LCRO 106/2015

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of a Standards Committee
BETWEEN	**WL and [Law Firm X]** Applicants
AND	**[Company B]** Respondent

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

Introduction

[1] Mr WL[1] has applied for a review of the determination by a Standards Committee that Mr WL[2] breached rule 13.9 of the Conduct and Client Care Rules[3] by putting a letter marked "without prejudice save as to costs" before an arbitrator prior to the arbitrator issuing his decision on an application that was before him.

[2] This review involves a consideration of the application of rule 13.9. The Committee proceeded on the basis that the rule creates a separate obligation to adhere to the rules of privilege generally rather than on the basis that the rule relates to privilege in the context of discovery.

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[1] The application for review is completed on the basis that Mr WL and [Law Firm X] are the applicants. [Law Firm X] are entitled to apply for a review pursuant to s 194(2)(c) of the Lawyers and Conveyancers Act, but for simplicity I have referred to the applicant as Mr WL throughout this decision.

[2] The complaint was made about Mr WL as the partner supervising the conduct of the lawyer responsible for forwarding the letter to the arbitrator. Mr WL has not at any stage taken the view that the complaint should be made against the employed solicitor.

[3] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[3] In proceeding on this basis the Committee was necessarily required to determine whether or not there had been a breach of privilege.

Background

[4] The facts of the matter are relatively straightforward:

(a) [Company B] and [Company A] were involved in arbitration. Mr WL of [Law Firm X] acted for [Company A] and Mr VL of [Law Firm Y] acted for [Company B].

(b) In May 2014 an application was filed on behalf of [Company A] seeking security for both the arbitrator's costs and its own costs.

(c) [Law Firm X] sent a without prejudice letter to Mr VL offering to withdraw the application if [Company B] paid $65,000.00 in full as security for half the arbitrator's costs. The proposal was not accepted by [Company B].

(d) Submissions were made on behalf of [Company B] in which the application was accepted in principle in respect of the arbitrator's costs, but it was argued that payment should be staged rather than "up front".

(e) A memorandum was then filed by [Company A] in which it withdrew its application for security for its own costs but maintained the application for the arbitrator's costs, stating that the security should not be provided by way of staged payments but should be paid in full. In the memorandum [Company A] also sought "to have the opportunity to make brief submissions on the issue of costs". A telephone conference was suggested.

(f) The arbitrator sought clarification as to whether the conference was sought to enable counsel to "make the brief submissions referred to" or to consider procedural matters.

(g) In response Mr VL filed a memorandum noting the issues which were extant as being:

(i) the amount of the arbitrator's costs;

(ii) whether security should be staged;

(iii) the costs of the application.

(h) Mr WL accepted these as being the issues to be addressed.

(i) Prior to the telephone conference, the 'without prejudice' letter was sent to the arbitrator by a solicitor in [Law Firm X] working on the file under the supervision of Mr WL. Mr VL objected to this, arguing that privilege in the letter was jointly held by the solicitors acting for each party, and that [Law Firm X] had breached privilege by sending the letter to the arbitrator.

(j) Following the telephone conference the arbitrator issued his decision in which he referred to the letter.

The complaint

[5] [Company B] subsequently complained to the Lawyers Complaints Service that the letter should not have been disclosed until the matter to which the offer related had been determined in all respects. It was contended that all matters raised in the application had not been determined and the letter was therefore privileged at the time of its disclosure to the arbitrator.

[6] Mr WL contended that at the time the letter was disclosed, there were no substantive issues to be determined and the letter was therefore not covered by privilege.

The Standards Committee determination

[7] The Committee addressed the following issues:

(1) whether the letter was released prior to the application for the arbitrator's costs being finally determined in all respects; and if so

(2) whether the letter should have been released when the only outstanding issue was costs on the application itself.

[8] In considering these issues the Committee discussed in some depth the rules relating to privilege as set out in the High Court Rules, the Evidence Act and the Arbitration Act.

[9] After considering all of the evidence and the submissions for the parties, the Committee decided that the letter should have been disclosed only when costs on the application itself remained as the sole matter to be decided. It determined that Mr WL was in breach of rule 13.9 of the Conduct and Client Care Rules and that this constituted unsatisfactory conduct by reason of s 12(c) of the Lawyers and Conveyancers Act 2006.

[10] The Committee did not impose any penalty on the grounds that "the finding of unsatisfactory conduct … was generally a sufficient penalty without there being any need to impose a fine".[4]

[11] Mr WL was ordered to pay $1000 to the New Zealand Law Society by way of costs and expenses and the Committee directed that the facts of the matter, excluding details that may lead to the identification of the parties, be published.

Review

[12] Mr WL has applied for a review of the Committee's determination. The application for review was accompanied by a memorandum in which Mr WL submitted that "the decision of the Committee is factually, legally and conceptually flawed" and in support of the application Mr WL included an opinion from Mr CR who was also authorised by Mr WL to represent him in connection with the review.

[13] Much of the content of the memorandum includes submissions on the rules relating to privilege as discussed by the Committee. Because of the view that I take with regard to the application of rule 13.9, it is not necessary for me to engage in this discussion.

[14] In any event, to embark on such an exercise, involves this Office in making determinations of the law of privilege that is properly a matter to be argued in the relevant judicial forum. It is not an exercise which should be undertaken by a Standards Committee or this Office.

[15] The undesirability of the Complaints Service becoming engaged in that process is highlighted by a comment in Mr CR's opinion, where he says:[5]

> Disputes over the status of without prejudice documents are relatively commonplace in litigation. Typically such decisions require the exercise of

[4] Standards Committee determination (7 May 2015) at [52].
[5] Letter CR to [Law Firm X] (19 May 2015) at [6 xiii].

> judgment in deciding when or if documents should be disclosed. It is not uncommon for such issues to have to be determined by judges or arbitrators. Simply having a judge disagree with a practitioner's exercise of judgment would not normally be considered an ethical issue. Any ruling by the Law Society that indicated such a penalty was even possible would be intolerable.

[16] That comment by Mr CR presents a valid reason why issues of privilege should not become matters to be ruled on by a Standards Committee or this Office. However, as alluded to above, that does not form the basis of this decision. My decision is founded on an interpretation of rule 13.9 which differs from that of the Standards Committee.

Rule 13.9

[17] Rule 13.9 of the Conduct and Client Care Rules provides:

> A lawyer who acts for a party in a proceeding must, to the best of the lawyer's ability, ensure that discovery obligations are fully complied with by the lawyer's client and that the rules of privilege are adhered to …

[18] The rule is headed "Discovery and privilege".

[19] On 8 September 2015 I wrote to the parties advising that my preliminary view was that the rule related generally to the process of discovery. It created an obligation for lawyers to ensure as far as possible that clients comply with discovery obligations and to ensure that in the course of discovery, the rules of privilege are adhered to. I noted that the form of rule 13.9 differed from the previous professional conduct rule relating to privilege (rule 8.01A) which provided that "a practitioner shall not claim privilege on behalf of a client in the absence of proper grounds for doing so". That applicability of that rule was therefore placed within the context of a **claim** of privilege, which generally arises in the course of discovery.

[20] The parties were requested to provide submissions/comments on my preliminary view.

[21] In reply, Mr VL submitted that "whether the breach falls within the scope of rule 13.9 is irrelevant".[6] He referred to the preface to the Conduct and Client Care Rules where it is noted that:

> The rules are based on the fundamental obligations of lawyers set out in section 4 of the Act, namely:

[6] Letter VL to LCRO (6 October 2015).

- to uphold the rule of law and to facilitate the administration of justice in New Zealand:
- to be independent in providing regulated services to clients:
- to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients:
- to protect, subject to overriding duties as officers of the High Court and to duties under any enactment, the interests of client.

He noted that the preface goes on to state that the rules are not an exhaustive statement of the conduct expected of lawyers, but set minimum standards that lawyers must observe, and provide a reference point for discipline.

[22] Mr VL also referred to rule 2, which obliges a lawyer "to uphold the rule of law and facilitate the administration of justice".

[23] He submitted that "a breach of the rules of privilege clearly falls within those parameters".

[24] Mr VL's response to my preliminary view was somewhat surprising. His three page letter of complaint[7] alleged that Mr WL had not adhered to the rules of privilege and therefore was in breach of rule 13.9. I cannot see anywhere in the Standards Committee file any reference to the preface to the rules, or an allegation of a breach of rule 2.

[25] The Standards Committee proceeded solely on the basis that the complaint involved a breach of rule 13.9 and the Notice of Hearing[8] posed the question to be answered as follows: "… did Mr WL breach the rules of privilege and accordingly breach rule 13.9 of the …" Conduct and Client Care Rules.

[26] I acknowledge that Standards Committees are not restricted to examining a complaint only on the basis that is put to it, but if the complaint were now to proceed on the basis submitted by Mr VL, I consider it would be necessary to return this matter to the Standards Committee pursuant to s 209 of the Lawyers and Conveyancers Act to reconsider. The Committee would also have to seek further comment from Mr WL.

[27] The High Court has recently expressed reservations about having recourse to the principle that the Rules represent minimum standards in the face of plain and unambiguous language.[9] Mr VL's submission rests on the basis that rule 13.9 is irrelevant to this matter, and Mr WL's conduct should be addressed on the basis of

[7] Letter VL to LCS (26 September 2014).
[8] Notice of Hearing (25 February 2015).
[9] *Stewart v LCRO* [2016] NZHC 916 at [54] to [63].

general statements of principle in the preface to the rules. To do so would introduce a degree of subjectivity and uncertainty that is unacceptable when adverse findings that are recorded against a lawyer's professional record could follow.

[28] If the drafters of the Rules intended that a lawyer should stand exposed to an adverse conduct finding for breaching the rules of privilege, there would need to be specific rule(s) dealing with that issue. As Mr CR has noted, "disputes over the status of documents are relatively common in litigation".[10] The only forum for addressing those disputes, must be the forum within which they arise. The law of privilege dictates what is admitted into evidence or not, and that will directly affect the outcome of the matter in question. It must then be left to the decision of the judge, arbitrator, or other judicial officer who is presiding over the matter to determine what is and is not admitted into evidence and it is up to that person to determine what weight to place on material put before them.

[29] The complaints process has no part to play in those decisions. There may be circumstances where documents are produced in clear breach of rulings by the relevant body. That would engage the complaints and disciplinary process, but in a different way from making an initial decision as to whether or not the material in question was privileged.

[30] Mr CR advised he was "not aware of any basis to suggest the New Zealand Law Society intended to expand rr 8.01A and B beyond a claim of privilege in the discovery context".[11] He also made the following comments in support of my preliminary view:

> …
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> (b) The LCRO's view is consistent with the well-established principle of statutory interpretation that a word or phrase is to be read in the context of the other words or phrases in which it appears. In this regard, the requirement that the rules of privilege be adhered to must be read in the context of the lawyer's obligation to ensure that the client's discovery obligations are complied with.
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> (c) The LCRO's view is also consistent with the heading "*Discovery and privilege".* In accordance with s 5(2) and (3) of the Interpretation Act 1999 headings provide useful guidance in ascertaining the meaning of a statutory provision. The fact that the words "*discovery"* and "*privilege"* are placed alongside each other strongly indicates that it is in the context of discovery that the rules of privilege are adhered to.

[10] Above n 5.
[11] Letter CR to LCRO (5 October 2015).

[31] Mr CR also referred back to his opinion addressed to [Law Firm X] which was provided with the review application.

[32] Taking all of these matters into consideration, I do not consider the matter should be returned to the Standards Committee to reconsider on the basis submitted by Mr VL.

[33] This review must address whether or not the finding against Mr WL for breach of rule 13.9 should stand or be reversed. In that regard I remain of the view that the reference to the rules of privilege in rule 13.9 is to be interpreted as a reference to the rules of privilege in the context of discovery. The rule should not be applied in a manner which would require a Standards Committee or this Office to make decisions as to what material is privileged or not in the context of particular proceedings, whether in a Court, arbitration or otherwise. Those are decisions that must be left to the relevant jurisdiction, and there should be no adverse professional consequence for making a judgment which differs from that of the presiding judicial officer.

[34] The finding that Mr WL is in breach of rule 13.9 is reversed.

The alleged breach of rule 2.10

[35] When application is made for review of a Standards Committee determination, all issues involved in the complaint, investigation and determination should be addressed.[12] The Review Officer is not restricted to the grounds of review included by the applicant in the application. Mr WL did not refer to the determination by the Committee to take no further action in respect of the alleged breach of rule 2.10. For the sake of completeness I will address that matter briefly but in somewhat more detail than perhaps necessary, primarily to observe on the unnecessary cost to the legal profession that such complaints entail.

[36] Mr VL did not allege that Mr WL had breached rule 2.10 in his letter of complaint. The issue arose when Mr WL, in his letter replying to the complaint,[13] suggested that Mr VL may have made his complaint for "a tactical or otherwise improper purpose",[14] which he said would be in breach of rules 2.3 and 2.10 of the Conduct and Client Care Rules. The suggestion was made in one paragraph of his 20 paragraph, 4 page, letter.

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[12] Lawyers and Conveyancers Act 2006, s 203; *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [41].
[13] Letter WL to LCS (17 October 2015).
[14] At [4].

[37] Mr VL responded[15] (again in one small paragraph of a 4 page letter). He said "If Mr WL wishes to take that position [that Mr VL had breached rules 2.3 and 2.10] he should make that complaint and have the matter dealt with in the ordinary way".[16] In a separate letter on the same day as the response, Mr VL made a separate complaint that Mr WL was himself in breach of rule 2.10 in his reference to possible breaches by Mr VL of rules 2.3 and 2.10. He referred to *UF v OU*[17] where it was noted that "the lodging of a complaint should have no ulterior motive".[18] In that case, OU threatened to lodge a complaint with the LCS if UG did not file a memorandum in Court retracting statements critical of OU, where the statements critical of OU related to advice provided by OU to clients who had subsequently withdraw instructions from OU and instructed UG. The language used was described as being "somewhat direct".[19]

[38] That decision relates to circumstances which are somewhat different to the present exchange.

[39] In the present instance, the Standards Committee determined to take no further action as it was "simply not sufficiently serious to warrant inquiry. It was in the context of a 'tit for tat' exchange that the Committee did not wish to get involved in".

[40] The description by the Committee of this complaint as part of a 'tit for tat' exchange, and its determination that it did not warrant the Committee becoming involved in that exchange, is the appropriate response. The resources of the LCS and this Office are to be used for matters which should help the LCS meet the objectives of the Act and the rules. It was not necessary for Mr WL to suggest possible breaches of the rules in his response to Mr VL's complaint, nor for Mr VL to take the additional step of himself making a separate complaint against Mr WL. This was an unnecessary cost to the LCS and now this Office which is a cost to the legal profession as a whole. Both parties are requested to bear this in mind in the future.

Decision

[41] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the finding of unsatisfactory conduct against Mr WL is reversed. The orders made consequent on that finding therefore fall away.

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[15] Letter VL to LCS (30 October 2014).
[16] At [20].
[17] *UF v OU* LCRO 90/2011.
[18] At [33].
[19] At [25].

[42] The determination of the Committee is modified to include a determination to take no further action in respect of the complaint against Mr WL on the grounds (pursuant to s 138(2) of the Act), that further action is unnecessary or inappropriate.

[43] The determination of the Committee to take no further action in respect of the complaint against Mr WL that he had breached rule 2.10 is confirmed.

Publication

[44] The New Zealand Law Society may wish to communicate the issues arising in this review to lawyers. In accordance with s 206(4) of the Act I direct that the details of this decision may be published but all identifying details are to be removed.

DATED this 5th day of July 2016

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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:

WL and [Law Firm X] as the Applicants
CR as the representative for the Applicants
[Company B] as the Respondent
VL as the Representative for the Respondent
TR as a related person as per section 213
A Standards Committee
The New Zealand Law Society