LCRO 8/2019

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [Area] Standards Committee
BETWEEN	**GM** Applicant
AND	**NK** Respondent

DECISION

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

Introduction

[1] Ms GM has applied to review a decision by the [Area] Standards Committee (the Committee) in which the Committee decided to take no further action on her complaint against Mr NK.

[2] The Committee's decision was made pursuant to ss 137(1)(c) and 138(2) of the Lawyers and Conveyancers Act 2006 (the Act).

[3] Those sections allow a Committee to take no further action on a complaint if it considers that it is unnecessary or inappropriate to do so.

Background

[4] In 1989, Ms GM and her then partner purchased the stratum title to a unit (the unit).

[5] The couple's unit was one of two on the land. They were side by side and had no road frontage. Access from the road to both units was by right of way down a section beside the two units, which had road frontage ([address]).

[6] [address] was also leasehold.

[7] The right of way easement had been registered in 1986. The easement was registered over the leasehold interest of [address] and not the underlying freehold.

[8] In 1992, Ms GM bought her, by then, ex-partner's share of the unit. The law firm [law firm] acted for Ms GM on that transaction.

[9] In 1993, [address] was made freehold, as the leasehold had expired. There was no title merger and the right of way easement did not form part of [address]'s freehold.

[10] The lease for Ms GM's and her neighbour's units was renewed in 2000. Neither Ms GM nor her unit-neighbour was legally represented and nothing was done about the lack of any right of way.

[11] In 2006, Ms GM purchased the freehold of the stratum estate for both her unit and the adjoining unit.

[12] Mr VR from [law firm] acted for Ms GM on that transaction.

[13] Ms GM and Mr VR discussed the lack of a recorded right of way, but nothing further was done.

[14] Ms GM's purchase was completed by Mr VR.

Complaint

[15] Ms GM's complaint was received by the New Zealand Law Society Complaints Service (the Complaints Service) on 26 July 2018.

[16] Ms GM noted that her complaint was against "[law firm]". She said that the law firm had acted for her in 2006 when she purchased the underlying freehold to her unit and the one next door to her.

[17] She said that she has subsequently tried to sell the units, but because no right of way was recorded on the title of [address], she has been unsuccessful.

[18] Ms GM is now faced with selling, at a considerable loss, to the owners of [address]. Those owners will not agree to a right of way.

[19] Ms GM said that lawyers acting for her have tried to negotiate with [law firm] to get that firm to rectify what she considers was their error in not ensuring that a right of way was negotiated when she purchased the freehold in 2006.

[20] Those negotiations have been unsuccessful.

[21] Ms GM's complaint sought an acknowledgment from the law firm that the 2006 transaction should not have proceeded without ensuring a right of way to the units. She sought legal costs and compensation for loss.

Responses

[22] Mr NK, a partner in [law firm], responded to Ms GM's complaint on 2 October 2018. He said:

(a) Mr VR acted for Ms GM in 2006. He has since left the law firm;

(b) Ms GM was aware of the right of way issue when she purchased the freehold in 2006;

(c) despite that she wished to proceed with the transaction;

(d) Mr VR did the necessary transactional work on her behalf; and

(e) Ms GM has other remedies available to her.

Standards Committee hearing and decision

[23] In its decision dated 13 December 2018, the Committee identified the issue as being whether it had jurisdiction to consider conduct said to have occurred before the introduction of the Act on 1 August 2006.

[24] The Committee noted that inquiry into conduct alleged to have occurred before that date was governed by tests under the Law Practitioners Act 1982 (the LPA). It observed that the conduct must either amount to misconduct or conduct unbecoming.

[25] After setting out the parties' respective positions about the 2006 transaction, the Committee concluded that the conduct complained about did not reach the level of either misconduct or conduct unbecoming.

[26] The Committee did note its concern about whether Mr VR had given Ms GM comprehensive advice in 2006, including whether she might have a remedy under the Property Law Act 1952 (in force at the time).

[27] A file note made by Mr VR at the time indicated that he would report to her about the issue, but it appears that he may not have done so.

[28] The Committee noted that:

> [19] The Committee considered that a failure to give such advice could constitute either a lack of diligence, a failure to complete the retainer (as Mr VR did not do what his file note recorded that he said he would do) or a lack of competence on the part of Mr VR.
>
> [20] The Committee also considered, however, that such a failure could not reasonably be considered to be either "misconduct" or "conduct unbecoming" for the purposes of the [LPA] …

[29] The Committee concluded that it had no jurisdiction to consider the matter further.

Review Application

[30] Ms GM filed her application for review on 10 January 2019. The grounds may be summarised as follows:

(a) She has been trying since 2012 to negotiate a solution to the lack of any right of way to the units, with [law firm].

(b) [law firm] gave her no advice in 2006 that she might have a remedy under the Property Law Act 1952.

(c) She is compelled to sell the units to the owners of [address] as those owners will not grant her a right of way and no other purchaser is interested because of the lack of one.

(d) This could have been avoided if [law firm] had met their legal obligations when acting for her at the time she purchased the freehold in 2006.

Response

[31] Mr NK provided response to the application for review in his letter to this Office dated 29 January 2019. Relevantly he said:

(a) Ms GM simply disagrees with the Committee's conclusions and wants to relitigate the issues in this Office.

(b) The right of way issue arose in approximately 2000, when Ms GM renewed her leasehold interest without legal advice, at a time when it was clear that there was no right of way to her unit through [law firm].

(c) In 2014, Mr NK spoke to Ms GM's lawyer about the issue with the lack of right of way. Mr NK suggested that Ms GM could apply to the High Court for relief under the Property Law Act 2007 on the basis that her land was effectively landlocked.

(d) Mr NK does not know why this was not pursued by Ms GM.

(e) Purchasing the freehold in 2006 did not worsen matters for Ms GM, as there had been a lack of any formal right of way since at least 1993 when [address] became freehold and the leasehold right of way was not carried over to the freehold title.

Nature and Scope of Review

[32] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[1]

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
>
> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
>
> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer

[1] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

> to exercise some particular caution before substituting his or her own judgment without good reason.

[33] More recently, the High Court has described a review by this Office in the following way:[2]

> A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[34] Given those directions, the approach on this review will be to:

- consider all of the available material afresh, including the Committee's decision; and
- provide an independent opinion based on those materials.

Review on the papers

[35] Both parties have consented to this review being conducted on the papers pursuant to s 206 of the Act.[3] Section 206 allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all the information available if the LCRO considers the review can be adequately determined in the absence of the parties.

[36] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submissions from either party. On the basis of the information available I have concluded that the review can be adequately determined in the absence of the parties.

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[2] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475, at [2].

[3] This Office wrote to the parties on 27 February 2019, indicating that a Review Officer had formed the view that the application for review could be adequately dealt with on the papers. The parties were invited to raise any objections to that process by 13 March 2019, pursuant to s 206(2A) of the Act. The parties were advised that if no objection was received by this date, then the matter would be dealt with by a Review Officer carrying out a hearing on the papers. None of the parties has raised objection to this process. They were further advised by this Office on 9 April 2019 that the application for review would be considered by a Review Officer on the papers.

Analysis

[37] Two issues are immediately apparent with Ms GM's complaint and her application for review:

(a) the events about which she complains, occurred before the introduction of the Act on 1 August 2008; and

(b) Mr NK has never acted for Ms GM.

Pre-1 August 2008 conduct

[38] The fact that events complained about occurred in 2006 is not fatal to that complaint being inquired into by a Standards Committee. However, complaints about conduct said to have occurred between 1 August 2002 and 1 August 2008 must be approached through the lens of the LPA and the Rules of Professional Conduct for Barristers and Solicitors.

Law Practitioners Act 1982

[39] The interplay between the LPA and the Act means that jurisdiction to consider the complaint under the Act arises in the following way: is the conduct complained about "conduct in respect of which proceedings of a disciplinary nature could have been commenced under the LPA"; or put another way, is "the case is of sufficient gravity to warrant the making of a charge (before the District Disciplinary Tribunal)".[4]

[40] To cross the "sufficient gravity" threshold the conduct must involve at least one of the following:[5]

(a) misconduct in a professional capacity;

(b) conduct unbecoming to a barrister and solicitor;

(c) negligence or incompetence of such a degree or so frequent as to reflect on fitness to practice or which tends to bring the profession into disrepute; or

[4] Lawyers and Conveyancers Act 2006, s 351 and Law Practitioners Act 1982, s 101.
[5] Lawyers and Conveyancers Act, s 106(3) and Law Practitioners Act, s 112(1).

(d) conviction of an offence punishable by imprisonment, which reflects upon fitness to practice or tends to bring the profession into disrepute.

Misconduct

[41] "Misconduct" was generally considered to be conduct:[6]

> … 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.

Conduct unbecoming

[42] "Conduct unbecoming" could relate to conduct both in the capacity as a lawyer, and as a private citizen. The test will be whether the conduct is acceptable according to the standards of "competent, ethical, and responsible practitioners".[7]

Negligence/incompetence

[43] For negligence to amount to a professional breach the standard found in s 106 of the Act and s 112 of the LPA must be breached. That standard is:

> the negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute.

"Sufficient gravity"

[44] If the case crosses the "sufficient gravity" threshold on account of any one of the criteria in [40] above, a Standards Committee has jurisdiction to consider and determine the complaint, including making a finding of unsatisfactory conduct.[8]

[45] In considering the complaint about pre-1 August 2008 conduct, the Committee must identify any breach/es of the applicable Rules or other applicable standards.

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[6] See: *Complaints Committee No 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105 (HC) at [27].
[7] See: *B v Medical Council* [2005] 3 NZLR 810 (HC) at 811.
[8] Law Practitioners Act, s 152(2)(b).

[46] If an unsatisfactory conduct finding is made, penalties are limited to those which could have been imposed under the LPA.[9] Those are provided for in s 106(4) of the LPA.

[47] The Committee approached the matter by indicating that the categories of conduct it could consider were either misconduct or conduct unbecoming.[10] It went on to provide examples of both.[11]

[48] I do not agree that Ms GM's complaint about the 2006 conduct may only be considered on the basis that it was either misconduct or conduct unbecoming.

[49] The Committee did not turn its mind to the third category of disciplinary conduct under the LPA: negligence or incompetence of such a degree or so frequent as to reflect on fitness to practice or which tends to bring the profession into disrepute.

[50] The correspondence from Ms GM's lawyers to Mr NK in 2018 was, very clearly, couched in the language of negligence. The allegation was that in 2006, Ms GM had not been advised about the right of way issue and her options, when a competent practitioner would (or should) have done so.

[51] That being said, even if the 2006 conduct is examined through a negligence or incompetence lens, I am not persuaded that Ms GM has made either allegation out.

[52] First, as the person bringing a complaint (and now this application for review) Ms GM has the burden of proving her case on the balance of probabilities. That means that Ms GM must persuade the Committee (and this Office) that her evidence about the events and their consequences is more probable than not.

[53] Moreover, she must establish that any negligence or incompetence is "of such a degree or so frequent as to reflect on fitness to practice or which tends to bring the profession into disrepute".

[54] A relevant consideration is whether Ms GM had been put on notice about the right of way issue in about 2000, when she renewed her lease but did not take the matter any further at that time.

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[9] Lawyers and Conveyancers Act, s 352. Subsection (2) allows a Standards Committee to impose penalties under the Act, for LPA conduct with a practitioner's consent.
[10] Standards Committee decision at [10].
[11] At [11].

[55] There is also some uncertainty about what instructions Ms GM gave Mr VR in 2006 and what advice he gave her. There is a suggestion that he made a note about getting back to her about the right of way issue, but Ms GM said that this did not occur.

[56] Mr VR's position on all of this is unknown. The Committee's decision records that he now practises law in [country].

[57] Moreover, there is uncertainty about any losses that Ms GM has suffered, given that the position has been on foot since 1993 and Ms GM now has the benefit of rent from the adjoining unit, which she purchased with the freehold.

[58] Issues about whether Ms GM could have mitigated her loss (if any) earlier than 2018, also arise. Mr NK spoke to her lawyers in either 2012 or 2014 about the possibility of relief under the Property Law Act 2007.

[59] Those are all issues that can only be resolved after a conventional hearing in the Courts where negligence is pleaded and argued before a judge. That process includes key witnesses giving evidence and being cross examined. This enables a judge to properly assess the competing cases and make a decision accordingly.

[60] The inquisitorial processes of this Office do not allow for that degree of inquiry and analysis. Parties do not give evidence. There is no cross examination. There is no process of discovery whereby parties exchange all relevant material.

[61] Moreover, this Office only has part of the picture. As indicated, Mr VR's recollection of his instructions and the advice he gave Ms GM in 2006, is not known.

[62] Unless there has been a finding of negligence by a Court, it is difficult for the disciplinary process to resolve that issue.

[63] It is open for a Committee or this Office to make a finding that a lawyer's conduct has fallen below the level of competence expected of lawyers: that a lawyer has acted incompetently.

[64] Again, however, that becomes difficult when the conduct complained about is so old (in this case, over 13 years old) and there is a real degree of uncertainty about what actually transpired at the time.

[65] On those accounts alone, Ms GM's complaint and application for review would fail.

Mr NK's conduct

[66] In my view there is a more fundamental difficulty with both Ms GM's complaint and her application for review.

[67] The complaint was initially made as one against [law firm].

[68] Complaints may only be made against an incorporated law firm, or an individual lawyer (or employee of a law firm).

[69] [law firm] was not an incorporated law firm in 2006. Nor was it such when Ms GM made her complaint in July 2018.

[70] When asked by the Complaints Service to clarify about whom she was complaining, Ms GM confirmed that it was Mr NK as he had negotiated on [law firm]'s behalf with Ms GM's lawyers during 2018 (and earlier).

[71] Ms GM said that Mr VR had done the transactional work in 2006, about which she was complaining, but she said that he had since left that firm.

[72] The Complaints Service processed this as a complaint against Mr NK. It forwarded the complaint to him, noting the issue as being "failing to advise on the lack of right of way on the title … and the [effect] that lack could have".

[73] Mr NK's response noted that Mr VR had acted for Ms GM at the relevant time. Mr NK said that his response to the complaint was "taken from an examination of [[law firm]'s] files and some interaction with [Ms GM], via her solicitors, subsequent to the transaction being completed".

[74] It is perfectly plain that the legal work complained about — which occurred in 2006 — was not carried out by Mr NK. Mr NK has never acted for Ms GM. His involvement has been limited to exchanges of correspondences and telephone discussions with her lawyers in 2018 (and earlier) about responsibility for the right of way issue.

[75] No complaint against Mr NK for legal work in which he had no involvement could ever be sustained and, on that account alone, the complaint ought to have been taken no further by the Committee.

[76] Moreover, there is nothing in Mr NK's correspondence with Ms GM's lawyers in 2018 which raises any conduct issues. There is no suggestion, for example, that he failed to treat those lawyers with respect and courtesy.

[77] Finally, and for completeness, I note that in 2006, when Mr VR acted for Ms GM, Mr NK was a partner in [law firm] and Mr VR was an associate.

[78] However, there is nothing before me to indicate that Mr NK was directly responsible for supervising Mr VR's work and so the question of whether Mr NK may have committed some disciplinary lapse, on account of not properly supervising Mr VR, cannot be considered. In any event, I do not understand that to be an issue of complaint by Ms GM.

Conclusion

[79] I am required to bring a fresh, independent and robust view to the complaint, the Committee's decision and the application for review. In doing so, I have carefully and comprehensively considered all of the relevant material that was provided to the Committee and to this Office on review. I have paid particular attention to the areas in which the applicant has said that the Committee was in error.

[80] Although I have approached the matter from the perspective that Mr NK has never been Ms GM's lawyer, nothing raised persuades me that the Committee's conclusions were wrong. The Committee's decision is therefore confirmed.

Decision

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

Anonymised publication

[82] Pursuant to s 206(4) of the Act, this decision is to be made available to the public but with the names and identifying details of the parties removed.

DATED this 25th day of June 2019

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Rex Maidment
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 GM as the Applicant
Mr NK as the Respondent
Mr TYas a Related Person
[Area] Standards Committee
New Zealand Law Society