

LCRO 94/2011

CONCERNING

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

AND

CONCERNING

a determination of the [South Island] Standards Committee

BETWEEN

IJ
Of [South Island]
Applicant

AND

QT
of [South Island]

Respondent

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

DECISION

Introduction

[1] The Standards Committee declined to uphold a complaint made by Mr IJ (the Applicant) against law practitioner Mr QT (the Practitioner).

[2] The Applicant sought a review of the Standards Committee decision. He progressed his review application with the assistance of his wife, whose involvement I have accepted on the basis that the Applicant himself suffers from significant health issues, together with the fact that his wife is materially involved in the complaint. I refer throughout to the Applicant's wife as Mrs T.

[3] The reason that the Standards Committee did not uphold the complaint was that the conduct complained of did not occur in the course of the Practitioner providing "regulated services" and was therefore perceived by the

Standards Committee to fall outside its jurisdiction. The Committee noted that where conduct complained of occurred outside the provision of regulated services, the conduct had to reach a threshold that could properly be described as “misconduct” as defined in Section 7 of the Lawyers and Conveyancers Act 2006. The Standards Committee did not consider that the conduct in issue reached that level. The outcome was that the complaint was dismissed for want of jurisdiction.

[4] The Applicant was unwilling to accept the finding that the Practitioner should not be required to account for conduct that had caused them such distress. The review application set out in detail the Applicant’s description of the distress and anxiety he and his wife experienced as a result of the Practitioner’s conduct.

Procedural matters

[5] The Applicant wished to be heard on the application, and a review hearing was scheduled for attendance by both parties. This was arranged by my office and required my attendance in the lower South Island. However, due to an administrative oversight by my office, the Practitioner was not notified of the hearing, and in the event only the Applicant, his support person and his wife appeared at the hearing. It was plainly evident that it had required significant effort to have the Applicant attend as he is in a wheelchair and needed the support and assistance of a third party, who was in this case a victim support person. In the circumstances I agreed to hear from them despite the Practitioner’s absence.

[6] The hearing consisted of an oral account of events that underpinned the complaint. These matters were described by the Applicant through his wife’s presentation, due to his limited capacity to speak. The Applicant’s wife, Mrs T, described the matters that had led to the complaint against the Practitioner, which she said had left her, and her husband, feeling powerless and vulnerable.

[7] In a subsequent directions teleconference, attended by the Applicant and his wife, and the Practitioner and his counsel, counsel objected to the fact that I had heard from the Applicant in the Practitioner’s absence. He declined a proposal that the hearing could be concluded on the basis of a

telephone hearing, insisting that the Practitioner wished to be heard in person. Arrangements were again made for a second hearing with both parties in the South Island but this hearing was thwarted due to delays in the Air NZ flight schedules, and the review hearing was unable to proceed for reasons outside the control of this office.

[8] There was no further opportunity to attend a personal hearing prior to the Christmas break, and the Practitioner therefore agreed that the review hearing could be rescheduled as a teleconference hearing as this would allow for the review to be conducted in a more timely fashion. All parties agreed to this proposal and a further review hearing took place by teleconference. The participants were the Practitioner and his counsel, and Mrs T.

[9] Notwithstanding the unfortunate procedural pathways that this review file has taken, there has been no prejudice to either party in this review. The Practitioner was given a full opportunity to hear the main arguments of the Applicant (through his wife) and had an opportunity to respond to those matters. His counsel also had the opportunity to forward submissions. The telephone hearing covered all issues that are likely to have been raised had the hearing been attended by all parties in person.

[10] I also record at this juncture that in between the first hearing and the subsequent teleconference hearing, the Practitioner provided witness statements from his parents, further comments from himself, and submissions from his counsel, all of which were forwarded to the Applicant, subject only to deletions from some portions of the evidence of the Practitioner's parents who had witnessed the events complained of. I exercised my discretion pursuant to section 208(2) of the Lawyers and Conveyancers Act 2006 to delete some of the information and have not taken those parts into account in this review.

Background

[11] The complaint emerged out of a specific incident. At the time the Applicant and his wife lived in Council flats, and also leased one of the car park spaces allocated to various units. The convenience of having a car space close by their unit is of particular significance to the Applicant because he is confined to a wheelchair and is significantly disabled.

[12] The Applicant and his wife are both in their late 70's and I accept that the Applicant's wife, who provides 24/7 care to her husband, finds it of material benefit to be able to park the car close to the unit, in order to assist her husband and his wheelchair in and out of the car as well as getting the shopping inside. The entire process is difficult and takes some time to complete.

[13] On a particular day, on returning home from shopping with her husband in the car, she found another car parked in their space. This was a very distressing for them. Mrs T explained that there was nowhere else that was convenient for her to park, and so she parked her vehicle behind the car that was occupying her space. This resulted in her car blocking the other car.

[14] Mrs T explained that she intended to remove her car after getting her husband and the shopping into their unit and after calming themselves down with a cup of tea.

[15] It appears that the owner of the other car returned a short while later and wanted to leave, but was unable to do because the Applicant's car was blocking his.

[16] The evidence disclosed that the car had been driven (and was owned) by the Practitioner's father. The Practitioner and his son and father were visiting the Practitioner's elderly grandmother who lived in the same block of units. When the blocked car was discovered the Practitioner's father approached the unit owned by the Applicant and his wife, and demanded that the car be removed immediately. Her refusal led to an argument between the Practitioner's father and Mrs T. It seems that heated words were exchanged and the noise of that argument brought the Practitioner out of the car to approach his father and Mrs T.

[17] The Practitioner's evidence was that he was attempting to calm down the situation that he was witnessing. He described his concerns for his father's health, as his father is a diabetic and also has other health problems, and only recently completed serious medical treatment. The Practitioner said that he apologised to Mrs T concerning the wrongful parking and asked her to remove the car, but that she refused to do so.

[18] In the course of that exchange, the Practitioner informed Mrs T that he was a lawyer and knew that she could not refuse to remove her car to let them out, adding that police assistance would be sought if she refused.

[19] It appears that Mrs T was willing to move the car, but at her own convenience which was after she had finished her cup of tea.

[20] The Practitioner and his family wanted the car removed immediately, and he said to Mrs T that if she would not phone the police, then he would. The Practitioner did in fact telephone the police from his cell phone, and at the direction of the police, Mrs T then removed her car.

[21] This led to the Applicant filing a complaint to the New Zealand Law Society alleging that he and his wife had felt significantly disempowered by the Practitioner having, as Mrs T describes it, yelled repeatedly that he was a lawyer and threatening to call the police.

Considerations

[22] The above events are being considered in the context of disciplinary enquiry involving the Practitioner. Despite some minor discrepancies in the evidence, the factual background and circumstances surrounding the matter are abundantly clear.

[23] I accept that the Practitioner was not responsible for the car being parked in Mrs T's car space. Nor can the Practitioner be held in any way responsible for the manner in which his father engaged with Mrs T which was, by all accounts, an exchange that was sufficiently heated to bring the Practitioner out of the car.

[24] It is clear that Mrs T perceived the wrongdoing to be on the side of, if not the Practitioner, then his family. The Practitioner accepts that his father ought not to have parked in the T's space, but denied knowledge of the car park belonging Mrs T and her husband.

[25] It is also clear from the evidence that the Practitioner's role in the matter was limited and belated. By the time he entered the argument, it seems emotions were already running high between Mrs T and the Practitioner's father.

[26] Mrs T's objection to the Practitioner's conduct concerned two matters. The first was that he had repeatedly stated he was lawyer, a claim she experienced as intimidation. The second was his threat to call the police.

[27] The Practitioner said that he mentioned only once that he was a lawyer, thinking that this information could be helpful in explaining the legal position. He said he had not intended to cause any distress, but had hoped to simply to defuse the situation that had arisen between Mrs T and his father. The Practitioner said he regretted having mentioned that he was a lawyer, as this clearly had increased or added to the acrimony, albeit unintentionally on his part.

[28] I accept that mentioning he was a lawyer may have fuelled matters from Mrs T's point of view, but there is no evidence that the Practitioner yelled it repeatedly. Furthermore, after some discussion at the review hearing, Mrs T agreed that the fact that he identified himself as a lawyer could not, of itself, amount to wrongdoing. I consider this was a proper concession on her part.

[29] The second element of the complaint concerned calling the police. I have difficulty in seeing any objection to the Practitioner having done so. There was evidence that Mrs T herself had proposed calling the police. It is open to any citizen to seek the assistance of the police, and there was no question that Mrs T had blocked the car belonging to the Practitioner's father, and that she refused to move it when asked. In the circumstances there was justification for seeking police assistance, and it was not an idle threat without any purpose. This does not raise disciplinary issues.

Conclusion

[30] *Misconduct.* I accept that the Standards Committee was correct in concluding that the conduct did not reach the threshold for a finding of "misconduct" under section 7 of the Lawyers and Conveyancers Act 2006. While this section allows for such a finding to be made where the conduct does not involve providing legal services, there would need to be very serious wrongdoing before a lawyer could be held guilty of misconduct outside of his professional practice. I agree that the Committee was right in assessing the conduct as not of that degree of wrongdoing

[31] *Unsatisfactory conduct.* A finding of unsatisfactory conduct may be made where a lawyer fails to meet acceptable professional standards in his or her practice, that fall short of a failing that could lead to a finding of misconduct.

[32] An unsatisfactory conduct finding most often arises in connection with the provision of legal services. In this case the Standards Committee perceived the matter to be outside of its jurisdiction because the Practitioner was not providing legal services (regulated services) at the time.

[33] In very limited situations a lawyer could be exposed to a disciplinary finding of unsatisfactory conduct while not acting as a lawyer providing legal service. This could happen if section 12(c) of the Lawyers and Conveyancers Act 2006 applied and involved:

“conduct consisting of a contravention of this Act, or of any regulation or practice rules made under this Act that apply to the lawyer or incorporated law firm, or of any other act relating to the provision of regulated services (not being a contravention that amounts to misconduct under Section 7).”

[34] It is clear that for such a finding to be made, the conduct must involve the contravention of the Lawyers and Conveyancers Act, or of any regulation or practice rules made under that Act relating to the provision of regulated services. The application of section 12(c) is clearly limited to those circumstances. The question was whether the Practitioner had breached section 12(c).

[35] Having given careful consideration to the statutory provision of the Act and also to the rules contained in the Rules of Conduct and Client Care, I have been unable to see that any part of the complaint raised by the Applicant involved any breach of the Lawyers and Conveyancers Act or its regulations or practice rules.

[36] I accept that Mrs T and her husband were significantly inconvenienced and distressed when they returned and found another car parked in their car park. I also accept that the way that the Practitioner's father engaged with them caused a great deal of aggravation and additional distress to them.

Given her perception that the wrongdoing was not hers, she could see no objection to requiring them to wait until she was ready to move her car. This led to a confrontation with the Practitioner's father. The Practitioner's intention to placate the situation backfired to some extent.

[37] It did not help matters that the Practitioner later returned to the property to take photographs for purposes related to this review.

[38] However, the disciplinary regime is not intended to regulate matters that are generally unconnected with the practice of law by lawyers. The complaint in this case did not occur when the Practitioner was providing legal services since he was on a private visit to his grandmother and there is nothing to suggest that he was acting in a professional role. There has been no breach of any statutory provision or professional rules by the Practitioner.

[39] In these circumstances I can see no proper basis for a disciplinary finding against the Practitioner.

Decision

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

DATED this 18th day of January 2012

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 IJ as the Applicant
Mr QT as the Respondent
AW as counsel for the Respondent
The Standards Committee
The New Zealand Law Society