

**CONCERNING**

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

**AND**

**CONCERNING**

a determination of Standards Committee

**BETWEEN**

**RC**

Applicant

**AND**

**ZN**

Respondent

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

**DECISION**

**Introduction**

[1] Mr RC has applied for a review of the determination by Standards Committee that his communication with Ms ZN of 28 May 2010 constituted a threat for an improper purpose and breached rule 2.7 of the Conduct and Client Care Rules.<sup>1</sup> The Committee considered that this constituted unsatisfactory conduct by reason of s 12(c) of the Lawyers and Conveyancers Act 2006. It imposed a fine of \$1,000 and ordered Mr RC to pay costs of \$750.

[2] At the review hearing Mr RC acknowledged immediately that it was the finding of unsatisfactory conduct which concerned him most but of course the penalties were imposed as a result of that finding.

[3] Another matter which requires to be clarified at the outset, is that it is acknowledged it is Ms ZN who was the complainant. Throughout correspondence with the Standards Committee, the names of Ms DF (who lodged the complaint on behalf of

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<sup>1</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

Ms ZN) and Ms ZN have been used interchangeably giving the impression that Ms DF herself was the complainant. That is not correct.

## **Background**

[4] The background facts are quite simple. Mr RC acted for a company which was owed money by two companies of which Ms ZN was a director. The debts were acknowledged and it was agreed they would be paid by instalments.

[5] Before the debts were repaid in full, one of the debtor companies changed its name and it then requested to be struck off the register of companies on the grounds that it had ceased to carry on business in New Zealand. In support of the request, Ms ZN made the required declaration that the company:

...has ceased to carry on business, and has discharged in full its liabilities to all known creditors, and has distributed its surplus assets in accordance with its constitution and the Companies Act 1983.

[6] Having learned of this, Mr RC wrote to Ms ZN reminding her that the debt to this client had not been repaid in full. He concluded his letter with the following paragraphs:

It may be that funds to pay the debt owed by [Company A] to [Company B] were put aside when you made the declaration of solvency quoted above, but that payment was inadvertently overlooked.

The purpose of this letter is to remind you of the debt owed to [Company B] and to invite payment in accordance with your declaration that [Company A] has discharged its liabilities in full.

If payment is not received within 14 days, we will be forced to the conclusion that [Company A] was/is unable to discharge its liabilities in full, and that your declaration of solvency may have breached section 377 Companies Act 1993 – and we will refer the matter to the authorities for further investigation.

[7] It would seem that Mr RC did communicate with the Ministry of Economic Development (which I shall subsequently refer to as the Companies Office) and Ms ZN was prosecuted. Ms DF was counsel for Ms ZN in relation to that charge.

[8] In the course of the proceedings the letter from Mr RC was disclosed in evidence and that prompted Ms DF to lodge the complaint on behalf of Ms ZN. She did this as soon as she was able to meet with Ms ZN and obtain instructions.

[9] The complaint was made on 11 April 2011 and the hearing of the charge by the Companies Office was due to proceed on 7 July 2011.<sup>2</sup>

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<sup>2</sup> I have assumed the hearing did proceed but the outcome is unknown to me. The outcome is not relevant to this review (or to a consideration of the complaint).

[10] Ms ZN's complaint was that Mr RC's letter constituted a breach of rule 2.7 in that it contained a threat, and, although the letter of complaint did not refer to this, the remainder of the rule requires the threat to have been made for improper purposes.

[11] It is appropriate here to record in full for the benefit of readers of this decision the text of rule 2.7. "A lawyer must not threaten, expressly or by implication, to make any accusation against a person or to disclose something about that person for any improper purpose".

### **The review**

[12] During the course of this review, I suggested that it could be completed on the basis of the material to hand as both parties had made comprehensive submissions. I also invited both parties to make further submissions. Mr QT represented Mr RC throughout the complaint and this review and advised that he wished to speak to his written submissions as he is entitled to do.

[13] The review proceeded with a hearing attended by Mr RC and Mr QT. Both Ms ZN and Ms DF were excused from attending the hearing and no further submissions were provided by either of them. I have of course reviewed the Standards Committee file in detail and have taken this into account along with the material provided to this Office by the parties during the course of this review.

[14] In determining the complaint, the Standards Committee took note of previous Standards Committee determinations. Mr RC requested full copies of these but it was not possible to be provided with same as no publication orders had been made.

[15] One such determination was reported in LawTalk Issue 357 and was headed "Threat to make criminal allegation". In that matter, a lawyer was found guilty of unsatisfactory conduct after threatening to make a report to the Securities Commission if the amount at the centre of a civil dispute was not paid. The lawyer's clients were seeking repayment of a share subscription promoted by the opposing client. The lawyer wrote to the opposing client stating that if payment was not made within a certain time "our clients will need to look to their legal remedies which include a civil claim and referring the matter to the Securities Commission". Subsequently, the lawyer wrote again stating that "our clients will refer this matter to the Securities Commission for investigation in the first instance" unless payment was made within a further seven days. The opposing client complained to the Law Society that the lawyer had committed blackmail under s 237 of the Crimes Act 1961. The Standards Committee noted that the allegation raised the issue of a breach of rule 2.7 of the Conduct and Client Care Rules and found that the lawyer

had breached that rule. It determined there had been a clear threat to make a disclosure to the Securities Commission and the threat had been for an “improper purpose” – i.e. to facilitate the settlement of a civil claim. The Committee determined that such conduct was not sufficient to support a charge of misconduct before the Lawyers and Conveyancers Disciplinary Tribunal, but considered that the conduct constituted unsatisfactory conduct. The lawyer was ordered to apologise to the complainant and to pay costs of \$1,000 to the Law Society.

[16] Whilst there are some similarities between that decision and the matter under review, the major difference is that the debts owed to Mr RC’s client were undisputed whereas in the reported decision it would seem the debts were disputed.

[17] The role of the Legal Complaints Review Officer (LCRO) is to consider all of the material and submissions and to reach an independent view of the matter.<sup>3</sup> I am not therefore influenced to any extent by previous Standards Committee determinations which may or may not have been reviewed by this Office.

[18] The issue under consideration often arises in the context of a “threat” to make a complaint to the Lawyers Complaints Service if certain conduct is not undertaken by the lawyer. This is of course the subject of rule 2.10, but the wording of each rule is similar in that the conduct which is not condoned is a “threat” to do something “for an improper purpose”.

[19] The third element of rule 2.7 is that the threat must be “to make an accusation against a person or to disclose something”.

#### **Did Mr RC “threaten” Ms ZN?**

[20] In his submissions to the Standards Committee Mr QT referred to the definition of a “threat” in *Butterworths New Zealand Law Dictionary*<sup>4</sup> and in *Adams on Criminal Law*.<sup>5</sup>

[21] The discussion in *Adams* is in relation to the crime of blackmail. The previous rules of professional conduct included a specific rule 7.05:

A practitioner must not make demands coupled with threats so as to commit the offence of blackmail. A practitioner must not, with an intent to gain, threaten, even if only by implication, criminal proceedings in the context of civil disputes.

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<sup>3</sup> *Deliu v Hong* [2012] NZHC 158 at [41].

<sup>4</sup> Peter Spiller and Marian Sybil Hinde *Butterworths New Zealand Law Dictionary* (5<sup>th</sup> ed, Butterworths, Wellington, 2001) at 308.

<sup>5</sup> Robertson JB (ed) *Adams on Criminal Law* (looseleaf ed, Thomson Reuters).

[22] The definition of the word “threaten” in *Butterworths* is:

Any menace of any such a nature and extent as to unsettle the mind of the person on whom it operates, and to take away from his or her acts that free voluntary action which alone constitutes consent.

[23] The definition of the word “threaten” in the *Oxford English Dictionary*<sup>6</sup> is “to press, urge, try to force or induce; especially by means of menaces”.

[24] The “threat” in Mr RC’s letter was that he would advise “the authorities” of the fact that Ms ZN may have made a false declaration.

[25] If the declaration was correct, then the statement by Mr RC would not have constituted a threat such as to cause Ms ZN to become concerned. It is somewhat difficult to accept the proposition, that a stated intention to take a particular course of action constituted a “threat” if a certain state of affairs known only to Ms ZN existed. Only she knew whether her declaration was true or not.

[26] If the company was in fact able to meet its debts as suggested by Mr RC, then his stated intention to advise the authorities could not be considered to have been a threat. Only Ms ZN knew whether she had made a truthful declaration or not and I accept therefore that Mr RC did not know whether his stated intention constituted a “threat” as defined, or not.

#### **Was there an “accusation”?**

[27] There is no need to consider in any length, the second element of the rule which requires the threat to make an “accusation”. I do not consider any communication by Mr RC to the Companies Office would or could be in the form of an accusation. It would be more in the nature of a statement of fact, that notwithstanding the declaration that the company was able to pay its debts, there were undisputed debts owing to Mr RC’s client.

#### **Was the “threat” made for an “improper purpose”?**

[28] The third, and most difficult part of the rule, is to consider what constitutes an “improper purpose”.

[29] As Mr QT has submitted, lawyers will often make a statement that unless payment of a debt is made, proceedings will be issued. That is a mere statement of intention and cannot be considered in any way to be a “threat” for an “improper

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<sup>6</sup> *Oxford English Dictionary* (Oxford University Press, Oxford, 2011) <[www.oed.com](http://www.oed.com)>.

purpose". The proper purpose of any lawyer instructed to recover a debt is to do just that, i.e. recover a debt.

[30] In *UF v OU*,<sup>7</sup> I considered that the proper test was to consider whether or not there was an ulterior motive in "threatening" to take a particular course of action. In that case, the lawyer required the opposing lawyer to remove certain statements contained in an affidavit which had been filed in court and which were critical of him, and threatened that unless this occurred he would lodge a claim with the Lawyers Complaints Service about the lawyer.

[31] I considered that the proper purpose of lodging a complaint against the lawyer was to bring to the attention of the Lawyers Complaints Service certain conduct of a lawyer which offended the Conduct and Client Care Rules, the Lawyers and Conveyancers Act 2006, or other professional standards. In that case, I came to the view that such a state of affairs should be reported in any event and should not be used as a means of having certain adverse statements made in an affidavit about the complaining lawyer removed. I reached the view that this constituted an "improper purpose". An improper purpose could otherwise be defined as being a purpose which a person is not otherwise entitled to insist should occur.

[32] A requirement that Ms ZN arrange for payment of an undisputed debt by the company of which she was a director, can hardly be considered to be an "improper purpose". It was perfectly proper for Mr RC to make that demand.

#### **What alternatives were there?**

[33] The most obvious alternative open to Mr RC was to communicate directly with the Companies Office without prior correspondence with Ms ZN and advise the Companies Office that there was an outstanding debt to his client. It would then be up to the Companies Office to take whatever steps it considered appropriate.

[34] The Standards Committee considered that Mr RC could or should have applied to have the company restored to the Register pursuant to s 328 of the Companies Act 1993. This would of course have also had the effect of advising the Companies Office that Ms ZN's declaration was untrue. It seems however somewhat impractical to advise a client to take this step, because the client would incur fees in this process and if successful, it may turn out that the company is indeed insolvent and be unable to

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<sup>7</sup> *UF v OULCRO* 90/2011.

make the payment which the client seeks to recover. That would not have been in the interests of Mr RC's client.

[35] For his part, Mr RC says he was merely giving Ms ZN the opportunity to validate her declaration by making the payment. If that were the case, the letter could have been worded somewhat differently by referring to the statement made by Ms ZN that the company could pay its due debts and pointing out to Ms ZN the debt to Mr RC's client remained unpaid. The letter could then have gone on and sought payment. There was no need to go further and advise that the matter would be referred to appropriate authorities.

### **Discussion**

[36] It is quite clear from the preceding paragraphs, and the discussion with Mr RC and Mr QT at the review hearing, that Mr RC did not intend his letter to be perceived as a "threat" and indeed may have been an "empty" threat if funds were in fact in place to clear the debt due to Mr RC's client. What is also clear, is that the finding of unsatisfactory conduct has proceeded on a reasonably narrow interpretation of the rule.

[37] Section 200 of the Lawyers and Conveyancers Act enjoins this Office:

... [to] conduct any review with as little formality and technicality, and as much expedition as is permitted by –

- (a) the requirements of this Act; and
- (b) a proper consideration of the review; and
- (c) the rules of natural justice.

[38] Applying such an approach means that I should stand back and take an overall view of the purpose and content of the letter and Mr RC's intentions. At most, I consider that Mr RC did not exercise good judgement in writing as he did to Ms ZN but I can discern no real threat in the content of the letter as there was a possibility that the declaration was indeed true. If Mr RC had taken the step of writing immediately to the Companies Office this could have been seen as somewhat peremptory and malicious if it turned out that Ms ZN had made provision for payment of the debt outstanding.

[39] Mr RC is concerned at the adverse finding against him and as this will be recorded against his professional record, an adverse finding should only be made where there are no grey areas in the evidence or interpretation of the relevant rules or legislation. In situations where grey areas exist, the Standards Committee and this

Office should exercise a discretion to take no further action in respect of the complaints. It is that outcome which I consider should have been the outcome in this case. Accordingly, I intend to reverse the determination of the Standards Committee and the penalties imposed.

[40] As a result, I have not addressed Ms ZN's submission that she should be awarded compensation of \$1,000.

### **Decision**

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee is reversed from which it follows that the penalties imposed no longer stand.

### **Publication**

This decision will be of interest to any lawyer acting to recover a debt due to the lawyer's client. I consider that the facts of this decision and the outcome of this review should be published, with all identifying details removed. I therefore order publication in the New Zealand Law Society publication LawTalk, on this basis pursuant to s 206(4) of the Lawyers and Conveyancers Act 2006.

**DATED** this 21<sup>st</sup> day of July 2015

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**O W J Vaughan**  
**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 RC as the Applicant  
Mr QT as the Representative for the Applicant  
Ms ZN as the Respondent  
Ms DF as the Representative for the Respondent  
Standards Committee  
The New Zealand Law Society