

LCRO 118/2016

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of [city] Standards Committee [X]

**BETWEEN**

**BO**

Applicant

**AND**

**JC AND GW**

Respondents

**DECISION**

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

**Introduction**

[1] Ms BO has applied for a review of the determination by [city] Standards Committee [X] to take no further action in respect of her complaints about Mr JC and Ms GW.

**Procedural matters**

[2] There is an initial matter relating to the evidence considered on review that must be addressed. The Early Intervention Process call log on the Standards Committee file records that Mr JC was telephoned by the Lawyers Complaints Service on 9 May 2016 to advise about Ms BO's complaint and that the Committee's preliminary view of the matter was to take no further action. Mr JC was offered the opportunity to respond but he advised he was content not to do so. The Standards Committee issued its determination to take no further action on the following day, 10 May 2016.

[3] Paragraph [6] of the Guidelines for Parties to Review issued by this Office notes that “it is expected all relevant information will have been placed before the Standards Committee”.

[4] On 4 May 2017 the parties were advised that the LCRO was unable to complete the review on the material available and a hearing to be attended by both parties was scheduled for 18 May 2017. On 15 May Mr JC provided an email chain between Ms GW and the firm’s client<sup>1</sup> as evidence of the material considered by him and Ms GW and at the review hearing Mr JC (counsel for the respondents) provided further documentary evidence in support of his clients’ defence.

[5] All of this additional evidence was accepted on review as nothing had been provided to the Standards Committee by the respondents. This was understandable, given that Mr JC had been advised that the Committee’s preliminary view was to take no further action on the complaint.

## **Background**

[6] At the time the events giving rise to the complaints occurred, Mr JC and Ms GW were partner and senior associate (respectively) in the firm of [Firm A]. In or around February 2016 [Company Q] instructed [Firm A] to recover fees owed to it by [Company P], a company of which Ms BO was the director and a shareholder. Ms GW was the lawyer who carried out the work, supervised by Mr JC.

[7] Prior to the firm being instructed, there had been a series of emails between Ms BO and Ms MF of [Company Q] in which Ms MF had advised Ms BO that [Company P] was indebted to [Company Q] in the sum of \$5,390.63. Ms BO objected to this figure and the invoice was corrected and reissued for \$3,593.75. It was this amount that [Firm A] was instructed to recover.

[8] Ms GW reviewed the email correspondence between [Company Q] and [Company P] and sought confirmation from [Company Q] as to:<sup>2</sup>

1. the outstanding amount;
2. the due date;
3. that the debt was undisputed “and the only reason they are not paying is because they do not have the funds”.

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<sup>1</sup> Mr JC advised that the firm’s client had waived privilege.

<sup>2</sup> Email Ms GW to Mr WT (1 March 2016).

[9] Mr WT, the CEO/managing director of [Company Q], confirmed all three points but it was subsequently established that the amount confirmed by him as owing was the earlier (incorrect) amount that had been claimed initially.

[10] Having received this confirmation Ms GW prepared a statutory demand pursuant to s 289 of the Companies Act 1993, arranged for it to be signed by Mr JC and for it to be served on the company.

[11] Ms BO sent an email to Ms GW objecting to the demand and advised that she believed it “to be a vexatious and misguided attempt by [Company Q] to liquidate [Company P] because of other recent business events”.<sup>3</sup> She went on to state: “Given that [Company P] is solvent, the invoice is disputed and I have a counter claim I suggest that this matter be resolved between the parties by some other more appropriate process such as the Disputes Tribunal”.

[12] Subsequently, Ms BO instructed Ms DE, a partner in the firm of [Firm B] who wrote to Mr JC:<sup>4</sup>

We confirm we have received instructions to act for [Company P].

We note that the amount of the demand is low. We have been instructed that the demand is disputed and seen correspondence between the parties which makes this clear. On that basis our client can and will (if required) file an Application to Set Aside the Statutory Demand. That seems to us to be a rather unsatisfactory way of resolving what (on the face of it) appears a minor issue.

[13] Ms GW responded:<sup>5</sup>

We have now had an opportunity to take instructions and, while our client appreciates your proposal, it will not be withdrawing the demand. Our client is adamant there is no genuine dispute that the debt is owed and it has very real concerns about the companies solvency. It is simply not prepared to let this matter drag on further.

[14] No application to set the demand aside was filed.

[15] The notice of demand expired and Ms GW wrote to Ms BO,<sup>6</sup> Ms DE having advised that [Company P] was no longer instructing her. Ms GW advised Ms BO she had been instructed to file an application to liquidate the company.

[16] The application was filed and a hearing date of 20 May 2016 was allocated.

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<sup>3</sup> Email from Ms BO to Ms GW (11 March 2016).

<sup>4</sup> Email from Ms DE to Ms JC (16 March 2016).

<sup>5</sup> Email from Ms GW to Ms DE (17 March 2016).

<sup>6</sup> Email from Ms GW to Ms BO (22 March 2016).

[17] Ms BO lodged her complaint with the Lawyers Complaints Service on 20 April and one of the outcomes sought was that Mr JC/Ms GW be directed to withdraw the proceedings.<sup>7</sup> The Standards Committee issued its determination on 10 May 2016.

[18] Ms GW then proceeded to advertise the application as required but the matter was settled before the allocated hearing date and the application withdrawn.

### **The Standards Committee determination**

[19] Having considered the material supplied by Ms BO the Standards Committee determined to take no further action.

### **Application for review**

[20] Ms BO made the following comments on the Standards Committee determination in her review application:

- (a) The unpaid invoice was disputed. But most importantly our complaint is based on the fact that [Firm A] could have reasonably known that it was in dispute and that they were assisting their Client, who is a direct competitor, to use the Statutory Demand process for illegal purposes i.e to interfere in my business and acquire my team.<sup>8</sup>
- (b) The claim “has now been settled to avoid the costs associated with retaining a Barrister to appear in the High Court”.
- (c) Mr JC and Ms GW had a duty to follow the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008:<sup>9</sup>

[Firm A] were very aware of ongoing disputes between the parties and had a duty to check when we communicated clearly that we knew that their Client had an ulterior motive.

- (d) The Committee’s comment that “a lawyer’s duty is to his or her client not the person on the other side of the dispute” is not relevant, because rule 2.3:<sup>10</sup>

... reflects the importance of lawyers using their knowledge of the law and legal processes honourably. It prevents the advancement of a cause on behalf of a client whose only aim is disruption (which

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<sup>7</sup> It is relevant to note here that neither the Standards Committee nor this Office has jurisdiction to make such a direction.

<sup>8</sup> Supporting reasons for review application at 1.

<sup>9</sup> Specifically rules 2.3 and 2.4.

<sup>10</sup> Above n 8 at 2.

it was in this case). They have in effect interfered with my rights. There is a threshold below which a lawyer should not assist in interfering with the rights of others. That is the purpose of the Rule. Otherwise the Rule would have no relevance or substance in these circumstances. [Company Q] sent copies of the notice in the [newspaper] to our brokers and insinuated that I would not be in business broking any longer. At the same time offering obscene packages for them to resign and join [Company Q].

(e) Mr JC and Ms GW had breached rule 2.3:<sup>11</sup>

... by continuing with the process when we had alerted them to their Client' ulterior motives that were proven to be true. They also knew that the invoice was part of an unresolved dispute between the parties. As a direct result there was costly and damaging business interference to my business.

[21] She sought an apology, damages and compensation.

### **Review**

[22] A review hearing was conducted in [city] on 18 May 2017. Ms BO attended, accompanied by Ms ZT.<sup>12</sup> Mr JC and Ms GW attended and were represented by Mr UG. The hearing was conducted by Mr Vaughan acting as a delegate duly appointed pursuant to clause 6 of Schedule 3 of the Lawyers and Conveyancers Act 2006 (the Act). The final determination of the outcome of this review as set out in this decision is made after full consideration of all matters by myself following discussion with Mr Vaughan.

#### *The claim for damages/compensation*

[23] At the commencement of the review hearing Ms BO confirmed that she sought an apology and compensation for damage to her business.

[24] The focus of the complaints procedure is to ensure adherence to professional standards. It should not to be regarded as the primary means by which to pursue compensation. Claims for damages, as sought by Ms BO, must be pursued through the Courts.

[25] In addition, s 156(1)(d) of the Act requires any loss claimed to be "by reason of an act or omission of a practitioner". In the first instance, it is noted that it was [Company Q] members who instructed [Firm A] to pursue liquidation, sent the [newspaper] advertisement to [Company P] brokers, and endeavoured to lure them away from [Company P]. The respondents are not responsible for any of this conduct.

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<sup>11</sup> Above n 8 at 3.

<sup>12</sup> Ms ZT had assisted Ms BO in the lodging of the complaint and application for review.

In addition, there has been no evidence provided as to what losses are alleged to have been incurred.

[26] These matters are mentioned to make it clear that even if the outcome of this review was to result in an adverse finding against the lawyers, it is unlikely there would be an order for payment of compensation. The question does not arise however, as the outcome of this review is to confirm the determination of the Standards Committee.

*Alleged breach of rule 2.3*

[27] Ms BO asserts that Mr JC was aware of the ongoing dispute between her and [Company Q] and that by serving the statutory demand, followed by filing the liquidation proceedings, Mr JC and Ms GW were using legal processes for an improper purpose, which was to damage her business.

[28] The purpose for which [Company Q] had engaged [Firm A] was to recover royalties claimed by [Company Q] pursuant to the franchise agreement. Mr JC and Ms GW had a duty to [Company Q] to take steps to recover the debt. The issuing of a statutory demand is a legitimate step to take to recover a debt owed by a company.

[29] [Firm A] had been provided with the emails between Ms MF and Ms BO concerning the debt. Whilst liability and the amount claimed were initially disputed a corrected invoice was subsequently issued.

[30] In an email dated 9 April 2015 to Ms MF, Ms BO said:

... due date needs to change to 20 October – we will pay this as full and final settlement of any further royalty claims against us once the deal is concluded and we receive the final earn out commission payment due 30 September.

[31] At another time during the exchange of emails Ms BO had also advised “[Company P] does not have the funds to pay any further royalties to you”.<sup>13</sup>

[32] Therefore the evidence available to Mr JC and Ms GW was that there had been a refusal to pay and advice that the company had insufficient funds, followed by an acknowledgement of the debt with a promise to pay.

[33] Following service of the demand Ms BO contacted Ms GW and took issue with the manner in which it had been served. She did not question the process itself.<sup>14</sup>

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<sup>13</sup> Email from Ms BO to Ms MF (19 February 2016).

<sup>14</sup> Email from Ms BO to Ms GW (15 March 2016).

[34] At another time, Ms BO requested Ms GW to provide “a full copy of the Court Documents by return so that we can file our Statement of Defence and Counterclaim before Friday”.<sup>15</sup> She clarified that the earlier comment about not having funds to pay the debt meant that [Company P] was not going to pay further royalties to [Company Q] rather than meaning that [Company P] had insufficient funds to pay valid creditors.

[35] Ms BO then instructed Ms DE who wrote to Mr JC:<sup>16</sup>

We confirm we have received instructions to act for [Company P].

We note that the amount of the demand is low. We have been instructed that the demand is disputed and seen correspondence between the parties which make this clear. On that basis our client can and will (if required) file an Application to Set Aside the Statutory Demand. That seems to us to be a rather unsatisfactory way of resolving what (on the fact of it) appears a minor issue.

[36] Ms DE also advised that her client was able to deposit the disputed amount into her firm’s trust account as evidence of ability to pay. Notwithstanding this, no steps were taken to have the demand set aside and the date set for payment of the debt expired. Mr JC and Ms GW had not been advised of the grounds on which the debt was disputed.

[37] In circumstances where a genuine dispute existed, it would be expected that a debtor would apply to have the demand set aside. That did not happen. Ms BO advises this was due to an unwillingness to incur legal fees but that is not something Mr JC and Ms GW can be required to take into consideration.

[38] After the date for payment stipulated in the demand expired, Mr JC and Ms GW followed instructions to apply for liquidation of the company.

[39] At the review hearing, Mr JC advised he still had no knowledge of the detail of the dispute between [Company Q] and [Company P]. Even if litigation had been commenced it would not necessarily follow that liability for the royalties was cancelled.

[40] The only matter which Mr JC and Ms GW were required to satisfy themselves about was that there was a debt due which had not been paid and that no genuine dispute existed. Ms BO had acknowledged the debt and in her email of 9 April 2015 had advised it would be paid. The fact that she attached conditions to payment did not mean the debt was not due. There was clear evidence in the email that Ms BO accepted the debt was due and payable.

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<sup>15</sup> Above n 14.

<sup>16</sup> Email from Ms DE to Mr JC (16 March 2016).

[41] Ms BO asserts that her proposal to pay the disputed amount into the trust account of [Firm B] meant that it was “improper” for the lawyers to then issue the demand. However, payment of the disputed amount into [Firm B]’s trust account did not mean the debt would be paid and [Company Q] was not obliged to accept the proposal. Mr JC and Ms GW were obliged to follow instructions.

[42] In these circumstances it was not improper for Mr JC and Ms GW to follow their client’s instructions and serve the statutory demand. They have not breached rule 2.3 of the Conduct and Client Care Rules.

[43] Rule 2.4 as referred to by Ms BO in the review application is not relevant as this refers to a lawyer assisting in a fraud or crime.

[44] I have reached the same conclusion as the Standards Committee, that further action in respect of Ms BO’s complaints is neither necessary nor appropriate.

### **Decision**

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee is confirmed.

**DATED** this 29<sup>TH</sup> day of May 2017

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**D Thresher**  
**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:

Ms BO as the Applicant  
Mr JC and Ms GW as the Respondents  
Mr UG as the Representative for the Respondents  
Mr TR as a related person  
[city] Standards Committee [X]  
New Zealand Law Society