

LCRO 29 / 2009

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

**AND**

**CONCERNING** A determination of the Auckland  
Standards Committee

**BETWEEN** **CLIENT T** of Paraparaumu  
Applicant

**AND** **LAWYER G** of Auckland  
Respondent

### **DECISION ON PENALTY AND COSTS**

#### **Introduction**

[1] In a decision of 23 April 2009 Lawyer G was found guilty of unsatisfactory conduct. Submissions were invited from Lawyer G in respect of the appropriate orders in respect of penalty, costs and publication. Submissions were invited from Client T in respect of the appropriate order in respect of publication only. Submissions from both parties were sought within ten working days. Client T did not communicate with this office further and it can be inferred that he wished to take no further action in the proceeding.

[2] Lawyer G wrote to this office on 29 April 2009 and sought further time within which to make submissions. An extension was granted to 11 May 2009. On 8 May 2009 Lawyer G sought a further extension of time until the end of June. This application was declined but an extension until 29 May 2009 was granted. No submissions from Lawyer G have been received and therefore I am considering the appropriate orders on the basis of the information available to me from the Standards Committee file and the material submitted in the conduct of the review.

[3] The facts that gave rise to the finding of unsatisfactory conduct have been traversed in the earlier decision and need not be repeated in detail. In that decision I found that Lawyer G had entered into a lawyer-client relations with Client T and

terminated that relationship without good cause in breach of 4.2 of the Rules of Conduct and Client Care. Lawyer G terminated the relationship on 18 August 2008 (shortly after the new Rules came into force). I found that the conduct of Lawyer G prior to 1 August 2008 did not breach the standards which were applicable at that time.

[4] In considering the appropriate orders to make I am mindful that I have found unsatisfactory conduct by Lawyer G only in respect on one matter (the termination of the retainer). However, that conduct should be viewed against the background of the history of the dealings between Lawyer G and Client T. On the one hand I note that Lawyer G did not act diligently or in respect of Client T's affairs or respond to Client T's enquiries in a timely way. He also prevaricated in obtaining a transfer of legal aid on the assumption that until he did so he would not be committed to work for Client T. On the other hand, Client T was clearly a difficult and demanding client and Lawyer G's view that his proposed course of action was inadvisable (and not that agreed to by the Legal Services Agency) was reasonable in the circumstances.

### **Penalty**

[5] I noted in my earlier decision that this was not a case in which I considered it possible to make any meaningful remedial orders. The focus is therefore on what the appropriate penalty is. The function of a penalty in a professional context was recognised in *Wislang v Medical Council of New Zealand* [2002] NZAR 573 as being:

- to punish the practitioner;
- as a deterrent to other practitioners; and
- to reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct.

[6] In this case I concluded that the breach of Lawyer G was inadvertent and that he was of the erroneous view that no solicitor-client relation existed between him and Client T. Accordingly he concluded that he was not terminating a relationship, but rather informing Client T that he could not accept him as a client. It is however relevant that this position was reached because Lawyer G had been equivocating in his own mind as to whether or not to proceed with Client T's work for several months.

[7] Lawyer G's conduct was therefore unacceptable, but not disgraceful or deplorable in any way. The "condemnation or opprobrium" which ought to be imposed in this case is modest. There has however been a breach by Lawyer G and it should

not pass unpunished. It is also important to mark out the conduct as unacceptable and deter other practitioners from failing to pay due regard to their professional obligations in this manner. By s 211(1)(b) of the Lawyers and Conveyancers Act (the Act) I am able to make any orders that could have been made by a Standards Committee. I consider that the most appropriate way to fulfil the functions of a penalty in this context is by the imposition of a fine.

[8] By s 156(1)(i) of the Act a fine of up to \$15 000 may be when unsatisfactory conduct is found. For a fine of that magnitude to be imposed it is clear that some serious wrongdoing must have occurred. It is unlikely that large fine would properly be imposed for conduct which was due to inadvertence or a failure to appreciate the proper legal position. The conduct under consideration in this case is at the other end of the spectrum. However, in allowing for a possible fine of \$15 000 the legislature has indicated that breaches of professional standards are to be taken seriously and instances of unsatisfactory conduct should not pass unmarked. This is a significant change from the position under the Law Practitioners Act 1982 where the District Disciplinary Tribunals could only impose a much more modest fine of up to \$2000 (s 106(4)(a)).

[9] In cases where unsatisfactory conduct is found as a result of a breach of applicable rules (whether the Rules of Conduct and Client Care, regulations or the Act) and a fine is appropriate, a fine of \$1000 would be a proper starting place in the absence of other factors. I note that by definition such a breach is not wilful or reckless.

[10] In this case Lawyer G has made no submissions as to penalty; however, I take into account the facts elicited in the course of the review itself. I observe that Lawyer G's conduct was attributable to an error as to whether a retainer existed or not, and also that he was perhaps under additional pressure given the nature of the demands placed on him by Client T.

[11] Taking into account the above matters Lawyer G is ordered to pay a fine of \$600 pursuant to s156(1)(i) of the Lawyers and Conveyancers Act 2006. That fine is to be paid to the New Zealand Law Society within 30 days of the date of this decision.

### **Costs**

[12] Where a finding has been made against a practitioner is it appropriate that a costs order in respect of the expense of conducting the review be made against them. In making this costs order I take into account the Costs Guidelines published by this office. Applying those guidelines I consider this to have been a relatively straightforward review. It was also one conducted on the papers with the consent of the parties. In light of these matters Lawyer G is ordered to pay to the New Zealand Law Society \$900.00 in respect of the costs incurred in conducting this review within 30 days of the date of this decision.

### **Publication**

[13] The Guidelines for Parties to Review of this office state that the interim position is that “in general the LCRO will not publish the names of lawyers or conveyancers who are found guilty of unsatisfactory conduct for the first time”. There is no reason to depart from this position in this case. I am mindful that in this case Client T has achieved some notoriety for his views and that an informed reader may be able to deduce his identity from the facts of this case. However, in light of the fact that Client T did not make any submissions on this matter and recognising that absolute anonymity may be impossible I am of the view that this decision is to be made available to the public with the names and identifying details of the parties removed in the normal way.

### **Orders**

[14] The following orders are made:

- Lawyer G is to pay a fine of \$600 pursuant to s156(1)(i) of the Lawyers and Conveyancers Act 2006. That fine is to be paid to the New Zealand Law Society within 30 days of the date of this decision.
- Lawyer G is to pay \$900.00 in respect of the costs incurred in conducting this review pursuant to s 210 of the Lawyers and Conveyancers Act 2006. Those costs are to be paid to the New Zealand Law Society within 30 days of the date of this decision.

**DATED** this 9<sup>th</sup> day of June 2009

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Duncan Webb

**Legal Complaints Review Officer**

In accordance with s 213 of the Lawyers and Conveyancers Act this decision is to be provided to:

Client T as applicant  
Lawyer G as respondent  
The Auckland Standards Committee  
The New Zealand Law Society