

LCRO 47/2009

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 No 4

BETWEEN **MR TRANENT** of Auckland

Applicant

AND **MR ABINGDON** of Auckland

Respondent

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

DECISION

Background

[1] Mr Tranent complained to the New Zealand Law Society regarding the conduct of Mr Abingdon. The matter was referred to the Auckland Standards Committee 4 for consideration. Mr Abingdon acts for Mr Tranent's estranged wife (Ms XX) in respect of certain relationship property matters.

[2] On 24 February 2009 the Auckland Standards Committee 4 resolved to take no action on the complaint. That decision was notified to Mr Tranent on 3 March 2009. Mr Tranent sought a review of the decision of the Standards Committee by an application received by this office on 31 March 2009. The review was conducted by a hearing in person on 13 May 2009 at which both parties were present.

[3] The complaint has a number of aspects. They include that Mr Abingdon has acted inappropriately and in breach of a duty of care that it is argued he owes to Mr Tranent. It was argued that the duty was breached in the way Mr Abingdon has managed the relationship property issues. In particular Mr Tranent argues that Mr Abingdon has failed to facilitate the release of certain funds which

are held in the trust accounts of other lawyers. Those funds are the proceeds of the sale of properties jointly owned by Mr Tranent and Ms XX. Mr Tranent also complains that Mr Abingdon has dealt with him in an unprofessional manner in that his communications have been defamatory, aggressive, bullying and intimidatory, and that he has failed to respond to communications from Mr Tranent.

[4] Underlying this complaint is a fraught relationship property dispute in which the parties are unable to agree as to the disposition of relationship assets. This hearing is not concerned with the merit of the parties' respective stances in relation to that dispute. That is a matter for the parties to resolve either by agreement or by recourse to the courts.

Duty of care

[5] Mr Tranent maintained that Mr Abingdon owed him a duty of care. He argued that by dint of the duty owed by Mr Abingdon to his client (Ms XX) Mr Abingdon also owed a duty to him. His argument was that the stance taken by Mr Abingdon in relation to the dispute was unreasonable and had the effect of causing ongoing financial losses to both Mr Tranent and Ms XX. It was argued that this was due to the fact that significant debt exists on jointly owned properties and that debt could be reduced by the release of the funds held on trust. He also argues that Mr Abingdon has not been co-operative in respect of the sale of other property, particularly a property situated in Australia, and thereby caused the loss of an advantageous sale.

[6] At the hearing Mr Abingdon stated that his duty was to protect the interests of his client as he saw them and to advise her as to the risks and benefits of possible courses of action. In this regard he is correct and there is no obligation to take into account the interests of Mr Tranent in proffering advice to Ms XX. Mr Tranent may disagree with the way in which Mr Abingdon is advancing the interests of Ms XX, however that is not the concern of Mr Tranent and is no ground for complaint. Mr Abingdon does not owe Mr Tranent a duty of care. While he owes his own client a duty, that is not in issue in this complaint.

[7] I observe that s 138(1)(e) of the Lawyers and Conveyancers Act 2006 explicitly states that a Standards Committee may resolve not to inquire further into a complaint where the complainant "does not have a sufficient personal interest in the subject matter of the complaint". In the present case Mr Tranent

does not have a legitimate personal interest in the manner in which Mr Abingdon discharges his professional duties to Ms XX.

Funds held in trust

[8] Mr Tranent maintained that Mr Abingdon had no legal basis for refusing to consent to the release of the proceeds of the sale of property held in the trust account of another lawyer. It appears that Mr Tranent was of the view that it was appropriate the funds held in trust be paid to an account in the joint names of himself and Ms XX at the ANZ Bank in order to reduce debt-servicing costs.

[9] Mr Abingdon said that he does not have an obligation to secure the release of the funds held in trust. Moreover he stated that he has no authority to do so. That authority lies jointly with Mr Tranent and Ms XX. It appears that Ms XX is unwilling to consent. It may be that her withholding of consent is on Mr Abingdon's advice, however as noted above, Mr Abingdon has no duty to Mr Tranent in respect of the advice he gives to Ms XX. It may be that Mr Tranent considers the decision not to release those funds to be unwise. Whatever the reasons for the delay, that issue can only be resolved by either agreement or recourse to the courts. In this regard Mr Abingdon is in breach of no professional duties.

[10] If a remedy for Mr Tranent exists in respect of the non-payment of the trust funds it would appear to lie in the courts. Section 138(1)(f) provides that where an adequate remedy exists in another forum that it is reasonable for the complainant to exercise it is appropriate for the Standards Committee to decline to enquire further into the matter. In light of this the Standards Committee was correct in its decision to dismiss this aspect of the complaint.

Unprofessional dealings

[11] Mr Tranent also complains that Mr Abingdon has been unprofessional in his dealings with him. The two principal aspects of this complaint are the tone of Mr Abingdon's communications and more recently Mr Abingdon's failure to communicate with him at all. Mr Tranent is not represented by a lawyer in the relationship property dispute (though lawyers have been used when conveyancing services are required). He complains that Mr Abingdon's letters

have been defamatory, aggressive, bullying and intimidatory. A number of letters were produced in support of these allegations. Those letters were blunt. Those letters contained statements such as that Mr Tranent constantly “bleated” was “untrustworthy”, has “no thought or consideration to anyone else except yourself”, was a “bully”, had an “inability to be honest”, stated “you lie”, and he had “stolen” a credit voucher.

[12] Mr Abingdon accepts that his communications on this matter have been blunt but argues that they are not in breach of any professional standard. It was put to Mr Abingdon that he had made serious accusations of dishonesty against Mr Tranent and that this must be done only with good reason. Mr Abingdon responded by stating that he had serious concerns in respect of some aspects of the conduct of Mr Tranent and how he dealt with money that had been received and he put those concerns to him, albeit bluntly. He stated that he did not consider that he was able to trust Mr Tranent. What is clear is that there is a high degree of mutual antipathy between Mr Abingdon and Mr Tranent and neither considers the other trustworthy. I note that Mr Abingdon has not made any of the allegations publicly, but simply put them to Mr Tranent in correspondence.

[13] The letters in which these statements were made were written between 16 January and 18 July 2008. The letters to which Mr Tranent objects were written prior to 1 August 2008. That date is relevant because it was then that the rules relating to the obligations of lawyers were changed. Conduct engaged in prior to that date must be considered under the provisions of the Law Practitioners Act 1982 and applicable standards. Conduct engaged in after that date must be considered under the provisions of the Lawyers and Conveyancers Act 2006 and the applicable standards.

[14] 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).

[15] The Standards Committee had the offending letters available to them and concluded that nothing in the correspondence could be regarded as unprofessional conduct by Mr Abingdon. This was the considered view of the Committee comprised of other lawyers and assisted by lay members. It would require a clear error of judgement for me to overturn a conclusion relating to what is acceptable according to the standards of other practitioners (being the standard for conduct unbecoming). I am not persuaded that the Standards Committee was wrong in its conclusion in this respect. I record also that I do not consider that the high threshold of 'reprehensible' 'inexcusable', 'disgraceful' 'deplorable' or 'dishonourable' required for a finding of misconduct has been reached.

Refusal to deal with Mr Tranent

[16] Mr Tranent complained that he had offered to meet Mr Abingdon "but he has not had the courtesy to respond" and that he had written, called, and emailed Mr Abingdon to secure the release of the funds without success. Mr Abingdon acknowledges that he has not responded to Mr Tranent and has stated that he is instructed to deal with Mr Tranent only through another lawyer. He explained at the hearing that he had formed the view that it was not useful to deal with Mr Tranent as he had been unable to obtain useful or meaningful responses in respect of earlier correspondence. He therefore considered that to communicate further with Mr Tranent would be a waste of time. He stated in correspondence to the Standards Committee that the decision not to deal with Mr Tranent other than through a lawyer was on the instructions of his client Ms XX. This obviously places a significant impediment in the way of Mr Tranent acting for himself in the resolution of this matter. This refusal to deal with Mr Tranent appears to have been ongoing from July 2008 to the present time. Accordingly the applicable standards are the Rules of Conduct and Client Care for Lawyers and the Lawyers and Conveyancers Act which have been in force since 1 August 2008 .

[17] Subsequent to the hearing I sought clarification of the manner in which Mr Abingdon let Mr Tranent know that he would not deal with him other than through a lawyer. In response to that Mr Abingdon stated in a letter of 19 May 2009 that

his first and only advice to Mr Tranent that he did not wish to deal with him direct was made at the LCRO hearing on 13 May 2009. He stated further that anything Mr Tranent sent him was referred to his client and if a response was required it would be responded to. A copy of the direction to Mr Abingdon was provided to Mr Tranent. He provided a letter and accompanying documents which largely duplicated material already provided. I record that that additional material was not relied on in reaching this decision.

[18] Rule 12 of the Rules of Conduct and Client Care for Lawyers provides that a lawyer must “when acting in a professional capacity, conduct dealings with others, including self represented persons, with integrity, respect, and courtesy”. That obligation must of course be viewed against the fact that lawyers practice in what is often a necessarily conflict ridden environment. It is particularly appropriate to note that in this case Mr Tranent is in effect the adversary of Mr Abingdon’s client. In this context the obligations of respect and courtesy are modest and do not extend to a requirement that Mr Abingdon be pleasant or co-operative. In some situations the role of a lawyer requires a lawyer to engage in conduct which is, in the view of the other party, obstructive and unhelpful.

[19] Mr Abingdon is of course required to follow his client’s instructions provided they do not breach his professional obligations. In this case he states that his client has instructed him not to deal with Mr Tranent other than through a lawyer. Mr Tranent is entirely within his rights to choose to conduct his own legal affairs (whether or not Mr Abingdon thinks that that is wise). I am concerned that the failure to even acknowledge the correspondence and communications of Mr Tranent may be unsatisfactory conduct by Mr Abingdon given the applicable standards. This is particularly the case because Mr Abingdon did not communicate to Mr Tranent the fact that he would not deal with him further other than through a lawyer.

[20] Certainly, it would not be acceptable for Mr Abingdon to ignore communications from another lawyer. It is also of note that Mr Abingdon has also objected to Mr Tranent communicating directly with Ms XX in the matter. In light of this Mr Tranent’s frustration is understandable.

[21] I also identify the fact that significant wider issues may arise were it considered appropriate for a lawyer to refuse to deal with an unrepresented

party. In particular such an approach may make the resolution of disputes for unrepresented parties more difficult and act as a barrier to justice in such cases.

[22] I am concerned that Mr Abingdon's refusal to acknowledge the correspondence and communications from Mr Tranent is in breach of obligation of courtesy in r 12 of the Rules of Conduct and Client Care and may therefore amount to unsatisfactory conduct. I note that this concern is magnified by the failure to inform Mr Tranent of the reason why he was not responding to his communications until the hearing before the LCRO.

[23] I am also concerned that Mr Abingdon's refusal to deal with Mr Tranent may be "conduct that would be regarded by lawyers of good standing as unacceptable" under s 12(b) of the Lawyers and Conveyancers Act 2006 and therefore unsatisfactory conduct. This concern is accentuated given the problems that arise if lawyers are permitted to refuse to deal with unrepresented parties. A breach of that standard is a question best answered by the Standards Committee.

[24] I also note that while this issue was put to Mr Abingdon at the hearing it is not a matter which had previously been clearly identified as in issue and it may be appropriate to give Mr Abingdon an opportunity to respond to this aspect of the complaint. It is for the above reasons that I make the following decision.

Decision

[25] The application for review is upheld. Pursuant to s 209(1)(a) of the Lawyers and Conveyancers Act I direct:

that the Auckland Standards Committee 4 consider the specific question of whether Mr Abingdon's conduct in refusing to deal with Mr Tranent except through a lawyer and/or his subsequent failure to acknowledge any communications from Mr Tranent amounts to unsatisfactory conduct.

[26] I request that the Auckland Standards Committee 4 provide a follow up report to me when it has complied with this direction pursuant to s 209(1)(c) of the Lawyers and Conveyancers Act.

Costs

[27] Mr Abingdon applied for costs against Mr Tranent in this matter. In light of the fact that the application has been upheld (albeit on a narrow aspect of the complaint) no costs order will be made.

DATED this 22nd day of May 2009

Duncan Webb
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 Tranent as applicant
Ms Abingdon as respondent
The Auckland Standards Committee 4
The New Zealand Law Society