

**CONCERNING**

An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006

**AND**

**CONCERNING**

a determination of the Standards Committee

**BETWEEN**

**MR WALLASEY**

of Christchurch

Applicant

**AND**

**MR BALA**

of Canterbury

Respondent

**DECISION (Amended as to Clause 3)**

**Application for review**

[1] An application was made by Mr Wallasey (the applicant) for a review of a decision made by the Standards Committee on his complaint against Mr Bala (the practitioner).

[2] The complaint is dated 4 January 2009 and consisted of three parts. The allegations against the practitioner are:

- That the practitioner made incorrect statements in a High Court document,
- The practitioner sent a letter to the applicant's mother when she was represented by another lawyer,
- The practitioner is still involved in court proceedings involving the family when he has been told he might be a witness in those proceedings.

[3] The Standards Committee's file included evidence of the several exchanges of correspondence between the applicant and submissions made by both for the

Committee' hearing on the papers. After considering all of the information the Standards Committee determined each of the complaints. The Committee accepted that there was a proper basis for the first complaint but was of the view that the conduct "was not of sufficient gravity to warrant a charge". The Committee ordered costs against the practitioner, tentatively assessed at \$100 but inviting the practitioner to make submissions on the issue of quantum. The remaining two complaints were not upheld.

[4] The Standards Committee also noted that the applicant had previously lodged complaints against the practitioner which had not been upheld by the Complaints Committee. The Standards Committee added that both the applicant and the practitioner had been agreeable to the information on the previous complaints file being considered in relation to the present complaints. The earlier complaints had been made in January 2008.

[5] The Standards Committee's enquiry involved consideration of whether the present complaints had been previously determined by the Canterbury District Law Society for the reason that complaints that have previously been considered cannot be the subject of a new complaint. The Committee did not uphold the second complaint, and concluded that the third complaint had been dealt with, albeit implicitly, as part of the complaints filed in 2008. For that reason the complaint was given no further consideration. The applicant disagreed with the Committee's decision on the second complaint, and disagreed that the third complaint had been previously dealt with.

[6] The review application relates to the Committee's decision on the second and third complaints.

### **Applicable professional standards**

[7] This review concerns conduct which 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.

[8] Section 351 of the Lawyers and Conveyancers Act makes provision for complaints about conduct that occurred before the commencement of the Act. For such complaints to be considered the conduct complained of must reach a threshold that could have led to disciplinary proceedings against the lawyer concerned.

[9] The pre 1 August 2008 standards are found in ss 106 and 112 of the Law Practitioners Act 1982. The threshold for disciplinary intervention under the Law

Practitioners Act 1982 was relatively high and may include findings of misconduct or conduct unbecoming. Misconduct was generally considered to be conduct:

of sufficient gravity to be termed 'reprehensible' (or 'inexcusable', 'disgraceful' or 'deplorable' or 'dishonourable') or if the default can be said to arise from negligence such negligence must be either reprehensible or be of such a degree or so frequent as to reflect on his fitness to practise.

(*Atkinson v Auckland District Law Society* NZLPDT, 15 August 1990; *Complaints Committee No 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105). Conduct unbecoming could relate to conduct both in the capacity as a lawyer, and also as a private citizen. The test will be whether the conduct is acceptable according to the standards of "competent, ethical, and responsible practitioners" (*B v Medical Council* [2005] 3 NZLR 810 per Elias J at p 811).

## **Considerations**

### *Second complaint*

[10] In relation to the second complaint the Committee appeared uncertain whether this had formed part of the applicant's prior complaints but given the uncertainty the Committee was willing to take the view that it had not been previously disposed of.

[11] The complaint alleged that the practitioner had sent a letter to the applicant's mother when she was represented by another lawyer Committee, in breach of Rule 6.02 of the Rule of Professional Conduct for Barristers and Solicitors which applied at that time.

[12] The Standards Committee considered the practitioner's explanation about the circumstances surrounding the practitioner's letter to the applicant's mother, noting that when the practitioner had written to her he had prefaced his letter with, "*I am writing to you directly because I understand that you do not have legal representation at this stage. Otherwise I would not do so.*" The Committee formed the view that the contact arose from an innocent mistake by the practitioner. In the Committee's view this did not disclose conduct that reached the threshold to warrant a charge or impose a fine.

[13] The applicant considered that the Committee had incorrectly applied Rule 6.02 of the *Rules of Professional Conduct for Barristers and Solicitors* under the Law Practitioners Act (repealed) which prohibits a lawyer from communicating with a person whom the lawyer knows is represented by another lawyer. Rule 6.02 stated that only in 'exceptional' cases should lawyer communicate with the client of another practitioner

in relation to a matter in which the practitioner is, or has previously been dealing with the other practitioner.

[14] The uncontested evidence is that the applicant's mother had written a letter to the practitioner on 17 December 2007, and had sent it to Mr XX. On 19 December Mr XX forwarded this letter on to the practitioner. That day he also wrote to the applicant's mother to inform her he had done so. On 21 December 2007 the practitioner wrote directly to the applicant's mother in response to her letter, and prefaced his letter with his understanding that she was not at the time legally represented. He sent a copy of the letter to Mr XX as a courtesy because of his prior involvement.

[15] The applicant contended that at the time the practitioner wrote to his mother that she was in fact represented by Mr XX, and that there was 'ample evidence' that the practitioner was aware that his mother had legal representation. He forwarded a copy of a Telephone Conference Minute issued by Judge Fogarty on 31 October 2007 which recorded Mr XX as solicitor for his mother. He also forwarded a copy of a letter dated 19 December 2007 which Mr XX had sent to his mother. He claimed that Mr XX had represented his mother from 31 October 2007 until 19 February 2008. The applicant said it had been Mr XX's decision to send his client's letter to the practitioner on 17 December.

[16] The applicant's alternative submission was that the Practitioner was at the very least uncertain about whether his mother was legally represented and ought to have made enquiry before writing to her, and could thereby have avoiding making an 'innocent mistake'. He said that relations between the practitioner and his mother were strained. He submitted that the practitioner's response to his mother's letter ought to have been sent to Mr XX.

[17] In response to the complaint the practitioner informed the Committee that Mr XX had written to him in November 2007 informing him that he (Mr XX) had temporarily stepped in to act for the applicant's mother when her counsel was elevated to the bench. The practitioner said that in a subsequent telephone conversation Mr XX had informed him that he had received no instructions from the applicant's mother. On or about 19 December 2007 Mr XX had forwarded to him a letter written to him by the applicant's mother, and he responded directly to her in the belief that she was not legally represented, as reflected in the opening lines of his letter.

[18] I considered the uncontested evidence and the views expressed by both parties. The question for the review is whether the practitioner's conduct reaches the required threshold for disciplinary action. The rule prohibiting a lawyer contacting the client of

another lawyer is strict and any question of culpability needs to be considered in the light of the overall circumstances surrounding the complaint at that time.

[19] It seems to me that the evidence in this matter provides reasonable support for the practitioner's belief that he should respond to the letter written to him by the applicant's mother, which had been forwarded to him by Mr XX. The fact that Mr XX forwarded to the practitioner the original letter written by the applicant's mother to the practitioner would be considered somewhat exceptional if Mr XX was representing her, and if that is the case then should be considered in terms of the 'exceptional circumstances' contemplated by the rule. It also addresses the applicant's alternative submission, that the practitioner ought to have made enquiries concerning whether the mother was represented.

[20] There is nothing in the evidence to suggest that Mr XX did not intend for the practitioner to directly respond to the letter. Mr XX appears to have raised no objection on receiving confirmation that the practitioner had in fact written directly to the applicant's mother, or any event there is nothing to indicate that he had concerns that another lawyer had contacted 'his' client if that were the case. It would be somewhat unlikely that the practitioner would knowingly have written to Mr XX's client in improper circumstances and to then advertise the fact by copying Mr XX into the correspondence. All of these surrounding circumstances reinforce the view that the practitioner understood that he was to respond directly to the letter written to him by the applicant's mother.

[21] Any question of professional culpability in a disciplinary context must include an element of knowledge or carelessness by the practitioner. That is to say, an accidental error as to the true situation would not be sufficient to lead to disciplinary action. The Standards Committee concluded that this was an innocent mistake on the practitioner's part. However, whether the practitioner's letter to the applicant's mother is viewed within the 'exceptional circumstances' envisaged by the rule that otherwise prohibits a lawyer contacting the client of another lawyer, or whether the practitioner responded at a time when Mr XX was not apparently actively involved as advocate for the mother, in my view the circumstances surrounding the practitioner's letter to the applicant's mother do not indicate culpability that reaches a threshold that could have led to disciplinary proceedings against the practitioner. I am therefore unable to see any basis for upholding the complaint.

*Third complaint*

[22] The applicant alleged that the practitioner was in breach of the rule that prohibits a lawyer from acting in proceedings in respect of which he knows he may be required to give evidence. The Standards Committee was of the view that this complaint had been part of a previous complaint considered by the Complaints Committee and could therefore not be reconsidered as a new complaint. The applicant disagreed that this complaint had been previously considered.

[23] Information relating to the earlier complaint was included in the Standards Committee file received by this office. A comparison was made between the present and former complaints. The earlier 2008 complaint had raised concerns about the extent of the practitioner's knowledge of the applicant's family. I am unable to see that it explicitly included a mention of the possibility that the practitioner could be asked to give evidence in the proceedings.

[24] The applicant referred to the Rules of Professional Conduct for Barristers and Solicitors which prohibit a practitioner acting as both counsel and witness in the same matter. Rule 7 envisages that a practitioner acting as counsel who knows that he or she may be required as a witness should decline from acting as a representative. The applicant alleged that the practitioner breached the rule in that he had been informed in November 2007 that he may be asked to give evidence in the proceedings in respect of which he acted as counsel for the applicant, and did not then withdraw as counsel for the plaintiff in the proceedings. The applicant referred to a letter sent by the practitioner to Mr XX on 5 December 2007 in which he refers to this matter, making it clear that he had knowledge of the possibility he could be called on to give evidence.

[25] The practitioner did not deny that this matter had been raised with him. The practitioner referred to his letter to Mr XX in which he had stated, "*If I am required to give evidence then I can obviously not appear as Counsel but that stage has not been reached.*" The practitioner withdrew as counsel in 2008, and was no longer involved when he was asked for an affidavit in 2009. The practitioner has maintained throughout that he had no relevant or significant information about the family.

[26] When the practitioner wrote to Mr XX in early December 2007 he had not at that time been asked to provide evidence, and had indicated to Mr XX that he did not consider himself to be disqualified from acting in the proceeding. The evidence shows that in early 2008 the applicant pursued, through the High Court, the practitioner's removal as counsel for the plaintiff. A Minute of Associate Judge Christiansen dated 19 February 2008 noted that if the defendant had an issue regarding the practitioner representing the plaintiff in the proceedings, then an application should have been filed by January 30 2008, further noting that no application had been filed. The Court

referred to a memorandum from Mr XX, and rejected his submission that the Canterbury District Law Society was the appropriate body to consider whether or not the practitioner should participate in the proceedings. The Judge decided that there was nothing of substance in the matters raised that would disqualify the practitioner from participating in the proceedings, and no basis for disqualifying the practitioner. Given the timing of that application to the Court it is reasonable to assume that the various grounds supporting the application included that which arises in the present complaint.

[27] The above indicates that this matter has been dealt with by the Court. However, if that is not the case then I note that the practitioner informed his colleague in December 2007 that he did not consider himself disqualified to act as counsel, that the defendant thereafter sought, through the High Court, the practitioner's removal as counsel, and that the concerns arising in this complaint could have been pursued at that time.

[28] Before a lawyer can be found in breach of the Rule there must at the very least be a reasonable prospect of his or her being involved as a witness in proceedings before the obligation to withdraw as counsel arises. If this were not the case then merely the suggestion by a party to proceedings would be sufficient to disqualify undesired counsel. There is no evidence that the practitioner was called upon for evidence until some 15 months later. By that time he no longer acted for any party to the proceedings. The practitioner declined to provide evidence unless subpoenaed. No subpoena has been served.

[29] The above indicates that there were no circumstances existing in late 2007 that disqualified the practitioner from acting as counsel in the proceedings on the ground raised in the complaint. I see no basis for upholding this complaint.

### **Decision**

Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act I confirm the determination of the Standards Committee.

**DATED** this 14th day of September 2009

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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 Wallasey as Applicant  
Mr Bala as Respondent  
The Canterbury Standards Committee No.1  
The New Zealand Law Society