

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of the Area Standards Committee

**BETWEEN**

**A S**

Applicant

**AND**

**D V**

Respondent

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

**DECISION**

[1] Mr AS has applied for a review of a Area Standards Committee's determination dated 19 December 2013 in which the Committee found his conduct unsatisfactory under the Lawyers & Conveyancers Act 2006 (the Act) in failing to pay Mr DV's fees, having instructed him as counsel (the decision). The Committee imposed a censure, ordered Mr AS to pay costs to New Zealand Law Society (NZLS) and Mr DV's fees of \$30,496.99.

[2] In a letter to Mr DV sent very shortly after he laid his complaint, Mr AS said he does did not "deny the account or the professional aspect".<sup>1</sup> He agrees he is professionally responsible for Mr DV's fees, but says there are a number of reasons why he has not paid them since Mr DV rendered his final invoice dated 31 July 2008.

[3] Mr AS acknowledges that he has not taken any steps to formally dispute Mr DV's fees, nor has he laid any complaint about Mr DV's conduct or the service he provided. His objection to paying primarily rests on an alleged failure of Mr DV to provide him with regular reports on the proceeding in respect of which he had instructed Mr DV. In the absence of any professional disciplinary complaint having been laid, those matters cannot be the subject of review.

[4] Mr DV says he delayed laying his complaint to enable Mr AS or his clients to bring a challenge to his invoice. When that had not happened by May 2013, Mr DV

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<sup>1</sup> Letter AS to DV (13 June 2013).

complained to the NZLS, alleging that Mr AS had instructed him but failed to pay his fee, and that Mr AS had made threats against him for the improper purpose of avoiding his professional responsibility for paying counsel's fee.

[5] Mr DV confirms that his fee remains unpaid and unchallenged.

### **Standards Committee Decision**

[6] The Standards Committee considered the two aspects of Mr DV's complaint, recorded the facts and referred to correspondence the parties had provided.

[7] The Committee did not consider that the threats Mr AS had made were sufficiently serious to attract professional disciplinary consequences.<sup>2</sup>

[8] With respect to fees, the Committee could find no basis on which to criticise the fees Mr DV has rendered.<sup>3</sup> There was no evidence of any formal complaint being made about Mr DV's fees, and no concerns were raised by the Committee about the level of Mr DV's fees.

[9] The Committee noted that Mr AS's file "reveals that he received payments from [his client] on account of Mr DV's fees but to date there has been no reduction in those invoices",<sup>4</sup> and that Mr AS had made no attempt to attend to payment of counsel's fees.

[10] On the basis of the information before it, the Committee concluded that Mr AS's failure to pay Mr DV's fees was a breach of Rule 10.7,<sup>5</sup> and amounted to unsatisfactory conduct. The Committee made orders under s 156 of the Act as mentioned above.

[11] Mr AS was dissatisfied with the decision and applied for a review.

### **Role of the Legal Complaints Review Officer**

[12] The role of the Legal Complaints Review Officer (LCRO) on review is to reach her own view on the evidence that is before her. Where the review is of an exercise of discretion, it is appropriate for the Review Officer to exercise particular caution before substituting her own judgment for that of the Standards Committee, without good reason.

### **Scope of Review**

[13] The LCRO has broad powers to conduct her own investigations, including the power to exercise for that purpose all the powers of a Standards Committee or an

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<sup>2</sup> Standards Committee determination 19 December 2013 at [24].

<sup>3</sup> Above n 2 at [28].

<sup>4</sup> Above n 2 at [30].

<sup>5</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 at Rule 10.7.

investigator, and seek and receive evidence. The statutory power of review is much broader than an appeal, and gives the LCRO discretion as to the approach to be taken on any particular review, and the extent of the investigations necessary to conduct that review.

### **Review Hearing**

[14] On 29 July 2014 Mr AS and Mr DV attended a review hearing in Auckland.

### **Review Issue**

[15] For the reasons discussed below, the only issue on review is whether there is good reason to modify any aspect of the decision. Other than modifying the timeframe for compliance with an order to pay counsel's fees, the answer is no.

### **Discussion**

[16] There are two elements to Mr DV's complaint, the failure to pay his fees, and the propriety of threats made by Mr AS to report Mr DV to NZLS.

#### *Failure to pay counsel's fees*

[17] Mr AS's primary concern is that the Standards Committee did not have all the relevant information before it when it made its decision. If the Committee had allowed him time to do so, Mr AS says he would have produced further detail from his file to account for his failure to pay Mr DV's fees.

[18] The relevant aspects of Mr AS's obligations as instructing solicitor are set out in Rule 10.7, 10.7.1 and 10.7.2 which say:<sup>6</sup>

10.7 A lawyer who, acting in a professional capacity, instructs another lawyer, must pay the other lawyer's account promptly and in full unless agreement to the contrary is reached, or the fee is promptly disputed through proper professional channels. This rule applies to the accounts of barristers sole and foreign lawyers.

10.7.1 Where the instructing lawyer and the lawyer undertaking the work have agreed that the instructing lawyer's client is to be solely responsible for paying the lawyer's account then (unless agreed otherwise) the instructing lawyer must use all reasonable endeavours to ensure the client pays the account. The instructing lawyer must promptly inform the instructed lawyer if it appears that the client will be unable or unwilling to pay the account.

10.7.2 A lawyer with a practising certificate as a barrister and solicitor may sue for and recover from the party chargeable any fees paid or payable by the lawyer to a barrister sole for work done or to be done on the instructions of the lawyer in

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<sup>6</sup> Above n 5 at Rules 10.7, 10.7.1 and 10.7.2.

relation to a client's affairs, if those fees are shown as a disbursement in a bill of costs rendered by the lawyer to the party chargeable.

[19] Significantly, Mr AS does not dispute that he was acting as a lawyer in his professional capacity when he instructed Mr DV, who is a barrister sole. He accepts that he failed to: attend to Mr DV's payment promptly; use reasonable endeavours to ensure his clients, the OWs, paid the account; communicate to Mr DV that the OWs were unwilling or unable to pay; take steps to sue the OW brothers to recover the fee, or raise any dispute through proper professional channels. Mr AS also said that he had not rendered an invoice to the OW brothers showing Mr DV's fees as a disbursement.

[20] Mr DV and Mr AS also concur that there was no agreement between them that would negate Mr AS's obligation to pay, for example by the OW brothers agreeing to pay Mr DV direct.

[21] Mr AS's admissions on review mean that he has comprehensively breached Rule 10.7, including Rules 10.7.1 and 10.7.2.<sup>7</sup> Nevertheless, on review Mr AS seeks to offer an explanation as to why payment has not been made, and to tender documents in support, which he says were not available to him at the time he responded to the Standards Committee's complaint because he had sent his file to the OW brothers' new lawyers and had not retained a copy.

[22] Despite the modest delay it would cause, I invited Mr AS to provide any further information he considered would be helpful and relevant to determination of his review application, and he has done so. Those materials have also been provided to Mr DV. Having read the documents I note that they are largely the same as the materials that were before the Committee, with the addition of some of Mr AS's file notes, which add nothing of substance to his position.

[23] The correspondence and notes Mr AS provided document the progress of his brief to Mr DV. They also typify the tensions that can inhere in a relationship between an instructing solicitor and counsel, where the instructing solicitor is managing his clients and their expectations, while independent counsel has conduct of the proceeding before the Court, and little or no direct contact with the instructing solicitor's clients.

[24] In addition to the information that was before the Standards Committee, I have carefully considered the further information Mr AS provided, and the evidence the parties gave on review. Mr AS's reliance on indications from his client that the client

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<sup>7</sup> Above n 5.

“will write a complaint” to the NZLS,<sup>8</sup> and leaving his exchange of correspondence with Mr DV with the comment “We are troubled. We may have to report to the Law Society”,<sup>9</sup> does not excuse him from complying with his professional obligation to ensure counsel’s fee is paid or disputed.

[25] Nothing Mr AS has said, and none of the further information he has provided, satisfactorily explains why, six years after receiving Mr DV’s invoice, he has not formally disputed or paid Mr DV’s fees, as he accepts he is professionally obliged to do.

[26] I have considered all of the information provided on review, including the parties’ evidence at the review hearing, and can find no reason to depart from the Committee’s determination that Mr AS’s conduct in failing to formally dispute or pay Mr DV’s fees was unsatisfactory. That aspect of the decision is therefore confirmed on review.

#### *Threat*

[27] The other issue raised by Mr DV in his complaint relates to comments made by Mr AS in correspondence suggesting a complaint may be made about Mr DV to NZLS. Mr DV describes threats that Mr AS did not follow through on, and he takes objection to those comments.

[28] Mr AS’s letter of 9 September 2008 invited communication with Mr DV which, for various reasons, did not materialise. The Committee did not consider Mr AS’s comments warranted disciplinary intervention, and decided to take no further action on that aspect of Mr AS’s complaint.

[29] I accept that Mr DV was affronted by the suggestion Mr AS might complain about his conduct to the NZLS, and it is unlikely that offence would be diminished by the lack of payment or any formal complaint. Although subsequent events attest to Mr AS’s reluctance to pay Mr DV’s fee, there is no evidence that his intention was improper at the time.

[30] Mr AS’s correspondence with Mr OW at the time supports Mr AS’s assertion that he had grounds for his belief that Mr OW would take responsibility for any complaint. Although it must have been apparent to Mr DV after receiving notice of Mr AS’s complaint that Mr OW had taken no such steps, I am not satisfied that his purpose at the time he wrote to Mr DV was improper.

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<sup>8</sup> Email OW to AS(12 August 2008).

<sup>9</sup> Letter AS to DV (9 September 2008).

[31] Having considered the comments in the context of all the information available on review, I have found no good reason to interfere with the Committee's discretion. The threat aspect of the decision will receive no further consideration on review, and that part of the decision is confirmed.

#### *Section 156 Orders*

[32] The only residual issue is whether the orders made under s 156 of the Act should stand. There is nothing objectionable in the censure or costs orders, and those orders are confirmed.

[33] Although Mr AS acknowledges he is under a professional obligation to pay counsel's fee, his resistance to paying is based on his failure to appreciate his client had not taken up the challenge, despite having indicated that he would, and Mr DV's belief that the fee is now beyond challenge. I have therefore considered the propriety of the Committee's order requiring Mr AS to pay Mr DV's fees of \$30,496.99 made under s 156(1), when the quantum of those fees has not been disputed through proper professional channels as Rule 10.7 anticipates. For the reasons set out below, that order is modified to alter the date by which Mr AS is required to pay, and is otherwise confirmed.

[34] Having determined Mr AS's conduct had been unsatisfactory, the Committee ordered Mr AS to pay Mr DV's fee, pursuant to s 156(1)(h) of the Act, and allowed him 90 days from the date on which the right to apply to this Office for a review expired within which to comply.

[35] A Committee can make an order on such terms and conditions as it thinks fit,<sup>10</sup> and the relevant part of s 156(1)(h) says that a Committee may:

order the practitioner...—

(i) to rectify, at his...own expense, any...omission;

[36] Mr AS's failure to pay Mr DV's fee constitutes an omission to actively comply with his duties under Rule 10.7, 10.7.1 and 10.7.2.<sup>11</sup> Mr AS says he assumed Mr DV was dealing with the OW brothers over his fees. However, he has been aware, at least since he received Mr DV's complaint in or about May 2013, that he was mistaken. He acknowledges that he is professionally obliged to pay counsel's fee, and says he is aware that he cannot avoid that obligation, but considers the fee should be capped at \$5,000, in line with an early estimate provided by Mr DV.

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<sup>10</sup> Lawyers and Conveyancers Act 2006 s 156(3).

<sup>11</sup> Above n 5.

[37] From the information provided to the Committee, and on review, it appears that the only people who genuinely believe that Mr DV's fee was unfair or unreasonable are the OW brothers. Mr DV considers his fee was appropriate. Mr AS says he does not consider Mr DV's fee of \$30,496.99 is unreasonable, and expressed the view that in any event the time for challenging the fee has passed.

[38] As it is not possible for Mr DV to sue Mr AS or the OW brothers for his fees,<sup>12</sup> or for interest on them, the way to resolve the stalemate would be by Mr AS disputing Mr DV's fee through "proper professional channels".<sup>13</sup> Without making any determination on that point, I observe that if a dispute were to be raised, the Rules anticipate that being done promptly.

[39] The reasonableness of Mr DV's fee could not be determined by the Committee at first instance as part of Mr DV's complaint against Mr AS, nor can it be determined by this review.

[40] As a result of Mr AS's omission to act in accordance with his duties, promptly or at all, although the Committee did not refer explicitly to the limitations on counsel suing for his own fee, the order requiring Mr AS to pay is a logical outcome of the decision.

[41] In the circumstances, there is no good reason to interfere with the Standards Committee's order requiring Mr AS to pay Mr DV's fees, other than to modify the timeframe within which Mr AS was originally required to pay. Taking into account the six years Mr DV has already waited for his fee, and the fact that Mr AS may have to fund the full payment from his own resources, Mr AS has 28 days from the date of this decision within which to pay Mr DV \$30,496.99.

## **Outcome**

[42] The finding of unsatisfactory conduct and orders that Mr AS be censured under s 156(1)(b), and pay costs of \$1,000 to NZLS, are confirmed. The order that Mr AS is to pay Mr DV's fees of \$30,496.99 pursuant to s 56(1)(h) to rectify his omission to comply with his duties under Rules 10.7, 10.71 and 10.7.2 is modified so that payment is to be made within 28 days of the date of this decision, and is otherwise confirmed.

## **Costs**

[43] The LCRO has discretion to make orders for costs pursuant to s 210 and the LCRO Costs Orders Guidelines. Mr AS was the Applicant for review, and he was unsuccessful. It is therefore appropriate that he be ordered to pay to NZLS the costs of

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<sup>12</sup> *Atkinson v Pengelly* [1995] 3 NZLR 104, 110 per Tipping J.

<sup>13</sup> Above n 5 at Rule 10.7.

review following a hearing attended by the parties of \$1,200, pursuant to the Guidelines.

**Decision**

1. Pursuant to s 211(1)(a) of the Lawyers & Conveyancers Act 2006 the decision of the Standards Committee is:

- (a) Modified to provide for Mr AS to pay Mr DV's fees of \$30,496.99 to rectify his omissions to pay, within 28 days from the date of this decision.
- (b) The decision and orders for censure and costs of \$1,000 to NZLS are otherwise confirmed.

2. Pursuant to s 210 of the Lawyers & Conveyancers Act 2006 Mr AS is ordered to pay costs on review of \$1,200.

**DATED** this 5<sup>th</sup> day of August 2014

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Dorothy 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:

Mr AS as the Applicant  
Mr QG as a Related Person  
Mr DV as the Respondent  
The Area Standards Committee  
The New Zealand Law Society