LCRO 70/2011

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [North Island] Standards Committee [X]
BETWEEN	**RS** Applicant
AND	**NC** Respondent

DECISION

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

Background

[1] Mr RS (the Applicant) and his brother Mr AS and other members of their whānau had filed a claim in the Waitangi Tribunal claiming rights to land in the [District X] area of the [Area A]. They had forwarded a Statement of Claim to the Tribunal in mid 2008, but the claim was not able to be registered until more information was provided. The Tribunal later informed the whānau that it no longer had jurisdiction to enquire into historical claims. Copies of letters (on the Standards Committee file) from the Waitangi Tribunal between August 2008 and June 2010 (written predominantly to Mr AS) reflected the nature of enquires that had been made by Mr AS and/or the Applicant.

[2] The Tribunal's request for more information in relation to their claim led the whānau to approach the Practitioner in around December 2008. The Practitioner advised from the

outset that there were difficulties with the claim because the [Iwi X] settlement was full and final to claims in the [Area A].

[3] In February 2009 of the following year an Agreement for Legal Services with the Practitioner's firm (Company B) was signed by the Applicant on behalf of the whānau and the following day a meeting took place with members of the whānau at which time the Practitioner was instructed to enquire about whether their claim could be progressed and also to investigate possible claims in other areas.

[4] By letter in December 2009 the Waitangi Tribunal confirmed that it would not register the claim to certain [District X] land because the Waitangi Tribunal no longer had jurisdiction to determine claims that were settled under the [Iwi X] Settlement. The Tribunal also asked for more information concerning other claims perceived by the whānau, in particular arising from a claim of an affiliation to [Tūpuna].

[5] No claim was ever accepted for filing by the Waitangi Tribunal, and consequently no Legal Aid funding could be obtained. This was because Legal Aid funding depended on a claim being accepted for filing and given a Wai number. Eventually the relationship between the Practitioner and the Applicant deteriorated and when, in July 2010, the Practitioner eventually sought payment of his fees, the Applicant filed a number of complaints against the Practitioner, which included an assertion that he should not be personally liable for the fees as the Practitioner had always known that they expected their fees to be met by Legal Aid. The Applicant further contended that the Practitioner had not undertaken sufficient enquiry into their claims and had not applied for Legal Aid. The allegations against the Practitioner, were that he:

- Acted incompetently.
- Did not follow instructions.
- Failed to protect the interests of the RS/AS whānau.
- Failed to adequately inform the RS/AS whānau.
- Did not adequately keep the RS/AS whānau aware of legal costs.
- The costs should go to/be paid by Legal Aid.

[6] The Practitioner's response of 25 November 2010 referred to an earlier response (which was not on the Standards Committee file, dated 25 August 2010), but addressed the various elements of the complaint as identified by the Standards Committee. He provided a full explanation about his contact with the Applicant, Mr AS and the whānau, and informed the Standards Committee about the work he had been asked to perform. The Practitioner claims to have given advice in relation to the concerns of the whānau that it had been excluded from the [Iwi X] settlements process. He also claims to have repeatedly requested information from the Applicant and Mr AS in relation to the whānau's claim to land via the various whakapapa connections in the [Area B], but that this was not provided.

[7] On the issue of Legal Aid, the Practitioner informed the Standards Committee that the Applicant and Mr AS knew that they could only get Legal Aid funding if their claim was registered with the Waitangi Tribunal. This, in turn, depended to the availability of evidence to support a claim that the Tribunal was willing to register.

[8] The Committee considered the complaints, along with the Practitioner's explanations, and its decision provided a detailed reasoning as to why it rejected the complaints. The Committee noted the fees that had been charged by the Practitioner. The Committee did not agree that the Practitioner had not followed instructions, nor that he had failed to protect the interests of the whānau or adequately inform the whānau. The Committee finally noted that there was evidence to show that the whānau had accepted that until Legal Aid was granted, costs would have to be met by them.

[9] The Standards Committee noted, in its decision, that the Practitioner had carried out the work and requested further information from the whānau to support the claim. The Standards Committee also noted that the Waitangi Tribunal had also sought further information, but that the whānau had failed to provide this further information to the Practitioner. The Committee further noted that the Practitioner had, in his own time, and for no fee, prepared an amended Statement of Claim on behalf of the whānau even though it appears no further information was provided. None of the complaints were upheld.

Review application

[10] The Applicant was dissatisfied with the Standards Committee's decision. His

dissatisfaction was explained in terms of failures by Mr FL to have taken into account "quite a few factors of our statements."[1] This intimated that the Applicant perceived Mr FL as responsible for the decision made by the Committee. Mr FL is the Legal Standards Solicitor for the Professional Standards Department in the [City] office, and undertakes much of the investigative and administrative work for the New Zealand Law Society. Mr FL is not part of the Standards Committee that ultimately determines any complaints. Despite this, I have considered the issues raised by the Applicant in terms of his dissatisfaction.

[11] The Applicant also required the Practitioner to provide to this Office all information he was holding that belonged to the Applicant, and also "letters and correspondence, in letter form that [the Practitioner had given to the Applicant]".[2] These were itemised as covering contact with a number of individuals who (it is understood) had some input into the Applicant's claims to the Waitangi tribunal.

[12] An Applicant-only review hearing took place on 17 July 2012, which was attended by both the Applicant and his brother, Mr AS. At that review hearing both were able to discuss at some length their concerns with the Standards Committee decision, and their original complaints.

Observations relevant to the conduct of this review

[13] It would be fair to say that the centre of Mr AS's focus was, and remains, on pursuing the rights and claims of his whānau in the Waitangi Tribunal. I explained repeatedly to him throughout the review hearing that the jurisdiction of my Office is confined solely to matters of discipline for lawyers, and this Office has no power to consider any claims, and has no connection whatsoever with the Waitangi Tribunal. Despite these repeated explanations, Mr AS nevertheless continued to speak to the merits of the alleged Treaty claim of his whānau. I am unable to make any comment about these submissions which are entirely irrelevant to the question of whether disciplinary issues arise for the Practitioner.

Review

[14] My task is to review the Standards Committee decision, which is a wide ranging

[1] Review application form by Mr RS (4 April 2011) at pg 3.
[2] As above n 1.

power of review, extending to considering the manner in which the Standards Committee dealt with the complaint.

[15] The review hearing was helpful in assisting me to distil the two essential grievances which fall within the jurisdiction of this Office.

[16] The first grievance concerns the scope of services provided by the Practitioner, and the second concerns whether the Practitioner had made it sufficiently clear to the Applicant that Legal Aid would not be provided unless and until a claim was given a Wai number by the Waitangi Tribunal.

[17] Peripheral issues concerned whether the Practitioner ought to have acted on, and charged for, instructions given by Mr AS, whether he ought to have recorded his advice in writing and whether he had returned to the Applicant all of the information that he had originally held.

[18] I record that there were a great number of elements that formed part of the discussion at the review hearing, but it is neither necessary nor appropriate to record all aspects of the discussion in this decision. Materially, there is no part of the Applicant's complaints to the Standards Committee that was not dealt with in the course of the review hearing.

[19] I also repeat that the major, if not sole, focus of Mr AS was to provide evidence of the substantive Treaty of Waitangi claim of his whānau, and that I reminded him on several occasions that any issues concerning a substantive claim was not within the jurisdiction of this Office, which was confined only to matters of discipline for lawyers.

[20] The review hearing was quite lengthy, and as I have noted, covered the broad range of issues arising in the complaints. Ultimately however what became evident was that there were a specific number of issues that were able to be identified and articulated by the Applicant. I informed the Applicant and his brother that I would put these matters to the Practitioner for response, a copy of which would be sent to them for comment.

[21] The specific matters were described in a letter sent by my office to the Practitioner on 20 July 2012 (and copied to the Applicant). The Practitioner was asked to respond to five specific issues. I deal with these specific matters below.

[22] The Practitioner was also invited to attend mediation to resolve the matter with the Applicant and Mr AS, an invitation which had also been put to the Applicant and Mr AS at the hearing. In the event neither party sought to progress the mediation proposal.

[23] The Practitioner responded to those issues that were put to him, and his response was sent to the Applicant with an invitation to comment. When no comment was received from the Applicant, a reminder was sent a month later, and thereafter I received a hand written response from Mr AS, although co-signed by the Applicant. Mr AS explained that the delay in response was due to personal matters having taken precedence and that they had given the Practitioner's response considerable thought.

[24] Mr AS directed me to a letter he had written to my office soon after the review hearing, dated 19 July 2012 (prior to the letter having been sent to the Practitioner). This 19 July letter was, he wrote, his response to the Practitioner's letter. It is fair to say that Mr AS's letter was difficult to follow, and much of it restated the substantive basis of the whānau's Waitangi Tribunal claim. Several pages were also devoted to a verbatim copy (in Mr AS's handwriting) of the content of the Letter of Engagement from the Practitioner. It is not necessary to comment on those aspects of this response.

[25] However, insofar as the 19 July 2012 letter was intended as a response to the comments made by the Practitioner, I had considerable difficulty discerning how Mr AS's letter could be considered a response to the letter written by the Practitioner, as it did not specifically address any of the statements of the Practitioner. I was therefore required to rely on and consider all of the information that was on the file in order to reach my decision.

[26] In the following paragraphs I address those issues which fall within the scope of my review, these matters being solely confined to the question of whether there are disciplinary concerns arising form the conduct of the Practitioner in his dealings with the Applicant and his whānau. I need to make absolutely clear that no part of this decision considers the merits of any claim or prospective claim that the Applicant or his whānau may have in the Waitangi Tribunal, such matters being wholly outside my jurisdiction.

[27] I have also confined my review to those matters that were identified at the review hearing as the "outstanding issues" within the scope of my jurisdiction, having found no other basis for criticising the Standards Committee decision, for reasons given to and

discussed with, the Applicant and Mr AS in the course of the review hearing. I now deal with the above mentioned issues.

Charging for services provided on the instructions of Mr AS

[28] This raised the question of who was the client. The Applicant claimed that he alone was the Practitioner's client and not his brother, Mr AS. The Applicant submitted that the whānau should not have to pay Practitioner's fees to the extent that this covered services provided by the Practitioner at the request of Mr AS. I note that the Letter of Engagement was in fact only signed by the Applicant.

[29] The Practitioner did not deny that some of his fees covered work he did on the instructions of Mr AS. In his response the Practitioner explained that the Applicant was the "point of contact" for the whānau and that in the majority of times the Practitioner received instructions from both Mr AS and the Applicant. The Practitioner explained that most often when he received instructions from Mr AS, the Applicant was also present and contributed further to those instructions, which included pursuing fictitious family links to the [District V] tribe, [Iwi Y]. The Practitioner continued that there were occasions where Mr AS would arrive without an appointment to seek legal advice on unrelated matters, was given advice on these matters, but no instructions were received, and that the whānau were not invoiced for those attendances. He asked why, if they felt that only the Applicant was the client, was Mr AS involved? The Practitioner also noted that correspondence to my office was drafted by Mr AS, albeit co-signed by the Applicant, and he added that no doubt Mr AS would also have provided his lengthy submissions at the Applicant-only hearing. I have already noted that this was indeed the case.

[30] In reviewing the file it is clear that there was considerable input by Mr AS, much of it in the presence of the Applicant, and that many, if not most, of the enquiries that Mr AS asked the Practitioner to undertake were known to the Applicant. Indeed it is abundantly apparent that Mr AS was at the forefront of the endeavours to press a claim at the Waitangi Tribunal (also corresponding directly with the Tribunal) and the evidence shows that his involvement was no less than that of the Applicant. If it was intended by the whānau that the Practitioner should only act on the instructions of the Applicant, then this was not clear since it was clearly known that the Practitioner was in fact acting on instructions from both Mr AS and the Applicant.

[31] Although only the Applicant signed the Letter of Engagement, I accept that the Practitioner was undertaking work for a Treaty of Waitangi claim by the whānau. It would have been impractical to have had all whānau members sign the Letter of Engagement, and this was not necessary where there was one who acted as a spokesperson. It was generally known that all of the Practitioner's engagements were with the whānau, and that he was investigating the basis of a land claim for them.

[32] There is a significant amount of evidence that work undertaken by the Practitioner at the request of Mr AS was known and supported by the Applicant, and although there may well have been occasions where the Practitioner acted on instructions given only by Mr AS, I do not consider that the overall circumstances indicate any wrongdoing or any failure to have obtained confirmation from the Applicant or anyone else.

[33] These circumstances do not give rise to any disciplinary proceedings for the Practitioner.

Written record of oral advice

[34] The Practitioner was asked to comment on the allegation that he had been asked to put his oral (via telephone) advice to the Applicant, in writing so that these could be taken to the whānau for discussion.

[35] The Practitioner disputed the allegation, claiming that it was he who had offered to put their issues into writing. The Practitioner said he was concerned about the increasing amount of time being wasted by Mr AS's "nonsensical instructions", and the need to keep advising both Mr AS and the Applicant on the same issues. The Practitioner said that there had been discussion about extra costs associated in having to write reports, including reporting on researching dead-end leads provided by Mr AS and the Applicant, and that the Applicant had instructed that it was not necessary to provide a written response to save costs.

[36] The only letter I could find that the Practitioner had written to the whānau was dated 14 July 2010, comprising four and a half pages, and comprehensively covered the various matters he had attended to.

[37] I am unable to find sufficient evidence to support the allegation that the Applicant had asked the Practitioner to record all his advice in writing. I have considered that the

Practitioner was asked to pursue a number of leads which were in the event irrelevant and came to nothing. Had he charged the Applicant for preparing an extensive explanation there would have been additional costs. In the event I accept that most of the dead-end leads were reported to the Applicant orally, and that no request was made for this information to be provided in writing. Had such a request been made then there is no reason why the Practitioner would not have done so and charged accordingly. In examining the file, it seems to me more likely than not, that the Practitioner would have been mindful of reducing costs, rather than increase them with providing written reports to the whānau. I do not find a sufficient basis for disciplinary concerns in this matter.

Information held by the Practitioner

[38] In response to the allegation that the Practitioner had not returned all of the information given to him at the commencement of the retainer, the Practitioner commented that all information provided by the Applicant was copied and returned to the Applicant at the firm's expense.

[39] The Practitioner noted that the request for information was in fact sought by Mr AS (reference was made to Mr AS's letter of complaint to the Privacy Commissioner). The Practitioner confirmed that information that was available online (pertaining to the [Iwi X] settlement) was not provided, as it was publicly available. The Practitioner did not consider this pertained directly to the whānau so to speak but it settled an important issue as to whether or not there had been consultation in respect of that settlement.

[40] There was evidence that Mr AS had written to the Privacy Commissioner about the information held by the Practitioner. The Commissioner had responded that the law firm had returned the file on or about 1 September 2011. This was disputed by the Applicant.

[41] The Applicant's comments on the Practitioner's response did not further the enquiry. If information is still in the possession of the Practitioner, it has not been identified by the Applicant. I am unable to see that the Practitioner (or his firm) has retained information. Given that the alleged retention of information has been before the Privacy Commissioner, and that there is insufficient support for a complaint that the Practitioner is still holding the Applicant's information, there is no basis for any adverse conclusion to be drawn. This complaint is not upheld.

Scope of the Practitioner's instructions

[42] The Applicant's whānau was [Area A] based. He claimed that the Practitioner had not been instructed to pursue any potential claims relating to land in the [Area B]. The Applicant had informed me (at the review hearing) that his Wananga had always accepted that the tribal connections were confined to the [Area A], and that this was clear in the instructions provided to the Practitioner. The Applicant had further claimed that any comments he made concerning connections with [Area B] land were only in response to questions raised by the Practitioner. The Applicant had asked why the Practitioner charged for chasing up [Area B] connections.

[43] The Practitioner knew that the whānau was [Area A] based but he firmly disputed the above. He referred to references that had been made by the Applicant and Mr AS throughout their complaints to "[Area B] claims". He contended that he had been instructed by both the Applicant and Mr AS to explore the possibility of whakapapa linkages in the [Area B].

[44] The Practitioner added that the whānau had claimed a [Tūpuna] connection in respect of a claim into the southern [Area B], and all of these claims were later determined to be completely unfounded. The Practitioner accepted that the actual information provided by the Applicant and his brother only related to [Area A] claims, but his evidence was that he was instructed to pursue all other avenues, including connections with the [Area B]. The Practitioner also referred to the Tribunal having asked whether the whānau claimed into the [Area B] or the [Area A] [Tūpuna] Tribe, and that he had been instructed by the Applicant and Mr AS that it was both.

[45] The evidence on the Standards Committee file included letters that had been written by the Applicant to the Standards Committee, which made clear that the Applicant had been well aware that the Practitioner had been investigating the whānau's [Area B] claims. The Applicant and Mr AS claimed affiliation with [Tūpuna] and had registered with them since 1998 and asked:[3]

> Isn't [Tūpuna] in the [Area A] and [Tūpuna] in the [Area B] the same, I would think so or is there two [Tūpuna]?

[3] Letter from RS and AS to the New Zealand Law Society (10 November 2010) pg 2-3.

> All I can say is that [the Practitioner] wasn't doing his job as a lawyer because if we are apart [*sic*] of [Tūpuna], why didn't he put a submission into the Waitangi Tribunal for the [Area B] and the North of the [Area A], as in [Tūpuna]'s claim Wai:[no.] was starting in 2008.

[46] Later in that letter he refers to the Practitioner having asked the Applicant to prove that they came from [Tūpuna] in [District Y] to which the Applicant responded, "[w]ell is there two [Tūpuna]?"[4]

[47] I have already referred to copies of letters sent by the Waitangi Tribunal to the Applicant and Mr AS, in late 2008 and in 2009. These letters advised them that the [Area A] claims were closed, but also advised that if they were making claims to [Area B] (by virtue of affiliation with [Area B] [Tūpuna]) these were under current consideration and that more information should be provided promptly. There is further evidence in these letters to show that the whānau were indeed making enquiries about a [Area B] based claim, as reflected in letters from the Tribunal dated 14 December 2009 (sent to the Practitioner) and 17 June 2010 (sent to A), stating that there had been mention of affiliations to [Tūpuna] in the [Area B].

[48] Also on file (the Standards Committee file) was an early letter written by the Practitioner to the Applicant's whānau (14 July 2010) where reference is made to [District Y] claims. In paragraph 4 of his letter the Practitioner noted that statements made by Mr AS indicated that the whānau could whakapapa into various areas including [Tūpuna], [District Y], [Iwi Y] and elsewhere. The Practitioner noted that he had awaited the additional information as [District Y], [Tūpuna], [District Z] and the Lower [Area B] were beginning in their respective hearings and the Practitioner was still awaiting information at the time of writing the letter.

[49] There are other references as well to investigations being undertaken by the Practitioner in relation to [Area B] connections, providing sufficient evidence to refute the Applicant's claim that the Practitioner had not been asked to pursue the possibility of a claim by the whānau to land in the [Area B]. The same evidence is inconsistent with the Applicant's contention that he was unaware that the Practitioner was undertaking this work. I do not accept that this was the case. No disciplinary issues arise from this matter.

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[4] As above n 3 at pg 6.

Liability for payment – Legal Aid

[50] The complaint was that the Practitioner was always aware that the whānau relied on Legal Aid to pay the bill and that there was an expectation that Legal Aid would cover legal costs. It was submitted by the Applicant that the Practitioner had never made it clear that the whānau would have to pick up his fees until, and unless, Legal Aid was granted.

[51] In reply, the Practitioner stated that from the commencement of instructions the Applicant was aware of the process that needed to be followed to obtain Legal Aid for the whānau's claim. The Practitioner contended that the Applicant's actions demonstrated that knowledge, and he referred to the Applicant's instructions that it was not necessary to put everything in writing so as to save on costs.

[52] Legal Aid was only available in relation to claims that the Waitangi Tribunal registered and which were then allocated a "Wai" number, this being an indicator that the Tribunal had accepted the claim for processing. Despite all efforts, no basis for a Treaty claim was able to be demonstrated by the whānau in respect of any [Area B] land, and in the event no claim was registered with the Tribunal. Consequently, no Wai number was ever allocated to this claim, and thus there was no eligibility for Legal Aid funding.

[53] It was alleged (throughout the complaints) that the Practitioner had not clearly explained that Legal Aid would not be available unless a Wai number was allocated to the file, or had not made clear that until such occurred, that the whānau would be liable to meet the Practitioner's costs.

[54] I carefully examined the file to discern what information there was concerning the matter of payment of legal costs. The file showed that there were discussions about Legal Aid.

[55] I note that complaints about the bill arose only after the Practitioner had billed the whānau $3,000.00. I also noted that Mr AS's criticisms of the $3,000.00 charges related to there having been no outcome for the whānau, rather than an expectation that Legal Aid would pay the costs. That is to say, Mr AS asked the Practitioner to explain what he had done for that money.

[56] In his letter of complaint the Applicant had attached an account he had prepared following a meeting with the Practitioner; there the Applicant wrote that the Practitioner

had stated he wasn't getting paid for the investigation because he couldn't get a Wai number from the Waitangi Tribunal so couldn't get Legal Aid. I have considered this allegation, which is one made by the Applicant but disputed by the Practitioner. However, I have found no evidence whatsoever that the Practitioner had informed the Applicant or anyone else that he would work for no reward. Indeed the Letter of Engagement (signed by the Applicant) clearly indicates the terms and conditions of the firm concerning fees, and by signing it, the Applicant assumed responsibility for payment.

[57] I do not consider it at all likely that the Practitioner would have stated or implied to the Applicant or any other person from the whānau that he was working for no reward until such time as a Wai number was be allocated. I do not accept that the Practitioner informed the parties that he would not need to be paid unless Legal Aid was available. That is, I do not accept the Applicant's evidence that "[the Practitioner] said to me he wasn't getting paid and that he couldn't charge us because he hadn't got a Wai number from the Waitangi Tribunal."[5] This is wholly inconsistent with the Letter of Engagement signed by the Applicant.

[58] The evidence revealed an expectation on the part of the whānau that there would be some advantage in seeking the assistance of the Practitioner in pursuing their Waitangi Tribunal claim, and it may be the case that the Applicant and others did not give further consideration to the question of payment of fees if the whānau's claim could not be registered and get a Wai number. However, there is no question that the Applicant signed the Practitioner's Letter of Engagement, and in the absence of any clear evidence to the contrary, which there is not, the Applicant assumed responsibility for the Practitioner's fees.

[59] The Practitioner's invoices recorded that he provided services which included investigations at the request of the whānau, considering correspondence and drafting Statements of Claim, and various communications; I can see no reason why he should not be paid for these attendances. It is the responsibility of the person raising the complaint to provide a sufficient evidential basis for the complaint. In this case all of the complaints refuting liability for the Practitioner's bill arose after the bill was rendered, at which time it became apparent that the whānau could not pursue a claim. By that time the Practitioner had been providing services for some 18 months. Having looked at the extent of

[5] Letter from the Applicant to the New Zealand Law Society (10 November 2010) pg 6.

attendances undertaken by the Practitioner, I accept that not all of his time was charged, and it has not been suggested that the Practitioner did not put in the hours of work. This complaint is not upheld.

[60] In terms of the disciplinary enquiry involving the Practitioner, I see no basis for taking a different view of the matter than was taken by the Standards Committee, whose decision will be confirmed.

Decision

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

DATED this 17th day of April 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:

Mr RS as the Applicant
Mr NC as the Respondent
Mr CK as a related person or entity under s 213 of the Act
The [North Island] Standards Committee [X]
The New Zealand Law Society