LCRO 125/2011

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Wellington Standards Committee 2
BETWEEN	**ST** Applicant
AND	**CBU** Respondent

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

Introduction

[1] ST has applied for a review of a determination by the Wellington Standards Committee 2 pursuant to section 152(2)(c) of the Lawyers and Conveyancers Act 2006 to take no further action in respect of his complaint against CBU Barristers and Solicitors Limited.

Background

[2] ST acted for SU who was a shareholder in, and a director of, CLL. SU died on 5 February 2010 and ST is one of the executors of his estate.

[3] The other shareholder and director of the company was SV for whom CBU acted. SV is now represented by SW.

[4] The company entered into a contract to purchase two floors in a building at [W Street], Wellington, following redevelopment of the building, and paid a deposit of $100,000. However, the development did not proceed as the developer defaulted in payments to its mortgagee, and the building was sold, either by way of a mortgagee sale or at the direction of the mortgagee.

[5] SV issued instructions to CBU to take steps to arrange a mutual termination of the contract. This resulted in CBU receiving repayment of the deposit, together with the sum of $200,000 which MG described as being an ex gratia payment to settle all matters between the company and the developer.

[6] Shortly after receiving the funds, CBU paid the sum of $50,000 to each of SU and SV and retained the sum of $200,000 in its trust account in the name of CLL.

[7] SU and SV disagreed as to the disposition of those funds and there has been litigation and complaints to the Law Society in respect of that disagreement.

[8] In March 2010, CBU applied to the court to put CLL into liquidation. The grounds specified in the notice of proceedings were the failure to comply with a statutory demand for payment of fees alleged to be due to CBU, that the company was dysfunctional and the relationship between its shareholders and directors had broken down to the extent that it was just and equitable to liquidate the company.

ST's complaint, the investigation and the Standards Committee determination

[9] ST's letter of complaint to the New Zealand Law Society Complaints Service dated 3 June 2010 states that liability of the company for the bills of costs was disputed and that therefore CBU were in breach of Rule 2.3 of the Conduct and Client Care Rules[1] by issuing the statutory demand.

[10] In documents provided with his complaint, he described how CBU came to be "instructed" to act for the company and disputes the legitimacy of the firm's instructions. He asserts that CBU acted unilaterally in negotiating the termination of the contract and advises that at the time, and consistently since, he has strenuously resisted all claims by CBU to be entitled to obtain and retain the funds, or that CBU had any instructions to act for the company in the matter.

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

[11] He disputes the description of the payment of the sum of $200,000 by the developer as being an “ex gratia” payment and instead asserts that part of the sum was in repayment of funds due to SU personally.

[12] In responding to ST’s complaint, CBU referred to a complaint also lodged by SV, and both matters were dealt with together by the Complaints Service.

[13] MH, for CBU, responded to the complaints by contending that neither ST nor SV had standing to challenge the firm’s bills of costs as neither of them were the “person who is chargeable with a bill of costs” as required by section 132(2) of the Lawyers and Conveyancers Act.

[14] He then traversed the history of events and disputed the allegation by ST that CBU did not have instructions to act. The firm’s position was that it held the funds on behalf of CLL and that the firm “had to go to considerable lengths to discharge [its] obligations and to prevent the improper payment out of the funds without agreement being reached”. He asserted that all attendances in relation thereto were chargeable attendances.

[15] MH considered that CBU had no choice but to defend SU’s application to have the funds paid to him. He refers to the work carried out by CBU following settlement which included filing an interpleader application for directions as to the payment of the funds.

[16] The Standards Committee sent an initial response to MH and invited him to consider whether the firm was acting on behalf of itself or the company. It suggested that if the firm was acting for itself, then a solution may have been to amend the invoices to reflect that and then attempt to address the point with the court.

[17] MH responded by stating that the firm considered it was acting on continued instructions from CLL after the settlement in October 2006. He conceded that in respect of the interpleader application, they were, in effect, acting for themselves. He advised that the firm considered very early after settlement that the funds should properly be removed from the firm’s trust account and held by a third party.

[18] The Committee then determined to set the matter down for a hearing on the papers. ST repeated his contention that his complaint was not confined to the quantum of the costs charged but concerned the conduct which gave rise to the bills of costs. The essence of his position was that CBU were acting without instructions and

therefore had no authority to take action on behalf of the company, or to render the bills of costs.

[19] MH responded on 14 March 2011 and advised that the funds had been transferred to another firm and its fees in respect of the unsuccessful High Court appeal had been paid from the funds retained by written agreement between the parties. He also advised that the firm had written off the remaining accounts and withdrawn the winding-up application. On that basis, he considered the complaint should not proceed.

[20] By an email of the same date, SW advised that as the firm had withdrawn its invoices and the winding-up application, SV withdrew his complaint.

[21] ST responded and disputed that there was an "agreement". He noted that the costs on the High Court appeal were paid by order of the Court and reiterated his complaint that

> …the basic falsehood from [CBU] was their claim to be entitled to payment in circumstances where they had received no instructions, had no retainer and had not done any work. They filed application papers in the High Court in support of their false claims!

[22] The Standards Committee determination was communicated to the parties on 30 May 2011. It determined that CBU had issued its invoices and winding-up application in error and not as a result of malfeasance. It considered that there was no deliberate misleading of the Committee and that by withdrawing its invoices and lodging the funds with another firm, CBU had remedied the situation. It described the firm's actions as "acting on an erroneous belief". Finally, it noted that:

> The primary forum for a merits assessment of a position taken by a lawyer is the courts. Standards Committees, applying the Rules of Conduct and Client Care, are not a substitute for courts. The Complainants have had a degree of success in relation to the merits assessment but have not established a breach of the Rules of Conduct and Client Care.

Review

[23] A review hearing took place in Wellington on 31 October 2012, attended by ST, MG and MH, and SW in support of CBU.

Standing

[24] Although MH did not pursue his submission to the Standards Committee that neither SU nor SV had standing, it is important for that submission to be addressed.

MH contends that neither SU nor SV was the party chargeable with the bills of costs as "neither complainant purports to be from or acting on behalf of [the] company." His submission is therefore, that the complaint can not be considered.

[25] As noted subsequently, the essence of SU's (and now ST's) complaint is not so much as to the quantum, but as to the actions taken by CBU to enforce payment. There is no question that SU (and ST) have standing to lodge and pursue that aspect of the complaint as section 132(1) of the Lawyers and Conveyancers Act provides that "any person" may lodge a complaint.

[26] MH's submission that the complaints were not expressed to be lodged in their capacity as directors is something of a technical argument. Both complainants were directors of the company and it is not necessary that they should express their complaints as being lodged in that capacity for the complaint to be accepted.

[27] It would also be something of an anomaly if it were necessary for there to be a formal company resolution to pursue a complaint, as in circumstances where there was disagreement between directors, a complaint could not be pursued. This is a factor which a Standards Committee would no doubt take into account, but I do not think it should prevent a complaint being considered.

Was there a breach of Rule 2.3?

[28] The history of events relating to this matter is longstanding and covers numerous issues of which I have been made aware during the course of this review. There have been two previous complaints to the Law Society and District Court litigation. In conducting this review, I have endeavoured to refer to only those matters which relate to the present complaints.

[29] ST's complaint is simple and has been repeated by him on a number of occasions, including at the review hearing. It is, as recorded in [18], that CBU did not have instructions from the company and that by issuing a statutory demand for payment of their fees knowing that liability was disputed, CBU had breached Rule 2.3 of the Conduct and Client Care Rules.

[30] The Standards Committee considered that the evidence fell well short of establishing a breach of the Conduct and Client Care Rules. It observed, however, that "in certain circumstances, a lawyer acting on an erroneous belief might breach the Rules of Conduct and Client Care".

[31] I am uncertain as to whether the Committee was implying here that CBU had acted on an erroneous belief but its subsequent statement that the evidence fell well short of establishing a breach of the Rules would seem to belie that. However, it clearly determined that CBU had proceeded on a misunderstanding. The misunderstanding identified by the Committee is that the firm considered it had appropriate instructions to take the steps that it did.

[32] Rule 2.3 of the Conduct and Client Care Rules provides as follows:

> 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.

[33] The commentary to the Rule specifically provides by way of example of a breach of the Rule, "the issuing of a statutory demand under the Companies Act 1993, knowing that (or failing to make enquiries whether) the debt is bona fide disputed."

[34] Although SV withdrew his complaint, the content of SW's email dated 20 May 2010, addressed to MH at the time SW was lodging the complaint on behalf of his clients, is extremely pertinent to ST's position. SW stated:

> I do not want the company in liquidation. To be frank, I regard all of your bills as baseless, and they should be withdrawn. The first line of both bills is for "receiving instructions". No instructions were given or received. The reality is that you received proceedings, and had to defend yourselves. You were being sued as stakeholders. It had nothing to do with the business of [CLL]. You are now trying to recover costs for your own time, in dealing with the matter. How you managed to amass so much time, I am not sure. The last line of the bills is also significant, ie "reporting". There was nothing to report, because you had not been asked to do anything.

It is clear that SV disputed that the company was liable for the bills.

[35] Similarly, it was made clear to CBU that SU did not consider the company was liable for CBU accounts either, when he responded on 2 February 2010, immediately upon receipt of the statutory demand in the following way:

> I refer to the Statutory Demand that your firm has served on [CLL] at its registered office.
>
> I have instructions from [SU] to set out his position in relation to the demand as follows:
>
> 1. [SU] does not accept that your firm ever had any proper mandate to provide legal services to [CLL] as itemised in your invoices. The invoices represent a significant total cost to [CLL] and proper authority in the form of a resolution of the shareholders and directors of the company to instruct your firm should have been obtained.

> 2. These observations, together with the District Court proceeding commenced by [SU] and now the subject of an appeal to the High Court, demonstrate that your claim against [CLL] is genuinely in dispute. You will be aware of the ethical considerations that apply to the continuation of action pursuant to a Statutory Demand in these circumstances.

[36] Notwithstanding these objections, CBU proceeded on 31 March 2010 to file the Notice of Proceeding for putting the company into liquidation.

[37] CBU took advice from CBV prior to taking this step. They have provided a copy of the letter of advice from CBV, dated 2 March 2010. In the first paragraph of that letter, CBV notes that:

> There is a dispute as to whether [CBU] had a proper mandate to provide legal services to the company – if not, then they may not be a creditor.

[38] CBV, however, also advised that CBU, as a creditor, could apply to the Court to liquidate the company on the grounds that it was just and equitable to do so. They advised that:

> It would be prudent to cover all bases if possible by raising each ground in evidence and seeking support of [SV] at least on the equitable ground.

[39] What neither CBV nor CBU appear to have turned their minds to was the requirements of Rule 2.3 and the commentary to that Rule. This makes it clear that the Rule is breached if a statutory demand pursuant to the Companies Act 1993 is issued where a debt is in dispute. ST had denied over a period of three years that CBU were able to seek costs against the company on the grounds that the firm had never been instructed. Regardless of the basis on which CBU considered it had valid instructions, ST had made it clear that his client did not accept that the company was liable. I note, for example, the content of ST's letter of 30 October 2006 to CBU where he says:

> Even if we were to concede a 60% shareholding to [SV], he did not have authority to provide instructions to you without the agreement of the other shareholder and director.

[40] Further in that letter, at the top of page 2, he states:

> You were never appointed solicitors to act for the company or to represent yourself as having the authority to conclude a settlement of matters. You have acted in clear breach of all trust accounting and solicitor/client fundamentals. It is obviously a serious and fundamental breach of the role of a solicitor to represent himself as having an authority which does not exist. You cannot in the circumstances plead a misunderstanding or ignorance of the legal position. You clearly acted upon your interpretation of matters so as to exclude my client and myself from the negotiation process and to thereby collect funds into your trust account for distribution solely in the interests of your client.

[41] In the circumstances, the proper course of action for CBU would have been to issue proceedings for recovery of the debt in the usual way and argue liability in that context.

[42] The action taken by CBU was not taken on the basis of any misunderstanding at all and the firm has breached the provisions of Rule 2.3. Even if the action was taken erroneously, the Rule has been breached, and the question as to whether or not the conduct was erroneous goes to penalty.

[43] Consequently, I find that the conduct of CBU in issuing a statutory demand for payment of outstanding costs, when liability was disputed, constitutes unsatisfactory conduct.

Penalty

[44] As I have noted, CBU cannot have failed to have been aware that SU in particular, disputed that the company was liable for the costs of the actions taken by CBU. It is clear also that SV shared this view. It should not, therefore, have issued the statutory demand.

[45] In *Workington v Sheffield* [2], the LCRO considered the function of a penalty in a professional context by reference to *Wislang v Medical Council of New Zealand* [3]. It was noted that it was important to mark out the conduct as unacceptable and to deter other practitioners from failing to pay due regard to their professional obligations.

[46] *BAB v PW*[4] involved a situation where a lawyer had lodged a caveat in breach of Rule 2.3. In that case, a fine of $500 was imposed as being the appropriate response to the breach.

[47] I consider that the action taken by CBU falls into a similar category as that case and in the circumstances a fine of the same amount should be imposed. In addition, as there has been a finding of unsatisfactory conduct, an order for costs in accordance with the Costs Orders Guidelines issued by this Office should also be imposed.

Decision

Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act, the determination of the Standards Committee decision is reversed.

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[2] LCRO 55/2009.
[3] [2002] NZAR 573.
[4] LCRO 4/2011.

The conduct of CBU in issuing a statutory demand in circumstances where the liability for the debt was disputed, constitutes a breach of Rule 2.3 of the Conduct and Client Care Rules. Such conduct constitutes unsatisfactory conduct pursuant to section 12(c) of the Lawyers and Conveyancers Act.

Pursuant to section 156(1)(i) of the Lawyers and Conveyancers Act 2006, CBU is ordered to pay the sum of $500 to the New Zealand Law Society by no later than 31 January 2013.

Pursuant to section 210(1) of the Lawyers and Conveyancers Act 2006, CBU is ordered to pay the sum of $1,200 by way of costs to the New Zealand Law Society by no later than 31 January 2013.

DATED this 10th day of December 2012

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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:

ST as the Applicant
CBU Barristers and Solicitors Ltd as the Respondent
Wellington Standards Committee No 2
The New Zealand Law Society