

LCRO 38 / 2009

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

AND

CONCERNING A determination of [Area] Standards
Committee No X

BETWEEN **AB**

Applicant

AND **CD**

Respondent

DECISION

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

Background

[1] The applicant [Mr AB] complained to the New Zealand Law Society in respect of conduct of the respondent [Mr CD] in relation to mortgagee proceedings. Entities controlled by [Mr AB] were mortgagors. The mortgagee was [Mortgage Company X]. [Mr CD] acted for the mortgagee in respect of enforcement of the rights under the mortgages and discharge of the mortgages when the amounts were refinanced by the mortgagors.

[2] [Mr AB] complained that [Mr CD] was reckless in sending out Property Law Act notices in respect of amounts allegedly due and owing under the mortgages. He alleges “sinister” motives. He also asserts that the law firm has a major shareholding in the mortgagee. The complaint was made on 4 November 2008 and accompanied by a number of supporting documents.

[3] [Mr CD] responded to the complaint on 20 November 2008 and also enclosed a number of supporting documents. He stated that he acted only on the instructions of

his client [Mortgage Company X]. He observed that he did not act for the complainant or any of the entities associated with him and that at all times they had their own legal advisor. He argued that the substance of the complaint was that the demand by the mortgagee was ill founded and that as such was properly a claim against the mortgagee. He stated that his law firm had no beneficial or financial interest in the mortgagee. It was clarified (on 23 January 2009) that he was a shareholder and director in a trustee company which held shares as a bare trustee of the holding company of the mortgagee.

[4] [Mr AB] replied to [Mr CD]'s response on 8 December 2008. In that response he reiterated his complaint and stated that there was no default under the mortgage in question. He stated that the issue of a Property Law Act notice was a "gross overreaction". [Mr CD] responded briefly on 23 January 2009 (as noted above) clarifying his relationship (though the trustee company) with the mortgagee.

[5] The matter was considered by the [Area] Standards Committee X on 11 February 2009 which concluded that in all of the circumstances there was no evidence of improper conduct. It resolved to take no further action pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006.

This Review

[6] An application for a review of the decision of the Standards Committee was made to this office on 24 March 2009. [Mr CD] replied to that application in a brief letter of 23 April 2009.

[7] The parties have consented to this matter being considered without a formal hearing and therefore in accordance with s 206(2) of the Lawyers and Conveyancers Act this matter is being determined on the material made available to this office by the parties and the Standards Committee.

[8] This review concerns conduct which occurred prior to 1 August 2008 and as such the applicable rules are those in force at that time. In particular, s 352 of the Lawyers and Conveyancers Act 2006 states that penalties may only be imposed in respect of conduct which could have been imposed for that conduct at the time the conduct occurred. The relevant standards are set out in ss 106 and 112 of the Law Practitioners Act 1982. Those sections provide that disciplinary sanction may be imposed where a practitioner is found guilty of misconduct in his professional capacity,

or conduct unbecoming a barrister or a solicitor (the provisions relating to negligence and to criminal convictions are not relevant here). Further guidance can be obtained from the Rules of Professional Conduct for Barristers and Solicitors which were the applicable rules at the time in question.

[9] The threshold for disciplinary intervention under the Law Practitioners Act 1982 is therefore relatively high. Misconduct is 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 is perhaps a slightly lower threshold. 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).

Consideration

[10] One of the fundamental duties of a lawyer is to protect and promote the interests of his or her client to the exclusion of the interests of third parties. At the outset it may be useful to note that the primary obligations of [Mr CD] were owed to [Mortgage Company X] as his client. The entities associated with [Mr AB] were the parties against whom [Mr CD] had been instructed to act. While lawyers owe limited duties to third parties, it must be held in mind that it is a fundamental obligation of a lawyer to protect the interests of his or her clients.

[11] One of the duties owed to their parties, and balancing the obligation of loyalty to the client (under the now replaced rules) was r 7.04 of the Rules of Professional Conduct for Barristers and Solicitors. That rule provided that:

A practitioner must make all reasonable efforts to ensure that legal processes are used for their proper purposes only and that their use not likely to cause unnecessary embarrassment, distress or inconvenience to another person's reputation, interests, or occupation.

[12] The issue for determination is whether the conduct of [Mr CD] in seeking repayment of the amounts owing under the mortgages (including issuing the Property

Law Act notice fell foul of this standard. Clearly it is inappropriate for a lawyer to issue a Property Law Act notice knowing that no proper basis for such a notice exists. However, that did not happen here. There was no evidence provided to the Committee which suggested that the belief of [Mr CD] that a Property Law Act notice could be properly issued was not reasonably held. There is no evidence of any ulterior motive of [Mr CD]. I am satisfied that in this case [Mr CD] did not breach any professional standards.

[13] I note that in matters concerning repayment of mortgages pursuant to alleged default it is not uncommon for dispute to exist as regards the existence or extent of default. [Mr AB] had his own legal advisor and accountant and the amounts claimed were ultimately paid. If a dispute about the amount owing existed it might properly have been raised at that time. Whatever the actual position about the amount due, [Mr CD] did not act inappropriately in following the instructions of his client in all of the circumstances.

Conclusion

[14] The application for review is declined and the decision of the Standards Committee is upheld.

DATED this 28th day of April 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 AB as Applicant
Mr CD as Respondent
The [Area] Standards Committee X
The New Zealand Law Society