LCRO 128/2010

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Waikato Bay of Plenty Standards Committee 1
BETWEEN	**MR BT** of Hamilton Applicant
AND	**MS YB** of Hamilton Respondent

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

DECISION

Background

[1] Following an unsuccessful business venture, DQ, the Applicant's son, was the subject of inappropriate behaviour from his previous business partner which was the cause of some distress.

[2] He sought to put a stop to this behaviour by applying to the Court for a bond to keep the peace under the Summary Proceedings Act 1957. This was a process that the Applicant was aware had been successful in similar circumstances in the past.

[3] The application was deficient, and the Judge requested that an amicus curiae be appointed to assist the Court in connection with the application. Mr WJ was appointed.

[4] Mr WJ viewed the Court file and met with the Applicant and DQ. In the course of those meetings, he advised that a more appropriate procedure would be to apply for a restraining order pursuant to the provisions of the Harassment Act 1997. This advice

was accepted by DQ, and Mr WJ introduced DQ to the Respondent to institute the proceedings.

[5] The Respondent has emphasised that she advised both DQ and the Applicant that they did not have to instruct counsel to act for DQ. However, in view of the fact that it was necessary to produce appropriate documents for filing in the Court, and the fact that DQ's former business partner was going to oppose the application, DQ and the Applicant instructed the Respondent to proceed.

[6] After the Respondent had filed the proceedings and responded to the defence she sent an account to DQ on 18 March 2009 (although the bill is dated 28 February) based on a reduced hourly rate of $185 plus GST.

[7] Despite several assurances that the account would be paid, it had not been paid as at 1 May 2009. At that stage the Respondent prepared a further account in respect of attendances to date, and arranged for this to be personally delivered by a friend together with a letter advising that unless payment was received by 4 May 2009, she would be withdrawing as counsel, and commencing debt collection proceedings.

[8] DQ advised at the Review Hearing that after the Respondent withdrew as Counsel, they continued with the application for a bond to keep the peace, which was successful in bringing the unwanted behaviour of the previous business partner to an end.

The Complaint and the Standards Committee decision

[9] The complaint was lodged by Mr BT. Section 132 of the Lawyers and Conveyancers Act 2006 provides that "any person" may lodge a complaint about the conduct of a practitioner. Consequently, it was in order for the Complaints Service to accept the complaint from BT. However, it proceeded with the complaint on the basis that the complainant was DQ. This may have some relevance with regard to the review and accordingly, there will be an order modifying the Standards Committee decision to record BT as the complainant/Applicant.

[10] In his letter of complaint, the Applicant alleged that Mr WJ did not give "a full assessment and good advice to the Judge re bond to keep the peace". He queried whether Mr WJ was correct in "steering [them] down a path that was going to be so long-winded, tie up the Courts and result in exorbitant costs for [DQ]".

[11] He also complained that Mr WJ persuaded DQ to engage the Respondent to represent him and that they both pushed for a "harassment case".

[12] He also queried the Respondent's account and complained that she had sent her account to DQ although it had been indicated he was going to be responsible for payment.

[13] Finally, he records that he was "totally affronted to find out that [the Respondent] had sent a 'heavy' around to DQ's family home to demand payment of her account." He considers that this type of action is totally unprofessional and inappropriate given the circumstances and describes the action taken by the Respondent "nothing short of uncalled for desperation or 'thuggery' ".

[14] The Committee considered the complaint and decided to take no action on it. This was a decision pursuant to section 138(2) of the Lawyers and Conveyancers Act 2006 that enables a Standards Committee, in its discretion, to decide not to take any further action on a complaint if it appears to the Standards Committee that any further action is unnecessary or inappropriate.

Review

[15] In conducting this review I have examined the Standards Committee file. In addition, a hearing was held in Hamilton on 12 May 2011 attended by the Applicant, DQ, and Mr WI QC on behalf of the Respondent.

The role of Mr WJ

[16] The application by DQ for a bond to keep the peace under the Summary Proceedings Act was deficient and the Judge requested that an amicus curiae be appointed. The Applicant advises that the Judge indicated that they would also be provided with an opportunity to ask questions of Mr WJ.

[17] In the process, Mr WJ advised them that he considered it would be best to proceed by way of an application for a restraining order under the provisions of the Harassment Act, rather than continuing with the application for a bond to keep the peace.

[18] Whether or not the Judge had indicated that the BTs would be able to ask questions of Mr WJ, he was formally appointed to assist the Court. He was not appointed to represent DQ and had no legal duty of care to him. The advice he offered was gratuitous and given to assist DQ.

[19] The Applicant considers that Mr WJ should be also the subject of this complaint. The Complaints Service however has treated the complaint as a complaint against the Respondent, and I agree that this was the correct course of action. Mr WJ

was not at any time engaged by DQ and had no duty to him other than to assist with any queries that the BTs might have.

Harassment Act v Summary Proceedings Act

[20] The Respondent says that when she was instructed, the decision to proceed with an application for a restraining order pursuant to the Harassment Act had already been made. This does not altogether relieve the Respondent from an obligation to make an independent assessment as to whether or not the proposed course of action was appropriate. As Duncan Webb has noted in his text *Ethics: Professional Responsibility and the Lawyer,* Second Edition, at page 451:

> It will not be an absolute defence to a claim of abuse for a solicitor to claim that he or she relied on a barrister's expertise. Such reliance may be warranted when the material is technical or the facts complex, but in most cases solicitors are expected to exercise independent judgment in light of their own skill as to whether the claim is well-founded. In matters of law and legal practice legal representatives may not, by relying on the advice of another, divest themselves of their responsibility to conduct litigation responsibly.

[21] I acknowledge that this matter does not relate to an abuse of process, but the principle enunciated is nonetheless relevant. If there can be any criticism of the Respondent, it would be that she did not exercise any significant degree of independent assessment as to the proposed course of action. However, to be fair, she was presented with instructions to take this course of action and there was, and is, no reason to suggest that proceedings under the Harassment Act were anything other than a proper course of action.

[22] The only basis on which there can be an adverse finding against the Respondent would be if her advice could be considered to constitute unsatisfactory conduct as that term is defined in section 12(a) of the Lawyers and Conveyancers Act. This section defines unsatisfactory conduct as being conduct which falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

[23] In the practice of law, a lawyer is regularly called upon to make a judgment as to the best course of action in a particular set of circumstances. Even if that judgment is wrong, it does not necessarily follow that the Respondent should be exposed to a disciplinary charge. An error of judgment is not an indicator that a lawyer lacks competence or has not applied him or herself diligently to the matter at hand.

[24] The Respondent proceeded on the basis that an application for a restraining order under the Harassment Act was the appropriate course of action. That course of action was one that Mr WJ thought was an appropriate course of action. Mr WI also commented that he had used this procedure on many occasions resulting in a successful outcome. There can be no suggestion that this advice constituted unsatisfactory conduct by reason of section 12(a) of the Lawyers and Conveyancers Act.

[25] By reference to a "gravy train" the Applicant suggests that the Respondent proceeded with an application under the Harassment Act because it would produce more in the way of fees. This is a serious allegation, which has not been supported by evidence in any way.

[26] DQ chose to instruct the Respondent. I must emphasise here that there is no evidence to the contrary that this was anything other than a choice freely made. I accept that DQ was under stress in the circumstances, but his instructions continued for some period of time, and at any stage following discussions with his father, those instructions could have been terminated. They were not.

[27] It can not be stated with certainty that legal costs to obtain an order under the Harassment Act would be any more than the costs to obtain a bond under the Summary Proceedings Act. Mr WI commented that this was not necessarily the case. The Applicant has not provided any evidence to support this claim.

[28] Even if the costs were to be greater, the Applicant must be able to substantiate the serious allegation that the Respondent took the approach she did purely to generate more fees. The decision to proceed with an application for a restraining order, was one which was based on the view that it was the appropriate course of action.

[29] Mr WI advised that the Respondent was an experienced and well respected barrister in Hamilton. The slur on her character by this allegation is upsetting to her and the Applicant has a duty to present facts to support the allegations he is making before casting such aspersions. He has not provided any.

The service of the letter

[30] In his complaint to the Complaints Service, the applicant BT stated that "he was totally affronted to find out that [the Respondent] had sent a "heavy" around to DQ's family home to demand payment of her account." He says that "this type of action is

totally unprofessional and inappropriate given the circumstances" and describes the Respondent's methods as "nothing short of uncalled for desperation or 'thuggery'".

[31] In investigating this aspect of the complaint, a member of the Standards Committee liaised with DQ to try to ascertain the facts relating to this incident.

[32] In his email of 7 April 2010, DQ does not elaborate any further on the conduct of the person who delivered the letter, but describes himself as also being affronted. He says "the most astounding issue of conduct though which I hope the Committee will address vigorously with [the Respondent] is that as a person of your Society who, after being questioned over her ongoing clipping of the ticket, sent a 'heavy' to my home to try and intimidate me in front of my family, to pay her account immediately!!! I was totally 'blown away' that a so-called professional person would stoop so low".

[33] With regard to this aspect of the complaint the BTs allege a visit from a "heavy", a demand for payment, unprofessional and inappropriate behaviour, thuggery, stand-over tactics and intimidation. These are all particularly emotive descriptions.

[34] When questioned at the Review Hearing, DQ described the person who delivered the letter as a smartly dressed male, not skinny or lanky. He stated that the person was opinionated and expressed a strong view that the bills should be paid. He did not swear, nor did he threaten DQ, although DQ felt intimidated.

[35] DQ acknowledged at the hearing, that although he described the person as "opinionated" he did not disagree with what the person was saying - namely, that the accounts which had been rendered were due and payable.

[36] Mr WI advised that the person whom the Respondent asked to deliver her letter, was a friend, whose wife and children were in the car when he visited DQ's home. The facts relating to this visit would seem to be somewhat different from the picture painted by the BTs. It seems to me that the visit as described by DQ cannot fairly be described in the terms that it has been by the BTs.

[37] The essence of the complaint therefore would seem to be more that the Applicant was affronted that the Respondent should take such steps.

[38] The Respondent's first account was rendered on 28 February 2009. No dissatisfaction had been expressed by DQ in respect of the work carried out by her, and there had been several promises that the account would be paid. It was understood that the Applicant would be paying the account, and in a phone message left on the Respondent's answer phone on 22 April, he advised that payment was going to be made either that day or the next.

[39] By 29 April, however, DQ was indicating that the Applicant was "reluctant to pay until we find out the end cost".

[40] A person appointed by the Standards Committee expressed the view that the Respondent had been precipitous in demanding payment of her account dated 1 May by 4 May. However, I do not see how or why the BTs should be "affronted". The visit took place on 1 May. The first bill of 18 March was due and payable but had not been paid. Promises of payment had not been kept. Mr WI advises that the Respondent arranged for personal service of the letter and final account so that there could be no dispute about service, as she was anticipating instituting proceedings for recovery. Personal service of various documents are commonplace and often required. There was nothing unusual about that.

[41] The Standards Committee considered that there was insufficient evidence to support this aspect of the complaint. I concur with that, and indeed consider that the complaint and now this application for Review, has proceeded on the basis of a misplaced sense of being affronted, and that the description of the visit to deliver the letter is not borne out by the evidence.

The Respondent's fees

[42] Inasmuch as the complaint concerns the level of fees, it can be readily disposed of. The Respondent's total fees amount to $1,080.85 including GST and disbursements. Rule 29 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 provides that a Standards Committee must not deal with a complaint about costs if it relates to a fee that does not exceed $2,000, exclusive of GST. Consequently, the Standards Committee has no jurisdiction to consider a complaint about the Respondent's fees unless, as provided by Rule 29, there are special circumstances that would justify otherwise. No special circumstances exist.

Decision

[43] Pursuant to Section 211(1)(a) of the Lawyers and Conveyancers Act 2006, the decision of the Standards Committee is modified to replace the name of the complainant, DQ, with that of his father, BT. In all other respects, the decision of the Committee is confirmed.

Costs

[44] At the end of the hearing, Mr WI made an application for costs against the Applicant. He submitted that the Applicant had absolutely no grounds to support the

allegations made by him against the Respondent and that they were outrageous and beyond the pale.

[45] Section 210(1) of the Lawyers and Conveyancers Act gives a general power to make such orders as to payment of costs and expenses as the LCRO thinks fit. As noted in the LCRO Costs Guidelines, a costs order may be made in favour of the other party where there has been some improper conduct in the course of the review. Such conduct may exist where a party has acted vexatiously, frivolously, improperly or unreasonably in bringing the application for review.

[46] In considering whether to make an Order for costs against the Applicant, it must be recognised that the Act provides for a right of review and costs orders will only rarely be made against Applicants exercising that right. It must be recognised that genuinely held views may be considered by the party complained about as outrageous and beyond the pale, but that does not necessarily mean that costs orders should follow.

[47] As this matter was raised at the end of the hearing, and the Applicant has not had a proper opportunity to consider this application for costs, I consider that it is appropriate that both parties be given an opportunity to provide submissions in this regard. Both parties are therefore invited to provide any submissions they wish to make by no later than Thursday 9 June 2011. An indication of the costs incurred by the Respondent is also sought.

DATED this 26th day of May 2011

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Owen 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:

BT as the Applicant
YB as the Respondent
WI QC as counsel for the Respondent
The Waikato Bay of Plenty Standards Committee 1
The New Zealand Law Society