

**CONCERNING**

a review of a decision of X  
Standards Committee 356  
pursuant to section 97 of the Law  
Practitioners' act 1982 and  
section 356 of the Lawyers and  
Conveyancers Act 2006

**BETWEEN**

**AB**

Applicant

**AND**

**ZY**

of X

Respondent

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

**DECISION**

**Background**

- [1] The Applicant is the son of Mr RH (Mr H), who committed suicide in June 2004.
- [2] Mr H had a history of bipolar illness and disability.
- [3] The Respondent was a lawyer in private practice, and also a District Inspector for Mental Health (DIMH) appointed by the Ministry of Health (MoH).
- [4] In June 2001, as the DIMH, the Respondent had requested a review of Mr H under section 16 of the Mental Health (Compulsory Assessment and Treatment) Act 1992.
- [5] As noted below, the Respondent had known Mr H for some time prior to that, and acted for him and his partner (Ms M) in conveyancing transactions.
- [6] In 1998, the Respondent acted for Ms M in connection with a property agreement, whereby it was agreed that a property at O owned by Mr H and Ms M,

would be transferred to Ms M, but with Mr H remaining liable in respect of borrowings secured against that property.

[7] Mr H was represented by another solicitor, but there is some uncertainty as to the extent of that representation, as recorded below.

[8] Subsequently, the terms of the agreement were called into question, and a dispute arose between Mr H and Ms M as to the extent of Mr H's equity in the property. This dispute remained unresolved at the time of Mr H's death.

[9] At the time of his death, his claim against the property was protected by a caveat.

[10] The Respondent acted for Ms M in the dispute with Mr H while he was alive, and subsequently continued to act on her behalf after his death.

[11] The Estate eventually abandoned its claim for reasons which are not evident from the file.

### **History of complaint**

[12] On 8 March 2006, the Applicant lodged a complaint with both the X District Law Society (XDLS) and the MoH.

[13] The core of the complaint related to the Respondent's role in acting for Ms M in connection with the property agreement and its subsequent defence, both during Mr H's lifetime and after his death, whilst at the same time being involved in matters relating to Mr H's mental health as the DIMH and in view of the fact that the Respondent had acted for Mr H (although the Respondent denies this) and had personal contact with him over the years.

[14] In the letter of complaint, the Applicant posed a number of questions designed to highlight the issues being raised by him.

[15] The initial response from the Law Society was that it was unable to assist the Applicant, instead, advising him that he should seek legal advice in respect of the matters he had raised.

[16] The Applicant referred the matter at that stage to the Lay Observer. The Lay Observer returned the file to the Law Society for review and for a decision to be made on the complaint.

[17] The Law Society's investigating solicitor had concerns about processing the investigation while the MoH inquiry was under way, as, in his view, the two inquiries were in respect of the same matter and the Respondent was thereby being subjected to double jeopardy.

[18] In August 2007, however, the investigating solicitor concluded that MoH concerns were separate from any concerns relating to legal professional standards or ethics and that the investigation should proceed.

[19] On 4 August 2007, he set out his views of the conflict of interest and the other matters alleged by the Applicant in some detail.

[20] The investigating solicitor saw the complaint as one essentially arising out of the fact that the Applicant disagreed with the advice provided by the Respondent. This was not a matter with which the disciplinary processes should be concerned.

[21] In an email of 28 August 2007, the Applicant referred to an earlier email which had not been received by the Law Society. In that email, the Applicant advised that the Respondent's appointment as a DIMH had been terminated. A copy of the MoH letter dated 20 August 2007 in this regard, was subsequently provided. The letter was brief and contained no reasons.

[22] On 4 September 2007, the Law Society's investigating solicitor advised the Applicant that his firm view was that the complaint could not be substantiated. With regard to the conflict of interest he advised that he considered the interests of Mr H and Ms M were identical at the time any legal matters were completed by them jointly.

[23] At that time also, the investigating solicitor advised that the Respondent was going to apply for a judicial review of the MoH decision, and proposed that the matter be left until the outcome of that Review was known.

[24] The complaint then lay dormant until reactivated by the Applicant in February 2009, when he enquired as to whether there had been any progress.

[25] It was then ascertained that the Respondent had not applied for a judicial review of the MoH decision and that the Respondent was no longer in practice.

[26] The matter was then considered by the Standards Committee and on 2 March 2010, the Standards Committee issued its decision not to take any further action. It recorded that it considered that there was no unethical or unprofessional behaviour

on the Respondent's part and that her advice to Mr H was in accordance with the usual practice at the time to protect his assets should he need to go into care.

[27] The Committee went on to state that even if the advice given by the Respondent was deemed to be erroneous, the mere fact that her opinion and advice was not correct did not in itself amount to a professional breach.

[28] The Committee also considered that there was no conflict of interest as the interests of Mr H and Mr M were identical.

[29] The matter now comes before the Legal Complaints Review Officer (LCRO) pursuant to section 355 of the Lawyers and Conveyancers Act 2006 (the Act).

### **The role of the LCRO**

[30] By virtue of the reform of the law relating to legal practitioners, the office of Lay Observers ceased to exist on 1 February 2009. Under section 355 of the Act, any inquiries by the Lay Observer which were incomplete at that time, are to be completed by the LCRO.

[31] In completing the inquiry, the LCRO has the duties and powers which the Lay Observer would have had under the Law Practitioners Act 1982.

[32] This inquiry is therefore undertaken on that basis, and in conducting the review I effectively stand in the shoes of the Lay Observer.

[33] The role of the Lay Observer is to consider any allegation by a member of the public "concerning any District Law Society's treatment of a complaint about the conduct of a practitioner" pursuant to section 97(1) of the Law Practitioners Act 1982.

[34] The reform of the law relating to legal practitioners also disestablished the Complaints Committees of the District Law Societies on the same date i.e 1 February 2009, and pursuant to section 356 of the Act, the New Zealand Law Society is required to appoint a Lawyers' Standards Committee to carry out the duties and exercise the powers that a Complaints Committee appointed pursuant to section 100 of the Law Practitioners Act 1982 would have had under that Act.

[35] Consequently, the Standards Committee of the X Branch of the New Zealand Law Society was established as a section 356 Committee and the primary focus of this inquiry is therefore on whether the Applicant's complaint has been properly considered by that Committee, and following such an inquiry, to provide a written

report to the New Zealand Law Society which may contain such recommendations as I consider appropriate. This report is then to be considered by the Complaints Service of the New Zealand Law Society and any actions taken by it reported back to me.

[36] For the sake of completeness, it is important to observe that any such action is at the discretion of the Complaints Service.

[37] The following paragraphs represent my report.

### **Conflict of interest**

[38] The Standards Committee considered that the Respondent did not have a conflict of interest, as the interests of Mr H and Ms M were identical at the time any legal matters were completed for them jointly.

[39] It is worth including in full here, the content of the agenda note considered by the Committee prepared by the investigating solicitor.

[40] In a summary of the position, the investigating solicitor notes as follows:-

“Briefly, the complaint is that [the Applicant] considers his father received bad advice, and that [the Respondent] did not act in the best interests of his father and had a conflict of interest in acting for him in a private capacity when she had a public responsibility as a District Inspector for Mental Health in matters relating to his father’s estate. The position is that [the Respondent] advised Mr H to transfer his residential property on [W] to his partner. This was because he had mental health problems and might have to go into care. I have no doubt the advice [the Respondent] gave at that time was in accordance with the usual advice to try and minimise the assets of the person concerned so that they did not all disappear in hospital fees if a person could no longer live alone”.

[41] It is worth noting that the investigating solicitor considers that the Respondent did in fact provide advice to Mr H with regard to the transfer of the W property to Ms M. This is in contrast with the Respondent’s position that she has never acted for Mr H.

[42] It is also relevant to note that the advice provided by the Respondent was considered by the investigating solicitor and the Committee to be in accordance with the usual advice given at that time. However, the Committee did not seek an alternative opinion from other practitioners and I have some doubt as to whether or not that view is correct. The Applicant himself has pointed to the provisions of the Protection of Personal and Property Rights Act 1988 which he considers could have been utilised. This may not have achieved the objective of divesting Mr H of his

assets. However, there was the option to consider whether a Trust or other entity could have been established to hold Mr H's interest in the property.

[43] Nevertheless, I acknowledge that the correctness or otherwise of the advice is not something which can be the subject of disciplinary action, unless such advice was so negligent as to cause the Committee to form the view that the Respondent was not a fit and proper person to practise as a lawyer. I must make it clear, that my comments are intended to go no further than the observations made above.

[44] I do not consider the summary of the conflict of interest has been expressed fully, and that consequently the Committee's consideration of the conflict of interest issue was limited. In the following paragraphs numbered [45] to [50] I set out matters that I consider ought to have been considered by the Committee in this regard.

### **The Respondent as District Inspector for Mental Health**

[45] The Respondent was the DIMH assigned to Mr H. In his letter of 20 December 2006, page 3, paragraph 4, the Applicant makes these comments in respect of the Respondent's position as the DIMH. "[The Respondent] wielded a great deal of influence over my father because of her role as a District Inspector. My father was only afraid of one thing in life, and that was being committed to a psychiatric institution, which is something [the Respondent] as a District Inspector had the power to make judgments about on his behalf. This put him in an extremely vulnerable position with regard to any discussion about anything else with [the Respondent]."

[46] I do not have sufficient knowledge of the position of the DIMH or whether or not there were or are any protocols or directions given by the Ministry concerning an inspector dealing in any other capacity with persons in respect of whom they have been appointed as an inspector.

[47] Given the statements made however by the Applicant, as set out in paragraph [45] above, it does follow that a solicitor who is also acting as the DIMH, would have an undue influence over a person in respect of whom they had been appointed as an inspector. Consequently, it does seem relevant for the Committee to consider whether it was appropriate for the Respondent to act in respect of any legal matters for Mr H, particularly where the client was being advised to divest himself of his property.

[48] In addition, it needs to be considered whether it was appropriate for the Respondent to act for Ms M in connection with the property agreement given the

Respondent's knowledge of the mental health of Mr H and also her knowledge in general about his affairs.

[49] Another matter in connection with the Respondent's position as the DIMH which appears to be highly irregular, is the handwritten statement by her at the foot of a letter to Mr G, who appeared to be acting for Mr H at that time, to the effect that Mr H lacked the capacity to make decisions with regard to a proposed purchase, and that she would put that information in an affidavit. It does not seem to me that that is information which she would be at liberty to disclose.

[50] The MoH inquiry may cast further light on these matters and the Committee will need to consider what approaches should be made to the MoH in this regard. In passing, I would note that it does seem somewhat odd that the XDLS investigation should have been delayed pending the outcome of the MoH inquiry, but that once that inquiry was completed, no attempt was made to ascertain the reasons for the Respondent's employment as the DIMH being terminated.

#### **Did the Respondent act for Mr H?**

[51] The Respondent has asserted that she never acted for the deceased, and that consequently no conflict of interest could arise. It is quite clear that the Respondent had acted for Mr H jointly with Ms M in respect of the sale of a property in E (refer Agreement for Sale and Purchase dated 19 December 1997). Further inquiries by the Committee would ascertain what other transactions she had acted for them jointly on. For example, whether she had acted for them both in connection with the purchase of the O property in 1995.

[52] Whether or not she had formally acted for Mr H, there are certainly indications that Mr H considered that she was his lawyer. In this regard, I note the statement made by Mr G in a letter to the Respondent that "in the knowledge that you have previously acted for our client we would ask that you consider whether you are using your knowledge of our client (which is privileged) to our client's disadvantage and to your client's advantage". The Committee's file contains only the second page of that letter on which that statement is made but it does appear that Mr G was at that time acting on behalf of Mr H with regard to the proposed W transaction.

[53] Another indicator that Mr H considered the Respondent to be his lawyer can be found in the file note dated 2 February 2002 from another law firm (W W) whom Mr H consulted. In that file note the solicitor notes that there are "problems with [the

Respondent] acting because she has acted for both of them, [i.e. Mr H and Ms M] and that [Mr H] had sent a lot of work to her over the years”.

[54] As noted above, the investigating solicitor also considers that the Respondent provided advice to Mr H in connection with the proposed property transaction. Notwithstanding that Mr G appeared to be acting at some stage, there is evidence of a subsequent dispute with Mr G and in that regard Mr H states that “the bills relate to matrimonial matters between April and November 1998, when in fact I had no contact with him with regard to matrimonial matters during that period.” This statement was made in a draft letter of complaint to XDLS dated 18 June 1999 with which the Respondent assisted Mr H.

[55] In addition to the matters referred to above, the Respondent and Mr H maintained ongoing contact where Mr H would often call in to see the Respondent at her office, and in the course of his employment as a real estate agent referred a number of clients to her.

[56] The outcome of all of this is that Mr H clearly considered that the Respondent was his lawyer and the Respondent was acquainted with a considerable amount of personal information about Mr H.

[57] In her letter to the Law Society dated 14 August 2006, the Respondent states that Mr H had consented to her continuing to act for his former partner. If, as the Respondent asserts to the Law Society, she had not previously acted for Mr H, why was any consent required? In addition, was Mr H capable of giving consent in any event given the statements made by the Respondent in her handwritten note to Mr G?

[58] The Applicant’s view of the conflict of interest issues are set out in his email of 4 August 2007.

[59] In summary, I do not consider that the Committee has identified or investigated the full extent of the Respondent’s conflicted position with regard to Mr H.

### **The investigation**

[60] The only formal response from the Respondent to the matters raised by the Applicant, is the response contained in her letter dated 14 August 2006. This was a response with regard to the initial letter of complaint only. This response itself was unsatisfactory, as it did not properly address the matters raised by the Applicant in his letter of complaint dated 8 March 2006.



[61] In addition, none of the subsequent correspondence from the Applicant in which he both extended and amplified the matters about which he was complaining, have been referred to the Respondent for her consideration and response. Consequently, the Committee has not had the benefit of considering that additional correspondence and/or the Respondent's replies thereto. By way of example only, I here refer to the following:-

- Letter from Applicant dated 20.12.06
- Emails from the Applicant dated 4.08.07, 8.08.07, 7.09.07, 9.05.09 and 2.11.09.

This list of correspondence is not intended to be exhaustive, and it is necessary for a thorough review of the file to be made to ascertain whether there are further items of correspondence which should be referred to in connection with this.

[62] Conversely, there has been no investigation into some of the matters asserted by the Respondent. I refer for example to the reasons for the Estate determining to cease its claims in respect of the W property. On the face of it, the comment made by the investigating solicitor that, "it appears your father really had no interest in the W property" appears to have been made on the strength of the discussions with the Respondent. The Applicant clearly takes issue with that statement and there would appear to be good reason for that. However, no further investigation into this has been made by the Committee.

[63] Overall, the extent of the investigation seems to have been truncated due to the deferral of the investigation pending the outcome of the MoH inquiry, and then subsequently by the anticipated application for a judicial review of that decision, which did not in fact eventuate. In addition, the knowledge that the Respondent was no longer in practice also seems to have had some bearing on the investigation by the Committee.

[64] In summary therefore, it is my recommendation that this file should be looked at afresh.

### **Recommendations**

[65] I have made recommendations throughout this report. To summarise they are as follows:

1. The file should be reviewed de novo. All correspondence in which the Applicant raises further issues, or expands on issues already raised, should be put to the Respondent for comment.
2. Assertions made by the Respondent and the views expressed by the investigating solicitor need to be reconsidered.
3. The potentially conflicted position of the Respondent should be considered in the light of paragraphs [38] to [50] above.
4. The Committee should consider whether to investigate further the outcome of the MoH decision.

**DATED** this 27<sup>th</sup> day of January 2010

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Owen Vaughan  
**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:

AB as the Applicant  
ZY as the Respondent  
The X Standards Committee 356  
The New Zealand Law Society