AND MS PERTHSHIRE** of North Island Respondent

DECISION

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

The complaint

[1] The review application (and the original complaint) was made on behalf of the Applicant, a Family Trust, by its lawyer who is himself one of the Trustees. I shall refer to him throughout as the "Trustee Lawyer". The original complaint alleged that the Practitioners had breached two undertakings. The Standards Committee did not uphold the complaints. The review application identified specific parts of the Committee's decision with which the Applicants disagreed and these are the main focus of this review.

Background

[2] The Applicant and the Practitioner's clients own properties along a shared a right of way. The Practitioner's client owned two adjoining lots on the same certificate of title; they wanted to have separate titles issued for the lots. As part of the Council's consent they were to make available part of their land as a passing bay for those properties that used the right of way. This required an easement to be signed by the Applicant and on 11 August 2008 the Practitioners sent to two of the Applicant trustees the relevant easement documents, also mentioning that the easement provided a benefit to their property. At the foot of the letter the Practitioners wrote, *"Please note should you seek independent legal advice your solicitor's reasonable legal costs will be met by our clients*." The trustees took the documents to the Trustee Lawyer.

[3] On 27 August 2008 the Trustee Lawyer wrote to the Practitioners asking that their clients sign an "Agreement for Provision of Legal Services" that he had enclosed, and also requesting $500 to be sent on account of costs. He also sought the Practitioners' undertaking to register the easement instrument simultaneously with orders for new Certificates of Title and to forward copies of the Certificates of Title to the Trustee Practitioner. There were a few other questions that were put to the Practitioners.

[4] On 10 September 2008 the Practitioners replied, informing the Trustee Lawyer that they did not believe it was necessary for their clients to sign the Agreement for the Provision of Legal Services as their client did not become clients of the Trustee Lawyer as a result of advice to the Applicant. The Practitioners continued that, notwithstanding, their client undertook to meet the reasonable costs associated with execution of the easement instrument, and requested an estimate of costs in order to advise their client. They included part of a documentation that had been omitted from the earlier posting, and answered the questions that had been raised. In the same letter the Practitioners gave the following undertakings: "*We undertake to register the easement instrument simultaneously with Orders for New Certificates of Title* x *and* y *and forward copies of all affected titles for your clients information*."

[5] On 16 September 2008 the Trustee Lawyer responded, repeating his request that the Practitioners' clients sign the Agreement. He noted that the Practitioners had not themselves provided an undertaking as to his fees, and nor had such been requested, but he reiterated that on his understanding of the "new legislation" such an agreement needed to be signed by the Practitioners' clients. He made it clear that his major concern was payment of his fees, and added that the 5 hours he had invested so far had revealed '*serious matters'* that needed to be considered by the trustees.

[6] On 17 September 2008 the Practitioners informed the Trustee Lawyer, by email, that their clients were overseas and could not therefore sign such a letter. The Practitioners stated that they would provide their solicitor's undertaking if the Trustee Lawyer could advise an estimate of his final costs so their clients could be advised. The Practitioners questioned the costs already accrued (noted to be in the vicinity of $1900) which they considered were high in relation *"to perusal of the easement instrument*" The Practitioner continued *". . . as we understand it your queries were covered in our letter of 10 September 2008",* and added some further information which they understood may have been overlooked.

[7] The next correspondence on the file is a letter by the Practitioners dated 2 December 2008, noting that the easement instrument had been signed, and *"We further acknowledge your advice that you will release the document upon our undertaking to pay your costs. We understand from discussions with you that your fee is in the vicinity of $1900."* Further comment was made about the fees being considered to be very high for perusal and execution of a standard instrument of easement. The Practitioners noted that while the Trustee Lawyer had conducted an investigation and suggested various amendments, these were not, in their view, required. The letter concluded, *"Accordingly we ask that you forward an itemised invoice as soon as possible together with the signed easement. Following receipt of the itemised invoice and an order to progress the matter we undertake to pay your invoice but reserve the right to seek a costs revision exercise by the Law Society."*

[8] On 5 December 2008 the Trustee Lawyer prepared two postings to the Practitioners. The first was an 'interim tax invoice' itemising the work he had undertaken with a final figure (inclusive of GST and disbursements) standing at $2,738.55. The second stated,

> *"We refer to your letter of 2 December 2008 and, in view of it, withdraw our offer to act for your clients in this matter on the basis of the Agreement for Legal Services enclosed with our 27 August 2008 letter to you.*
>
> *Our instructions are that the trustees of the .... Family Trust will meet our costs in the matter.*
>
> *They will not authorise us to release the signed Easement instrument we hold or to disclose the result of our research and the information we have uncovered ..... regarding the right of way until a payment to our trust Account of $4,500 for the ..... Family Trust has been made."*

[9] On 10 December 2008 the Trustee Lawyer wrote again to the Practitioners, repeating his earlier letter, and further explaining that the Family Trust would meet his costs out of the $4,500 that they required the Practitioners' clients to pay into his Trust Account. He reiterated his earlier advice that the easement instrument would not be released until that payment had been made.

[10] Thereafter the Practitioners took steps to contact the surveyor and the local Council to see what alternative pathways were available by which their client could obtain Certificates of Title they sought. A means was found whereby the easement previously sought by Council was no longer required and the Practitioners' clients were able to achieve their objectives without the need for the easement from the Applicant.

[11] On 22 May 2009, having discovered the actions taken by the Practitioners, the Trustee Lawyer again wrote to the Practitioners, seeking proposals for compensation for the trust before the matter was referred to the Lawyers Complaints Service. This letter later became the subject of adverse comments by the Standards Committee.

[12] On 10 June 2009 the Practitioners replied, setting out what they understood had been the entire course of correspondence between them; essentially a reiteration of the correspondence to which I have referred above. With reference to the latest letter, the Practitioners expressed concern at what they saw as the bullying tactics employed by the Trust in relation to the easement instrument which had led their clients to seek an alternative pathway. The letter concluded with *" ... the easement instrument in question was never returned to enable registration as required and accordingly our clients undertaking to meet your reasonable costs associated with the same is of no effect. No offer of compensation will be forthcoming."*

[13] The Trustee Lawyer wrote again to the Practitioners on 1 July 2009 enclosing a copy of the Practitioners' 10 September 2008 letter, and alleging a breach of the undertaking to register the easement simultaneously with the orders for new certificates of title. He explained that this was a breach which would be referred to the Lawyers' Complaints Service.

[14] The Trustee Lawyer then lodged a complaint against the Practitioners on behalf of the Applicant. The complaints alleged that the Practitioners had failed to honour undertakings that they had given. After canvassing the background the Standards Committee concluded that the undertaking with regard to registration of the instruments could not crystallise in the circumstances that the Trustee Lawyer had not returned the instruments to the Practitioner; the obligations under the undertaking never came into

being and therefore there could be no breach of Rule 10.3.1 of the Rules of Conduct and Client Care.

[15] The Committee also noted that the Trustee Lawyer rejected the fees undertaking offered by the Practitioner. The complaints were not upheld.

Review Issues

[16] The parties were advised that I had formed the view that the review could properly be conducted on the papers and in the absence of the parties. This procedure is available pursuant to section 206 of the Lawyers and Conveyancers Act 2006 where it appears to the LCRO that a review can be adequately determined on the information made available and in the absence of the parties, their representatives and witnesses. However, the Applicant exercised the right to be personally heard and a review hearing took place on 29 April 2010, attended by the Trustee Lawyer and the other two trustees of the Family Trust. The Practitioners were not required to attend and the Applicant was informed that further enquiry would be made if it that appeared necessary as a result of the hearing.

[17] After the review hearing the Trustee Lawyer forwarded further submissions, and reminded me that it was the Practitioners undertakings that were in question and that he did not expect to be criticised as to his handling of the matter. While it is of course correct that the complaint involved allegations that the Practitioners had breached their undertakings, the submissions he presented at the review focused to some extent on the Standards Committee's comments about steps he had taken. In any event I have proceeded with this review on the basis of the review issues that were raised by the Trustee Lawyer.

Breach of undertaking to register documents/provide copies of CTs

[18] The main focus of the review application was the alleged failure to honour an undertaking to register the easement (and to provide copies of CTs) rather than the undertaking concerning costs. The Trustee Lawyer submitted that the Committee was wrong to have concluded that the Practitioners had not breached their undertakings on the basis that the undertaking had not crystallised because the easement documents had not been provided to them. He submitted that the easement instrument had been withheld only because the matter of his costs had not been resolved, and that the Applicant was entitled to withhold the documents until costs were paid. This submission was understood to be that the Practitioners' wrongful conduct was the

material cause for the easement documents not being forwarded, and thus not being available for registration.

[19] The Applicant considered the Committee was wrong to conclude that the Practitioner's undertaking was impliedly rejected, because the Applicant still held the Practitioners to the undertaking concerning registration of the documents. This suggests that the two undertakings were seen as separate and unrelated matters. Having considered all of the information I do not see how the complaint concerning the undertaking to register the document could be considered separately from that concerning costs since the failure to pay costs dominated much of the transaction and was ultimately the reason why the documents were not forwarded to the Practitioners. I noted that the major part of the Standards Committee decision focused on the complaint concerning the failure of undertaking in respect of costs.

[20] I have therefore considered whether any part of the Practitioners' conduct could reasonably be perceived as having caused or contributed to the circumstances that led to the Applicant withholding the signed easement documents. In doing so I have taken into account the Trustee Lawyer's challenges to the Committee's conclusions.

Agreement to provide services

[21] The Applicant submitted that the Standards Committee was in error in suggesting that the Trustee Lawyer had 'misdirected' himself in seeking a letter of engagement in terms of the Rules. The Trustee Lawyer saw the Agreement as having the purpose of guaranteeing payment of his fees, and it appears he could see no other way to ensure that payment would be made. He submitted that the request for the Practitioners' clients to sign the Agreement was not made pursuant to the Rules of Conduct and Client Care, but was a requirement of the Applicant for its co-operation. I reject this submission for the reason that his letter of 16 September 2008 informed the Practitioner that he believed the *'new legislation does require the Agreement for Provision of Legal Services we sent you to be signed by your client to enable to matter to progress.*' This could only have been a reference to the Rules. It is clear from the correspondence that the Practitioners had understood that the Agreement as one sought pursuant to the Rules, and explained to the Trustee Lawyer why it would be inappropriate for their client to sign such a document.

[22] Rule 3.4 of the Rules of Conduct and Client Care requires require lawyers to provide what has generally come to be called a "Letter of Engagement" to clients in advance of services to be provided, which outlines those services and estimated costs.

This sets out the contract between the lawyer and his or her client, setting out the scope of the retainer and the terms and conditions on which the service is to be provided.

[23] Having considered the Standards Committee comments and also the submissions of the Trustee Lawyer, it is my view that the Standards Committee correctly saw the Agreement as *'a letter of engagement'* pursuant to the Rules. I therefore agree with the Committee's conclusion that the Trustee Lawyer was mistaken in seeking such a letter from the Practitioners' clients, and its further observation that the Agreement would have resulted in the Practitioners client becoming the client of the Trustee Lawyer who could then not be perceived as providing independent legal advice.

Undertaking as to costs

[24] The evidence of the correspondence clearly shows that there were communication difficulties concerning payment of the Trustee Lawyer's fees. The fees estimate sought by the Practitioners was not forthcoming, and their concerns that the Trustee Lawyer appeared to be undertaking work that had not been requested were not heeded. It appears that the Trustee Lawyer considered the investigations were necessary if he was to advise the Applicant, but the nature and extent of that work was not communicated to the Practitioners who remained concerned about the uncertainty surrounding the Trustee Lawyer's fees.

[25] When the Trustee Lawyer was unwilling to accept the undertaking of the Practitioner's clients to pay his fees, and the Practitioners were unwilling (or unable) to have their client sign the letter of engagement, the Practitioners then gave their own undertaking to pay the Trustee lawyer's reasonable fees, reserving their right to a costs revision. The Practitioners undertaking was rejected by the Trustee Lawyer. The Standards Committee, however, concluded that the Practitioner's undertaking was appropriate and reasonable in the circumstances.

[26] The Trustee Lawyer considered the Committee was mistaken in concluding that the costs could be determined by an independent body. He submitted that any payment sought by the Applicant was solely a matter for the Applicant which was entitled to place a value on agreeing to sign the easement instruments which conferred a considerable financial benefit on the Practitioners' clients. It was explained that the $4,500 payment was a "consideration" for the Trust's co-operation. The Applicant's view was that the Standards Committee was wrong in finding that a landowner is

obliged to sign a document presented to that land owner affecting that landowner's title at a cost determined by an independent body. The Applicant challenged the Committee's observation that a fee in the vicinity of $500-700 was normal for such advice.

[27] It seemed to me that the Applicant may have confused legal fees on the one hand with a consideration sought on the other. The Applicant is correct to say that a monetary value sought for its cooperation is a matter that falls outside of the review of a Standards Committee, but is mistaken if it considers that lawyers' fees cannot be made the subject of a cost revision. In my view the Standards Committee correctly observed that the Practitioners undertaking was reasonable in all of the circumstances, as was its observation that the Trustee Lawyer's rejection of the undertaking meant that the Practitioners were not bound by it.

[28] Nevertheless, the Applicant's complaint implied that the Practitioners (or their clients) were obliged, by virtue of the Practitioner's 10 September 2008 undertaking, to make such payment as was sought by the Applicant. I have therefore considered whether there was any wrongful action on the part of the Practitioners that thwarted the possibility of carrying out the undertaking. This requires consideration of whether the refusal of the Practitioners (or their clients) to pay the $4,500 was wrongful such as to make the Practitioners accountable for the easement documents not being forwarded to them for registration in accordance with their undertaking.

[29] The demand for payment of $4,500 clearly did not relate to the Trustee Lawyer's fees which were advised would be met by the Applicant. I noted that in none of the prior exchanges between the Trustee Lawyer and the Practitioners was any mention made of consideration to be paid to the Applicant for signing the easement instrument, and that discussion of costs was confined to the Trustee Lawyer's professional fees. The undertaking to register the easement was given in the context and circumstances set out in the Practitioners' letter, and which in turn referred back to the prior communications between the parties. The subsequent payment sought by the Applicant bore no relationship to those circumstances and I can see no basis upon which the Practitioners (or their clients) could have been compelled to pay it. When the Trustee Lawyer then made it abundantly clear that the easement instrument would not be released to the Practitioners unless that payment was made, the Practitioners were entitled to proceed on the basis that they were no longer bound by the undertaking to register the instrument.

Adverse Comments by the Standards Committee

[30] The Trustee Lawyer objected to the Standards Committee's comments concerning his 22nd May letter which the Committee perceived as an ultimatum. The Trustee Lawyer had written:

> *"Before the Trustees refer to the Lawyers Complaints Services* [sic] *the breach of the undertaking contained in your 10 September 2008 letter to us ..... what proposals do you have for compensating the trustees for the loss they have suffered as a result of relying on your undertakings."*

The Committee noted that such ultimatums are at risk of themselves being in breach of the Rules and potentially the criminal law.

[31] The Trustee Lawyer submitted that the Committee was wrong to make such a finding, and referred to the actions taken behind his back by the Practitioners, their client's surveyor, and the local district council, adding that no payment had been made in respect of his fees, and that the Applicant had been kept in the dark for almost six months. He added that notwithstanding these "elements of subterfuge" and "bad faith" he saw his letter of 22 May 2009 as giving an opportunity to the Practitioners to remedy the matter and so to avoid the need for the matter to be referred to the Lawyers Complaint Service.

[32] In my view the 22 May letter was clearly intended as an ultimatum to the Practitioners that a complaint would follow if compensation was not made and the Committee was entitled to have taken this view.

[33] For all of the above reasons, the application for review is declined.

Decision

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

DATED this 27th day of May 2010

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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:

The Trustees of the Grangemouth Family Trust as the Applicant
Mr Weston and Ms Perthshire as the Respondents
The Standards Committee
The New Zealand Law Society