

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 3 of the New Zealand Law Society

BETWEEN

APPLEBY BUILDING LTD
of Napier
Applicant

AND

C ALVA
of Auckland
Respondent

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

DECISION

[1] Appleby Building Ltd complained about the conduct of Mr Alva. Mr Alva acted for Helmsdale Limited (Helmsdale) in respect of an application to liquidate that company. The complaint was that Mr Alva had used the procedures of the Court for an improper purpose by seeking adjournments to defend the application when his client company was hopelessly insolvent.

[2] The matter was first called on 8 October 2008. The preceding day Mr Alva filed an application for leave to appear and for an extension of time to file a statement of defence. The Court adjourned the matter until 17 October 2008 when it was again called over. At that time the Court set the matter down for a substantive hearing to be held on 13 November 2008. Appleby Building arranged for a notice of opposition to Helmsdale's application and supporting affidavit to be filed and served on 29 October 2008.

[3] On 31 October 2008 Helmsdale Limited was wound up by order of the Court on the application of another creditor.

[4] When the matter was called on 13 November Appleby Building sought costs from the principal of Helmsdale Limited personally (although not from Mr Alva) and was successful in that application. In awarding those costs Justice Asher expressed the view that the defences put forward on behalf of Helmsdale Limited were without merit.

[5] Appleby Building alleged that Mr Alva acted inappropriately in assisting Helmsdale in the liquidation proceedings. In particular it complains that Mr Alva assisted Helmsdale in using the Courts processes for an improper purpose, namely to delay the date of liquidation. It was stated that this was in breach of r 2.3 of the Rules of Conduct and Client Care for Lawyers. That rule provides:

A lawyer must use legal processes only for proper purposes. A lawyer must not use, or knowingly assist in using, the law or legal processes for the purpose of causing unnecessary embarrassment, distress, or inconvenience to another person's reputation, interests, or occupation.

[6] Compensation in the sum of the wasted costs of the Company was sought.

Privilege

[7] In his response to the complaint Mr Alva asserted that he was unable to disclose information that was privileged to his client, Helmsdale Limited. This is clearly not the case under the Lawyers and Conveyancers Act 2006. By s 147 of the Lawyers and Conveyancers Act the Committee is entitled to require any lawyer to produce a wide range of documents which will include documents which are privileged. It may be that where documents are privileged their contents will not be disclosed to other parties. In this regard I note that the Committee has a discretion not to disclose information in an investigators report under s 150 of the Act. This office has a similar power not to disclose evidence and information where good reason exists under s 208(2) of the Act. Clearly the fact that information is privileged this may amount to such a good reason.

[8] The fact that a solicitor may not claim privilege in respect of a demand of him or her to produce evidence in response to a professional complaint was determined by the English Court of Appeal in *Parry-Jones v Law Society* (1969) 1 Ch 1; [1966] 1 All ER 177. It is of note that the privilege in this case belongs to Mr Andrew's client (Helmsdale). Lawyer-client privilege gives the client a right to refuse to produce those documents in any tribunal in which it is a party to proceedings. As such it is misconceived for Mr Alva to claim his client's privilege in respect of a proceeding to which he (and not his client) is subject. This is now made clear by s 53 of the Evidence Act 2006 which provides that:

A person who has a privilege conferred by any of sections 54 to 59 [which includes legal professional privilege] in respect of a communication or any information has the right to refuse to disclose in a proceeding—

- (a) the communication; and
- (b) the information, including any information contained in the communication; and
- (c) any opinion formed by a person that is based on the communication or information.

[9] That section confers the right to refuse to disclose the communication and associated information and opinion only on the person who has the privilege. In the present case the privilege is held by Helmsdale, not by Mr Alva. Accordingly only Helmsdale has the right to refuse to disclose (and then in respect of proceedings to which it is subject). As far as Mr Alva is concerned the information he holds is not privileged and may be required of him. The fact that the relevant documents may be required (or proffered) does not affect their privileged status as regards Helmsdale. It is well established that documents may be disclosed for a limited purpose without affecting privilege: *B v Auckland District Law Society* [2004] 1 NZLR 326. I observe that that case determined that B (a lawyer) could demand the return of certain documents on the basis of privilege where the documents related to proceedings in which the lawyer was a party. It was therefore the lawyer's privilege and not that of his client.

[10] In the event I do not consider it necessary to require Mr Alva to produce further information and consider that sufficient information to determine the matter has been provided.

The proceedings

[11] Mr Alva was first instructed in the liquidation proceedings on 8 October. The matter was being called the next day. He states that in the circumstances he was obliged to act with urgency.

[12] I also take note of the suggestion (for Appleby Building) that Mr Alva had a general knowledge of the affairs of Helmsdale (and therefore of its hopeless insolvency). Mr Alva states that he initially thought that the defence based on the application for liquidation being filed outside of the 30 day time limit was sound. He accepts that this was due to an oversight on his part as regards certain holidays not being counted in that period. However his response is a tenable one and I am of the

view that there can be no criticism of him in taking the steps he did in this proceeding on 8 and 9 October.

[13] More widely the object of Mr Alva after 9 October acting on behalf of his client Helmsdale was to avoid liquidation. There was no wider collateral purpose of an illegitimate nature. Justice Asher found the steps taken on behalf of Helmsdale were without merit and designed to delay or defeat genuine meritorious claims. This does not amount to a finding that there was an underlying improper purpose. For there to be an improper purpose behind the use of court process there must be some purpose other than that on the face of the application. The purpose of the steps taken in this case was to avoid liquidation. In this regard the purpose was more hopeless than improper. It is also observed that a very high threshold will exist for the finding of an improper purpose where the procedure impugned is essentially defensive in nature.

[14] While there will be rare cases where bringing some unfounded defence or seeking to forestall some execution may be inappropriate, this cannot be said to be one. An example exists in *Chua v ANZ Banking Group (New Zealand) Ltd* (1997) 11 PRNZ 523. However that case concerned a lawyer making substantive applications to prevent the creditor bank from proceeding with a mortgagee sale. In that case Hammond J considered the application to be frivolous and vexatious and imposed costs against the lawyer. His honour was of the view that the lawyer had “seriously misled the Court” in obtaining an *ex parte* interim injunction and “put his zeal for his clients’ interests ahead of his plain duty of candour to the Court”. There is no suggestion of such misconduct by Mr Alva in this case.

[15] It is relevant that the conduct of Mr Alva was before the Court in these proceedings and no adverse comment was made. Justice Asher was well placed to determine whether Mr Alva had acted inappropriately. He made no such finding.

[16] The question of the responsibility of counsel to screen client’s demands that hopeless cases be put before the Court was considered by the Privy Council in *Harley v McDonald* [2002] 1 NZLR 1 where at p 29 Lord Hope stated:

As a general rule litigants have a right to have their cases presented to the Court and to instruct legal practitioners to present them on their behalf. Although exceptional steps may have to be taken to deal with vexatious litigants, the public interest requires that the doors of the Court remain open. And on the whole it is in the public interest that litigants who insist on bringing their cases to Court should be represented by legal practitioners, however hopeless their cases may appear.

[17] The decision of Asher J of 21 November appears to confirm that the defence of Helmsdale was hopeless. However, in light of the words of Lord Hope it was appropriate that Mr Alva follow his client's instructions and seek to put the defence before the Court. In this regard there has been no professional breach by Mr Alva.

Procedure of the Committee

[18] The application for review suggests that the Committee failed in the procedure it adopted. In particular it is suggested that the Committee did not set out the facts relied on or provide adequate reasons. If such a flaw existed the reasons provided in this decision should be adequate to remedy it.

[19] However, I do not consider that the Committee failed to provide adequate reasons. The Committee is a tribunal of summary jurisdiction and while it is obliged to provide reasons (s 158 of the Lawyers and Conveyancers Act 2006) they need not be expansive. The Committee did not set out its particular factual findings and reasoning it relied on. Rather it summarised the material provided by the parties and expressed its conclusion (referring to r 2.3 of the Rules of Conduct and Client Care). I am satisfied that it formed the view that in light of the facts before it (in respect of which there was little real dispute) it was of the view that no professional breach had occurred.

[20] The applicant seemed to suggest that the Committee ought to have made a finding of fact regarding the level of knowledge of Mr Alva of the financial affairs of Helmsdale. In light of the fact that it is appropriate for a lawyer to put forward a hopeless argument (on clear instructions) there was no need for the Committee to make a finding either way in that regard.

[21] What amounts to adequate reasons was considered in *in Re Palmer and Minister for the Capital Territory* (1978) 23 ALR 196 at 206-7. There it was held that reasons must enable a party to read the decision and conclude: "even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact or an error of law, which is worth challenging". This is a useful general framing of the function of reasons. In the present case I am of the view that the reasons of the Committee serve this function adequately.

[22] There is no procedural flaw in the decision of the Committee that would require any further consideration of this matter.

Decision

The application for review is declined pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 and the decision of the Standards Committee is confirmed.

DATED this 12th day of October 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:

Appleby Building Limited as Applicant
C Alva as Respondent
Firm X as a related party
The Auckland Standards Committee 3
The New Zealand Law Society