

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 2

BETWEEN

MR BANBURY
of North Island
Applicant

AND

MR SELKIRK
of North Island
Practitioner

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

DECISION

The complaint

[1] In October 2009 a complaint was filed by Mr XX on behalf of Mr Banbury. Throughout I shall refer to Mr Banbury as “the Applicant” since he is the person cited referred to as the complainant. The complaint was against Mr Selkirk (the Practitioner) and also cited his law firm. The complaint related to an application to WINZ for a rest home subsidy for the Applicant’s wife. He alleged that certain errors made by lawyers in the Practitioner’s law firm in 2004, involving the financial affairs of him and his wife, led to delays by WINZ in approving a rest home subsidy for his wife in 2008. He incurred additional rest home costs as a result of the WINZ delay in approving the subsidy. He attributed these costs to the errors by the Practitioner’s law firm back in 2004.

[2] The Standards Committee declined to uphold the complaint. The review application essentially reiterated much of the substantive complaint that had been originally raised, but these complaints were particularised as being against the

Practitioner's firm, with the Applicant clarifying that his complaint "*was never particularly about* [the Practitioner].

[3] A review hearing was held on 29 April 2009 and attended by the Applicant, Mr XX, and the Practitioner.

Background

[4] In 2004 another practitioner who was then involved in the law firm had undertaken work for the Applicant and his wife in relation to a Family Trust. When the trust property was transferred to a new trust there had been no continuation of the gifting programme to reduce their assets. When, four years later, a means test showed the assets to be above the allowable threshold, WINZ declined an application for a rest home subsidy for the Applicant's wife who by then required rest home care.

[5] Offers have since been made by the Practitioner's firm to compensate the Applicant but these have been rejected.

Considerations

[6] The lawyer who was responsible for the file in 2004 is no longer with the law firm. The Applicant clarified that his complaint was not against the Practitioner personally (who had himself not been involved in any of these matters) but rather that his complaint was against the law firm. No complaint has been made against the lawyer who was originally involved in providing the legal services, who is understood to have since retired.

[7] The Practitioner's law firm is not incorporated. At the review, it was explained to the Applicant that a complaint could only be made against a Practitioner personally or an incorporated law firm. The category of persons against whom a complaint may be made are lawyers or former lawyers, an incorporated law firm or former incorporated law firm, or a person who is not a practitioner but who is an employee or a former employee of a practitioner or an incorporated firm (section 132 of the Lawyers and Conveyancers Act 2006).

[8] The Practitioner denied any wrong-doing, and the Applicant agreed that the Practitioner himself had done nothing wrong. In these circumstances it appeared that the Standards Committee was correct in declining to uphold the complaint against the Practitioner.

[9] The Applicant was concerned and very upset by the fact that despite a delay of six months, he had not been informed (by the Standards Committee) from the outset that the complaint against the firm could not be progressed in a disciplinary forum. The Applicant considered that he had now wasted six months in having this matter explored by a Standards Committee when clearly it was outside the Committee's jurisdiction. He was of the view that he had made it clear to the Standards Committee that the complaint was against the law firm and not the Practitioner personally, and that the Standards Committee ought to have informed him at the start that the law firm was not incorporated and no such complaint could therefore be laid.

[10] I noted that in his initial reply to the Standards Committee, the Practitioner had informed the Committee that the Applicant's complaint involved a civil dispute and that it was more appropriate that it should be resolved in a forum for dealing with civil disputes, rather than pursuing a solution in a disciplinary forum. The Committee's decision did not comment on this aspect of the Practitioner's response, simply concluding that there was no unprofessional conduct on the part of the Practitioner.

[11] In examining the Applicant's initial complaint to the Standards Committee I noted that the Applicant had in fact cited the Practitioner as the lawyer about whom he wished to complain. Notwithstanding, the bulk of the complaint referred to the actions of the firm rather than the Practitioner. In any event, it appears that the Standards Committee did not address the distinction at the start and processed the investigation on the basis that the complaint was made against the Practitioner personally.

[12] The Practitioner's response to the complaint set out the background matters and remedial offers that had been made by the firm. A copy of this letter was sent to the Applicant and I noted that his comment on that letter (29 October 2009 to the Standards Committee) indicated that his complaint was not confined to the law firm but referred throughout to the Practitioner. I make this observation for the reason that it was not obviously apparent that the complaint was only against the firm and not against the Practitioner. However, I also noted that the Standards Committee letter to him of 6 November 2009 referred to his allegation against the firm, and further explained that the conduct complained of had occurred prior to the commencement of the current Lawyers and Conveyancers Act 2006 which would have an impact on the matter of its jurisdiction. No mention was made to the fact that the law firm was not a proper respondent in the circumstances.

[13] It would be fair to say that the correspondence exchanged between the Applicant and the Law Society referred interchangeably to the Practitioner and to the firm. The

extent of the Practitioner's involvement was much later when he (or his legal secretary) assisted the Applicant to fill in a form for the WINZ subsidy. I note that it would have been helpful had the Committee made it clear to the Applicant that no complaint could be advanced against an unincorporated law firm and that it could consider only the complaint against the Practitioner. Notwithstanding this, it could not be said that the Applicant's information made it very clear to the Standards Committee that he was not pursuing a complaint against the Practitioner and it cannot therefore be surprising that he was the subject of the Committee's determination.

[14] The fact that the Applicant's law grievance is against the firm rather than the Practitioner was made more explicit at the Review Hearing. The Applicant conceded that the main omissions were caused by another lawyer who had previously practised at the firm and who was no longer there. The Applicants further conceded that his main grievance was not directed at the Practitioner but rather the firm.

[15] In the circumstances I informed both the Applicant and the Practitioner, at the Review Hearing, that the Standards Committee decision must be accepted as correct given that there was uniform agreement that there had been no professional wrongdoing by the Practitioner. It was further agreed between the parties that the dispute was indeed a civil one and that it ought to be pursued via an appropriate forum dealing with civil disputes. For the above reasons, the review application is declined.

Decision

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

DATED this 2nd day of June 2010

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 Banbury as the Applicant
Mr Selkirk as the Respondent
YY as an interested party
The Auckland Standards Committee 2
The New Zealand Law Society