LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2020] NZLCRO 171

Ref: LCRO 16/2020

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 [X]
BETWEEN	**PF** Applicant
AND	**VJ** Respondent

DECISION

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

Introduction

[1] Mr PF has applied for a review of a decision by the [Area] Standards Committee [X] to take no further action in respect of his complaint concerning the conduct of Mr VJ, a lawyer and at the relevant time a director of [law firm] (the firm).

[2] PF's ABC Ltd, owned by Mr PF and his wife, was the franchisee of a [redacted] business. Mr VJ acted for the franchisor, DEF Ltd (DEF), which administered a network of franchised [business] supplying people with [redacted] related products and services.[1]

[3] As detailed in my later analysis, Mr PF's complaint stems from his interactions with DEF from February to September 2019 concerning aspects of the franchise

[1] My reference in this decision to Mr and Mrs PF includes the franchisee.

relationship. From 4 June 2019, Mr and Mrs PF's lawyer, Ms FB, and Mr VJ exchanged correspondence in which each set out Mr and Mrs PF's, and DEF's respective positions about franchise issues.

[4] Those issues were brought to a head by Mr PF not attending DEF's two-day networking conference of franchisees on 9–10 September 2019 resulting in Mr VJ, on behalf of DEF, serving on Mr and Mrs PF a notice of breach of the franchise agreement.

Complaint

[5] Mr PF lodged a complaint with the Lawyers Complaints Service on 4 October 2019.

[6] He sought (a) reimbursement of Mr VJ's fees he and Mrs PF paid in respect of the notice of breach to end the matter and "prevent" incurring further costs, plus interest, and (b) an apology from Mr VJ to him, and to Ms FB for [Mr VJ's] "unprofessional behaviour".

[7] Mr PF claimed Mr VJ:

(a) "falsely" served the notice of breach on him and Mrs PF.

(b) charged fees for the preparation and service of the notice of breach that were excessive. He also objected to the notice of breach having demanded immediate payment otherwise interest would accrue at "20% per day".

(c) delayed responding to Ms FB's Thursday, 19 September 2019 letter, in which Ms FB challenged the validity of the notice of breach, until Monday, 23 September 2019 resulting in further interest accruing on Mr VJ's fees.

(d) made "very personal remarks" about him in correspondence to Ms FB. He said it was unprofessional of Mr VJ to send "constant obstructive lengthy responses" without "attempt at resolution" of his issues with DEF.

Response

[8] Following an initial assessment by the Lawyers Complaints Service (LCS), Mr PF's complaint was dealt with through its Early Intervention Process which I refer to later in this decision.

Standards Committee decision

[9] The Standards Committee delivered its decision on 17 December 2019 and determined, pursuant to s 138(1)(f) of the Lawyers and Conveyancers Act 2006 (the Act), that no further action on the complaint was necessary or appropriate.

(1) Notice of breach

[10] The Committee stated that the dispute resolution provision in the franchise agreement provided Mr PF with "an alternative process" to resolve his dispute with the franchisor "in the first instance" adding Mr PF could make a new complaint about Mr VJ if, following that process, he still had "concerns about Mr VJ's conduct".

(2) Personal remarks

[11] Whilst noting Mr VJ did not act for Mr PF, a third party, the Committee stated Mr VJ was required, pursuant to r 12 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) to "conduct his dealings" with Mr PF with "integrity respect and courtesy".

[12] However, the Committee decided there was "nothing in the complaint material to suggest" Mr VJ had not treated Mr PF with integrity, respect and courtesy.

[13] In reaching that conclusion the Committee stated Mr VJ's letters to Mr PF, and Ms FB, were "standard legal communications about a breach of the franchise agreement" and had not been "disrespectful or discourteous" to Mr PF.

Application for review

[14] Mr PF filed an application for review on 23 January 2020. He repeats his request for (a) reimbursement of Mr VJ's fees plus interest paid, and (b) an apology.

(1) Committee hearing

[15] Mr PF claims, in effect, the Committee did not give him a fair hearing. He says he expected the Committee would call for further evidence, once "the initial evidence" had been "presented and reviewed", but did not do so.

(2) Notice of breach

[16] Mr PF contends he "should [neither] have received" the notice of breach, which he describes as "condescending at best", nor "incurred" any related costs. Therefore, he says it was a further "surprise" to receive the notice of breach, particularly from Mr VJ direct instead of through Ms FB.

[17] He says the Committee ignored that his attendance at the conference "would have had extremely detrimental effects" on his mental health. He says it was "apparent" to him the Committee had not read "all letters" exchanged between Mr VJ, and Ms FB, and "reviewed the contents".

[18] In support, he referred to Mr VJ's statement in [Mr VJ's] 9 July 2019 letter to Ms FB that Mr PF could be excused from attending the September conference if he and Mrs PF had staff rostering issues. He said Ms FB's and Mr VJ's following exchange of correspondence included discussion about him not being able to attend the conference on medical grounds.

[19] He says when subsequently attending DEF further training, he informed DEF's representative of his "great difficulty in getting any staff to cover the conference days, as casual staff", but "no solution, or assistance was offered" by DEF.

[20] He says to provide adequate staffing he stayed at work which would have been "no surprise" to DEF when Mrs PF attended the conference without him.

[21] He says because Mr VJ rejected Ms FB's request for mediation "no other avenue" for dispute resolution was open to them other than a complaint.

(3) Fees

[22] Mr PF challenges DEF's demand for immediate payment of Mr VJ's fees plus interest at 20% per day for non-payment. He refers to "common practice" requiring payment within 7 to 14 days.

(4) Delay

[23] He says it was "vindictive" of Mr VJ to take "five-days" to reply to Ms FB's 19 September letter in response to the notice of breach, thereby allowing interest to "accrue" on Mr VJ's fees.

Response

[24] In his response filed on 14 February 2020, Mr VJ denies that he or the firm acted unprofessionally. He says his correspondence to Ms FB was "professional and provided complete and detailed responses". He says except for service of the notice of breach on Mr and Mrs PF as required by the franchise agreement, all of his correspondence was addressed to Ms FB.

(1) Notice of breach

(a) Service

[25] Mr VJ says the franchise agreement requires that notices pursuant to that agreement be in writing and delivered, or posted to a party's address as well as the business address. He says in serving the notice of breach on Mr and Mrs PF he complied with the Rules.

(b) Validity

[26] Mr VJ says by serving the notice of breach, DEF wanted to make it "abundantly clear" to Mr PF that "non-attendance at a meeting/conference" was "a very serious matter".

[27] He says Mr PF's complaints "are of a contractual nature" concerning issues between Mr and Mrs PF, and DEF. He says it was for DEF, not him, to decide whether or not to mediate the issues between Mr and Mrs PF, and DEF.

(2) Personal remarks

[28] He says his correspondence to Ms FB makes it "patently clear" that "at all times" he "acted professionally and courteously". He draws attention to having "expressed" his "serious concern" for, and "recommended" Mr PF afford "priority" to [Mr PF's] "well-being", and if need be "step back from the business" until well enough"

(3) Fees

[29] Mr VJ says because his invoices were for less than $2,000, for the purposes of reg 29 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 (the Regulations), there were no "special circumstances" to justify consideration of his fees.

[30] He says the recovery of his fees in his invoices issued to DEF, and interest on those fees pursuant to clauses 90.1(f) and 26 of the franchise agreement was a contractual matter.

(4) Delay in responding

[31] Mr VJ denies he delayed responding to Ms FB's Thursday, 19 September 2019 letter. He says having obtained DEF's instructions on Friday, 20 September, he responded on Monday, 23 September.

Review on the papers

[32] The parties have agreed to the review being dealt with on the papers. This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[33] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party. On the basis of the information available I have concluded that the review can be adequately determined in the absence of the parties.

Nature and scope of review

[34] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[2]

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
>
> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
>
> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where

[2] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

> the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[35] More recently, the High Court has described a review by this Office in the following way:[3]

> A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[36] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to consider all of the available material afresh, including the Committee's decision, and provide an independent opinion based on those materials.

Preliminary

[37] The LCS dealt with Mr PF's complaint through its Early Intervention Process (EIP). This involves a Standards Committee conducting an initial assessment of a complaint and forming a preliminary view as to outcome.

[38] If the Committee's preliminary view is that the complaint lacks substance, a Legal Standards Officer (LSO) will inform the lawyer concerned of the Committee's preliminary view, inviting response. Any response is noted in a file note and provided to the Committee, which then completes its inquiry into the complaint.

[39] On 17 December 2019, an LSO telephoned Mr VJ and invited him to respond explaining if he did, the complaint would be considered in a more formal process. Having informed the LSO he would provide any further information required, the LSO said the complaint could be adequately decided on the information held.

Issues

[40] The issues I have identified for consideration on this review are:

(a) Did Mr VJ owe Mr and Mrs PF, who were not his clients, any professional obligations and duties? If so, what were the relevant obligations and duties?

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[3] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

(b) Did Mr VJ contravene any of those obligations and duties?

(c) Were Mr VJ's fees for his preparation and service of the notice of breach fair and reasonable?

Analysis

(1) Mr VJ's professional obligations and duties – issue (a)

[41] The preliminary question is whether Mr VJ, who acted for DEF, owed Mr and Mrs PF any professional obligations and duties.

[42] The professional rules in the Lawyers: Conduct and Client Care Rules, as the name suggests, concern the way in which lawyers must first, conduct themselves, and secondly, act for their clients. Although the rules do not represent "an exhaustive statement of the conduct expected of lawyers", they do "set the minimum standards that lawyers must observe and are a reference point for discipline".[4]

[43] The rules conveniently fall into three broad categories. First, those rules which directly concern the provision of legal services by lawyers to their clients.[5] Secondly, those rules which concern lawyers' dealings or interactions with other lawyers, and third parties. Thirdly, those rules which concern the rule of law and administration of justice, and lawyers' overriding duties to the High Court. [6]

(a) Clients

[44] The professional duties and obligations lawyers owe their clients include the duties to act competently, to treat them with respect and courtesy, to respond to their inquiries promptly, and to provide them with information on the principal aspects of client service and client care at the commencement of a retainer.[7]

[45] Also, the obligation and duty to be independent, the duties to protect and promote a client's interests to the exclusion of third parties' interests, to consult with the

[4] See the Preface to the Rules at Notes about the rules.
[5] See also s 4 of the Act which specifies lawyers' fundamental obligations, including (b) "be independent" when acting for their clients and (c) "…act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients"
[6] Section 4 also specifies (a) "uphold the rule of law and facilitate the administration of justice in New Zealand"; … (d) "protect [clients'] interests" subject to "overriding duties as officers of the High Court".
[7] See rr 3, 3.1, 3.2; 7.2; 3.4, and 3.5 (with rr 3.4A and 3.5A applying to barristers sole).

client, to hold a client's information in confidence, and to charge the client fees that are fair and reasonable.[8]

(b) Non-clients

[46] There may be occasions when a lawyer owes a duty, other than a professional duty, to persons for whom the lawyer does not act, such as a duty of care in negligence.

[47] Generally, however, a lawyer acting for a client would not owe a duty to a person who was an opposing party in litigation, or on the opposite side of a transaction. There are some exceptions, for example, where a lawyer acting for a client on a transaction provides an undertaking to hold or pay funds, or to do something concerning the transaction, or to provide a certificate as to certain facts and circumstances.[9]

[48] For that reason, "the existence of a duty" owed to a non-client has been described as "exceptional".[10]

[49] The Courts have referred to policy considerations to explain why a lawyer acting for one party to a transaction owes no professional duty to a party on the other side of the transaction, the most obvious being the different interests possessed by each party.[11]

[50] Where one party to a contract, such as Mr PF, complains about the conduct of a lawyer who acts for the opposing party, it is the duties and obligations in the second category of the Rules which might be relevant in the context of Mr PF's complaint. These include the duties to (a) use legal processes for proper purposes, (b) promote and maintain proper standards of professionalism in the lawyer's dealings , and (c) when acting in a professional capacity, conduct dealings with others, including self-represented persons, with integrity, respect, courtesy.[12]

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[8] See s 4(b) of the Act, and rr 5, 5.2, 5.3, 5.4; 6; 7.1; 8; 9, and 9.1.
[9] For example, on a conveyancing transaction, payment of rates, water charges; provide a certificate for e-dealing purposes in Landonline.
[10] See Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [5.4.3] - referring to *Burmeister v O'Brien* [2010] 2 NZLR 395 (HC) at [234].
[11] Webb Dalziel and Cook, above n 10 at [5.4.3], referring to *Burmeister v O'Brien*, above n 10.
[12] Specifically r 12, but also see rr 2.3 and 10. Duties in other rules which may be relevant when a lawyer is not acting for a client include, not to attempt to obstruct, prevent, pervert or defeat the course of justice (rule 2.2), not to provide false certificates (rules 2.5, 2.6).

(2) Notice of breach – issue (b)

(a) Context

[51] Mr PF claims Mr VJ contravened his professional duties owed to him (a) by issuing the notice of breach, and (b) by serving the notice on [Mr] and Mrs PF direct. He says Mr VJ had led him to believe he need not attend DEF's September conference if unwell, and therefore by not attending he had not breached the franchise agreement.

[52] The interactions between Mr and Mrs PF, and DEF, and the correspondence exchanged by Mr VJ and Ms FB during the eight-months prior to the service of DEF's 13 September 2019 notice of breach by Mr VJ provide the context for discussion of this aspect of Mr PF's complaint.

[53] Mr and Mrs PF purchased their [redacted] business towards the end of 2018. On 20 December 2018, they signed DEF's franchise agreement whereby DEF granted them the right to operate the business, identified as a franchised outlet.

[54] Mr PF became unwell during the first few months of 2019. On 16 March 2019, he informed (by email) DEF of his disappointment at DEF's lack of assistance provided to him and Mrs PF during the handover of the business, and his misgivings about the purchase itself.

[55] On 17 April 2019, DEF and Mr PF exchanged (by email) views about the cart opening hours over Easter. Mr PF said DEF was asking them to "put [their] business over [their] religious beliefs". He told (by email) DEF the following day that his illness may explain his recent behaviour towards DEF.

[56] On 29 May 2019, two DEF representatives made an unannounced visit to Mr and Mrs PF at the [business location]. Ms FB wrote to DEF on 4 June 2019. She referred to DEF's obligations under the Health and Safety at Work Act 2015, and its "common law obligation" not to interfere with the contractual relationship between Mr and Mrs PF and their employees.

[57] Ms FB said the DEF representatives told Mr and Mrs PF the visit followed a customer's complaint about "a coffee made the previous day". She said the representatives referred to Mrs PF, and an employee being uncommunicative with customers. She said one of the representatives "bull[ied] and harass[ed] Mrs PF and their employee leaving them "upset", and possibly leaving Mr and Mrs PF open to a personal grievance by the employee.

[58] On 5 June, Ms FB asked (by letter) DEF "not to … further … harass and bully" Mr and Mrs PF or their staff. Ms FB said Mr PF's illness was caused by franchise relationship "issues", and asked that communications be through her.[13]

[59] On 7 June 2019, DEF sent (by email) to Mr and Mrs PF notice of DEF's annual conference, to be held on 9 and 10 September 2019.

[60] Mr VJ responded (by letter) to Ms FB on 14 June. He said DEF's representatives had provided "constructive feedback" to Mr and Mrs PF at the 29 May site visit to "assist" them to "mitigat[e] against being in breach" of the franchise agreement thereby "protect[ing] the legitimate interests" of DEF, and other franchisees. He said Mr PF "had no cause for complaint" under the franchise agreement, the FANZ Codes of Ethics or Practice, or the Employment Relations Act.[14]

[61] On 17 June, Ms FB informed (by letter) Mr VJ that Mr and Mrs PF did "not accept" DEF's position. Ms FB said DEF risked being a party to a personal grievance claim if its actions "interfere[d] with the employment relationship" between Mr and Mrs PF and their employees.

[62] During the three-week period commencing 9 July, Mr VJ and Ms FB exchanged further correspondence about (a) the requirement Mr and Mrs PF attend the September conference, (b) staffing the cart while at the conference, (c) why DEF required Mr and Mrs PF and their employee attend further training, and whether that requirement was linked to the fall in the business turnover.

[63] Mr PF says throughout this time, although unwell, out of necessity he continued to work in the business.

[64] On 17 July 2019, Ms FB suggested (by letter) mediation of the parties' differences, or a negotiated settlement by correspondence. Ms FB asked Mr VJ if DEF would either (a) purchase the business for [redacted] which represented Mr and Mrs PF's investment in the business, or (b) release them from the franchise agreement.

[65] In his response (by letter) on 19 July, Mr VJ informed Ms FB that DEF would not purchase the business at that price, but may purchase if Mr and Mrs PF could not sell the business on the open market.

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[13] A doctor's certificate accompanied Ms FB's letter.
[14] FANZ - Franchise Association of New Zealand.

[66] Mrs PF, without Mr PF, attended the DEF conference on 9 and 10 September. On 13 September, Mr VJ served a notice of breach of the franchise agreement on Mr and Mrs PF at their business address citing Mr PF's failure to attend the conference as the breach.

(b) Validity of notice

Parties' positions

[67] Mr PF says DEF knew he may not be well enough to attend the September conference, and therefore should not have instructed Mr VJ to serve a notice of breach due to his absence from the conference.

[68] Mr VJ says DEF instructed him to serve the notice of breach to emphasise to Mr PF that "non-attendance at a meeting/conference" was regarded by DEF as "a very serious matter".

Discussion

[69] The essence of this aspect of Mr PF's complaint is whether, in the circumstances I have described, Mr PF's absence from the conference constituted a breach of the franchise agreement which justified DEF serving the notice of breach on Mr and Mrs PF.

[70] In her 16 September 2019 letter, Ms FB told Mr VJ that Mr PF had relied on DEF's representation [Mr PF] need not attend the conference if there was a "rostering issue". She said Mr VJ's costs were "unnecessary", but because DEF "may have been expecting" Mr PF to attend the conference he and Mrs PF would pay DEF's expenses of $182.12 plus GST.

[71] In her follow-up letter on 19 September 2019, Ms FB said if "staff rostering" prevented both Mr and Mrs PF from attending the conference then Mrs PF, who had told DEF she spent more time working in the business, could attend on her own. Ms FB said it was therefore "incumbent on" Mr VJ to advise any "change of position".

[72] In Ms FB's view, because Mr PF's absence from the conference was a "minor matter", the notice of breach was unnecessary. Instead, Ms FB said DEF could have requested payment of its expenses incurred for Mr PF to attend the conference.

[73] Ms FB said any notice of termination would be contested, the dispute resolution provisions in clause 81.1 of the franchise agreement invoked, and costs sought from

DEF. She requested an undertaking, by 5 PM on 20 September 2019, that DEF would not terminate otherwise Mr and Mrs PF would apply for an injunction, and associated costs.[15]

[74] Ms FB described as "confusing" the requirement in the notice of immediate payment of $956.93. In her view an immediate right of termination did not arise because clause 78.1 required a 14 day period of non-payment. Ms FB also described as confusing the statement that failure to pay would result in a further breach notice, or possible termination.[16]

[75] Mr VJ says he acted on DEF's instructions. He says Mr PF had raised difficulties about staff rostering, not [Mr PF's] illness as the reason for his absence from the conference. In his submission it was Mr PF's responsibility, if unwell, to tell DEF [Mr PF] could not attend the conference.

[76] He says Mr PF sought to invoke the dispute resolution provisions of the franchise agreement "at times when there was no dispute" just "broad and unsubstantiated allegations". He says clause 38.1, referred to in the notice of breach, requires franchisee managers to attend meetings and conferences.

[77] Mr VJ refers to his letters to Ms FB during July. In particular his 9 July 2019 letter, about the requirements in the franchise agreement that (a) both Mr and Mrs PF attend the conference, (b) staffing while attending the conference, and (c) further training. He disagrees that his 9 July 2019 letter took "precedence" over his subsequent letters.[17]

[78] He says Mr PF had a change of position, evidenced in Ms FB's 16 September 2019 letter, stating [Mr PF] had "no issue with paying wasted expenditure" incurred by DEF due to [Mr PF] not having attended the conference. He says if, following his 18 September 2019 letter to Ms FB, Mr PF was unsure of his position [Mr PF] should to have said so. He says Mr PF paid his fees "with interest" to DEF.

[79] It is evident from this discussion that the question whether Mr PF's absence from the conference constituted a breach of the franchise agreement, and therefore

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[15] Clause 78.1(c) confers on DEF the "option immediately by notice [to] terminate" the franchise agreement in respect of "a breach or non-observance or non-performance" of the franchisee's "covenants and conditions", but "[w]ithout limiting" DEF's "rights" of "immediate" termination under clause 77.1(j) for events including a breach of clause 38.1, namely, a failure to attend meetings and conferences.

[16] See the Notice of breach of franchise agreement (13 September 2019) at [5] and [6]: clause 90.1(f) cited in the notice of breach requires the franchisee to pay "immediately upon demand" "[a]ny costs and expenses" incurred by DEF "in connection with any default and/or breach" by the franchisee of any term of the franchise agreement, the "enforcement (including attempted enforcement)", or "termination" of the franchise agreement.

[17] Mr VJ, letters to Ms FB (9, 15, 25, and 31 July 2019).

justified DEF serving the notice of breach on Mr and Mrs PF, is a dispute between two parties to a contract about their respective obligations and rights pursuant to the franchise agreement.

[80] As such, the dispute is a matter for the Court to determine, or as provided in the franchise agreement, by dispute resolution. The complaints jurisdiction of a Standards Committee, or a Review Officer, under the Act is not an alternative to Court proceedings when the issues at stake fall within the jurisdiction of the Courts to decide.

(c) Service of notice

Parties' positions

[81] Mr PF claims Mr VJ "falsely" served the notice of breach on him and Mrs PF.

[82] Mr VJ says he served the notice of breach on Mr and Mrs PF as required by the franchise agreement.

Discussion

[83] Mr PF's position, advanced by Ms FB in her correspondence with Mr VJ, is that by serving the notice of breach on Mr and Mrs PF, Mr VJ, in contravention of the prohibition in r 10.2 of the Rules, "communicate[d] directly" with Mr PF whom Mr VJ knew "[wa]s represented by another lawyer in that matter".[18]

[84] Clause 101.1 of the franchise agreement provides that "[a]ll notices to be given pursuant to th[e] [franchise] [a]greement shall be in writing and may be delivered or sent by prepaid post to the address of the parties as set out at item 28 of Schedule 1 and, in addition, to the address of the location at which the Business is conducted".

[85] Mr VJ submits by serving the notice of breach on Mr and Mrs PF he complied with the requirements of the franchise agreement which fell within r 10.2.6.

[86] Rule 10.2.6, which contains one of the six exceptions to the prohibition in r 10.2, provides that "[a] lawyer may communicate directly with a person represented by another lawyer where that communication is a notice or proceeding or other document that must be given to that person in order to be effective".

[18] Rule 10.2 reads "A lawyer acting in a matter must not communicate directly with a person whom the lawyer knows is represented by another lawyer in that matter except as authorised in this rule".

[87] In my view service of the notice by Mr VJ on Mr and Mrs PF at their business address falls within that exception.

(d) Proper purpose

[88] Due to the broad nature of Mr PF's complaint that the notice of breach was "false", for completeness I also refer to r 2.3 of the Rules which prohibits a lawyer from "us[ing] legal processes" for other than "proper purposes".[19]

[89] In that context, the likely meaning of "proper" is "genuine", "conforming to recognised social standards or etiquette; decent, decorous … seemly", "respectable", "correct".[20]

[90] A helpful description of the rationale for this rule is that "public interest in the due administration of justice necessarily extends to ensuring that the court's processes do not lend themselves to oppression and injustice".[21]

[91] Because r 2.3 contemplates the possibility of more than one purpose, the observation has been made that "[i]f there was a second purpose and this was the predominant purpose then, if such purpose was improper, there would be a breach of Rule 2.3".[22] It follows that r 2.3 would be contravened "where there is only one purpose, and that is improper".[23]

[92] The footnote to r 2.3 provides three "[e]xamples" of possible breaches, namely, (a) "issuing a statutory demand under the Companies Act 1993, knowing that (or failing to make inquiries whether) the debt is bona fide disputed", (b) "registering a caveat on a title to land knowing that (or failing to inquire whether) there is a "caveatable interest" on the part of the client to be protected", and (c) "serving documents in a way that causes unnecessary embarrassment or damage to the person's reputation, interests, or occupation".

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[19] Rule 2.3 reads: "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".

[20] Oxford English Dictionary <www.oed.com>. Conversely, "improper" means "[u]nbecoming, unseemly, indecorous".

[21] GE Dal Pont *Lawyers' Professional Responsibility* (6th Edition, Thomson Reuters, Sydney, 2017) at [17.215] and fn 244; *BU v DG* LCRO 276/2011 (17 September 2013) at [43]; Webb, Dalziel and Cook, above n 10 at [13.5]. Conversely, if a lawyer "uses the law for a purpose which is quite contrary to that for which it was intended, the lawyer will be guilty of using the law for an improper purpose".

[22] *Alloa v Ullapool* LCRO 159/2009 (10 June 2010*)* at [19]. Also see Webb, Dalziel and Cook, above n 10 at [13.5]: where a lawyer takes action "not intended to affect any legal rights, but to achieve some collateral purpose the action is inappropriate and an abuse of legal process".

[23] *BU v DG*, above n 21 at [44].

[93] Where the legal process under consideration is a statutory demand, or a caveat, a useful test suggested as to whether the statutory demand was bona fide, or whether there was a caveatable interest, is to ask whether the demand or caveat was "warranted".[24]

[94] Applying that test to the notice of breach served by Mr VJ, I consider that on the face of it, unless and until otherwise determined by a Court, Mr PF's absence from the conference left it open to Mr VJ to act on DEF's instructions to prepare and serve the notice of breach on Mr and Mrs PF.

(3) Personal remarks – issue (b)

(a) Parties' positions

[95] Mr PF claims it was unprofessional of Mr VJ to send "constant obstructive lengthy responses" to Ms FB in which Mr VJ made "very personal remarks" about him without "attempt at resolution" of his differences with DEF.

[96] Mr VJ says it is evident from his correspondence to Ms FB that he "acted professionally and courteously". He says he "expressed serious concern" for Mr PF's well-being and suggested Mr PF "step back" from the business" until well again.

(b) Context

[97] Mr PF's expression of regret to DEF in mid-March 2019 about purchasing the business, his exchange with DEF in April about opening hours during Easter, and the 29 May visit by DEF representatives appears to have provided a less than ideal start to their business relationship. Mr PF was also unwell at that time.

[98] By early June, Mr and Mrs PF had instructed Ms FB who, on 4 June, communicated their concerns about the business relationship to Mr VJ.

[99] As I have noted, the correspondence between Mr VJ and Ms FB discloses that the issues of contention between Mr and Mrs PF and DEF largely concerned the requirements in the franchise agreement that Mr and Mrs PF attend (a) the DEF September conference, and (b) further training.

[100] It appears, as also noted earlier, that DEF's reasons for asking Mr and Mrs PF, and their employee to attend further training arose from a customer's complaint made to

[24] Webb, Dalziel and Cook, above n 10 at [13.5].

DEF about the quality of a coffee produced by Mr and Mrs PF resulting in DEF's 29 May visit to their cart.

[101] In his 14 June letter to Ms FB, Mr VJ says, again as noted earlier, the visit was to provide "constructive feedback" to Mr and Mrs PF to assist them to comply with the franchise agreement. He asked Ms FB to explain to Mr and Mrs PF the requirement in the franchise agreement that they attend the DEF conference. He said if "staff rostering" prevented both from attending, then Mrs PF, who had informed DEF she spent more time in the business, must attend the conference.

[102] In his 9 July letter, Mr VJ referred to Mr and Mrs PF's attendance at the conference being a "contractual obligation" under the franchise agreement. He raised DEF's requirement that Mr and Mrs PF, and their employee, "attend additional training".

[103] In his 15 July letter, Mr VJ said DEF, although "hurt" by Mr and Mrs PF's "bullying and harassment" allegations, took Mr PF's health "extremely seriously" but questioned his "adversarial approach".

[104] Mr VJ said by requiring they attend further training, DEF did not have a "hidden agenda" designed "to catch [Mr and Mrs PF] out". He referred to Mr and Mrs PF's request to be released from the franchise agreement, and asked for their "proposed [exit] terms".

[105] He said Mr PF was looking to "deflect blame" for his business issues. He referred to Mr PF having voiced regrets about purchasing the business, and having resisted, for religious reasons, operating the business over Easter. He explained DEF's purpose for training which DEF expected Mr PF to attend unless unwell.

[106] In Mr VJ's view, Mr and Mrs PF's employee's claim of "harassment" against DEF was "[not] credible". He said if Mr PF, because unwell, was "not fully participating" in the business then until he improved only Mrs PF need attend the conference.

[107] In his 16 July letter, Mr VJ explained that DEF wanted to ensure Mr and Mrs PF, and the other franchisees, complied with the franchise agreement. He referred to Mr and Mrs PF's "manner and aggression" which he said "appear[ed] to be creating a conflict where none should exist". He said they had not provided "substantive responses" to DEF's position on their "allegations".

[108] He said Mr and Mrs PF, despite saying the opposite, had "creat[ed] confrontation" and had not attempted to "resolve their concerns by mutual negotiation".

He asked whether their intention was to "exert inappropriate pressure" on DEF to release them from the franchise agreement on "suitable terms".

[109] He referred to Mr and Mrs PF not having taken up DEF's agreement to "waive the restriction on selling the business within the first 12 months". He asked whether that was due to the reduction in turnover, and goodwill. He repeated his request for details of their exit "propos[al]".

[110] In his 19 July response to Ms FB, Mr VJ rejected any notion he and DEF had "contrived a dispute" to improve DEF's bargaining position in "exit" discussions. He said Mr and Mrs PF's only allegation against DEF was bullying. He said DEF had not discriminated against Mr and Mrs PF on health grounds.

[111] Mr VJ's 25 July letter to Ms FB, the last before he served DEF's 13 September notice of breach, concerned training by Mr and Mrs PF's employee, and attendance by Mr PF, if well enough, at both "additional training", and the conference.

(c) Discussion

[112] When "acting in a professional capacity", r 12 requires that a lawyer "must, conduct dealings with others, including self-represented persons, with integrity, respect, and courtesy".

[113] By referring to a lawyer's "dealings with others", r 12 sits in the second category of the Rules which concern lawyers' dealings or interactions with other lawyers, and third parties. As such, the duty of "integrity, respect, and courtesy" owed to "others" could, as with this matter on review, extend to another lawyer's client referred to in the lawyer's communications about the lawyer's client's matter.

[114] Illustrations of contraventions of r 12 include a lawyer's manner of communications, and not responding to letters received from another lawyer engaged by the complainants.[25]

[115] Because Mr VJ's communications were to Ms FB who acted for Mr and Mrs PF, for completeness I also refer to the corresponding duty in r 10.1 that "[a] lawyer must treat other lawyers with respect and courtesy".

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[25] *EO & EP v VO* LCRO 240/2010 (3 August 2011) at [7] and [49] – rule 10.1 which requires that "[a] lawyer must treat other lawyers with respect and courtesy" was perhaps the relevant rule where the lawyer had not responded to another lawyer's correspondence – in this regard see *IO v SJ* LCRO 84/2010 (1 February 2012).

[116] Taking into account the circumstances in which the dispute between Mr and Mrs PF and DEF arose, it is to be expected that DEF's insistence of strict observance by Mr and Mrs PF with the terms of the franchise agreement may not have been welcomed by Mr PF.

[117] Nevertheless, assuming DEF instructed Mr VJ to take that approach, then so long as Mr VJ's communications to Ms FB were conveyed in a professional manner, he cannot be criticised for doing so. To do otherwise would risk a complaint from his client, DEF, for failing to carry out instructions.

[118] As noted, Mr PF says Mr VJ's correspondence contained "very personal remarks" about him, and was "lengthy" without "attempt at resolution" of his differences with DEF.

[119] However, that does not necessarily translate to Mr VJ having been disrespectful or discourteous towards Mr PF. From my reading of Mr VJ's and Ms FB's correspondence I have referred to, each worked to communicate their respective clients' positions in the best way possible.

[120] Whilst Mr VJ's approach adopted in his correspondence might be described as direct, and perhaps robust, I do not consider he was disrespectful or discourteous towards Mr PF.

(4) Delay in responding – issue (b)

Parties' positions

[121] Mr PF claims that having received Ms FB's Thursday, 19 September 2019 letter, in which Ms FB responded to the notice of breach, Mr VJ delayed responding until Monday, 23 September 2019.

[122] Mr VJ denies that claim.

Discussion

[123] Mr PF says it was "vindictive" of Mr VJ not to respond to Ms FB for the five day period from 19 to 23 September thereby allowing interest on Mr VJ's fees to "accrue".

[124] Mr VJ says he received (by letter/email) Ms FB's response to the notice of breach on Thursday, 19 September 2019 at 1:13 PM that day. He says having obtained

DEF's instructions the following day, Friday, 20 September, he responded on Monday, 23 September.

[125] As noted above, r 10.1 requires a lawyer to "treat other lawyers with respect and courtesy". Of assistance in addressing Mr PF's complaint is a decision where a lawyer was found to have contravened that rule by not replying to two letters from another lawyer for approximately four months, and then responded only after having been notified of a complaint against him. In reaching that conclusion the Review Officer stated that: [26]

> … professional courtesy would reasonably envisage that a colleague would have, within a reasonable time, responded to a letter, even if only to acknowledge receipt and to explain any delay in addressing substantive matters. It is not necessary to define a 'reasonable time' in order to reach a decision that the delay in this case was unreasonable.

[126] The observation has also been made that a contravention of r 10.1 requires that the lawyer's delays in responding must be 'excessive, repetitive and unjustifiable".[27]

[127] With those helpful comments in mind, Mr VJ replied to Ms FB's 19 September letter the following day, 20 September. He said he had been out of his office for most of 19, and 20 September. He said he had forwarded Ms FB's letter to DEF for instructions, and would "likely revert by close of business" on Monday, 23 September. On 23 September Mr VJ sent his response to Ms FB.

[128] As noted in the decision referred to above, it is reasonable to expect that a lawyer, upon receipt of a colleague's written communication that calls for a response, would within a reasonable time inform the colleague if unable to respond straight away, and ask when the colleague might like to expect to receive the response.

[129] Mr VJ did exactly that. No issues of a professional nature arise for Mr VJ concerning this aspect of Mr PF's complaint.

(5) Fees - issue (c)

[130] Mr VJ issued two invoices to DEF concerning the notice of breach, and following communications with Ms FB. First, on 13 September 2019 for $650 plus GST, total, $747.50 – obtaining DEF's instructions following Mr PF's absence from the conference, considering the relevant provisions of the franchise agreement and advising DEF, and preparing and serving the notice of breach on Mr and Mrs PF.

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[26] *R v D* LCRO 56/2009 (19 June 2009) at [20].
[27] *IO v SJ* LCRO 84/2010 (1 February 2012) at [47].

[131] Secondly, on 18 September 2019 for $580 plus GST, total $667 – consideration of Ms FB's 1[6] September 2019 letter in response to the notice of breach, advice to DEF, considering the professional rules referred to by Ms FB, preparing and obtaining DEF's instructions on a draft letter in reply to Ms FB.

[132] Mr and Mrs PF paid the invoices as demanded in the notice of breach.

(a) Parties' positions

[133] Mr PF claims Mr VJ's fees were "excessive". In his view, because he had not breached the franchise agreement those costs ought not have been incurred.

[134] Mr VJ says Mr PF's absence from the conference was a breach of the franchise agreement, and therefore he and Mrs PF were required by clauses 90.1(f) and 26 of the franchise agreement to pay his fees, and interest concerning the notice of breach.[28] He says because his fees were for less than $2,000, for the purposes of reg 29 of the Regulations there were no "special circumstances" which justified consideration of his fees.

(b) Discussion

(i) Person chargeable

[135] Section 132(2) of the Act provides that:[29]

> **Any person** who is **chargeable with a bill of costs**, whether it has been paid or not, may complain to the appropriate complaints service about the amount of any bill of costs … [emphasis added]

[136] A helpful discussion of the meaning and interpretation of the scope of "[a]ny person who is chargeable" has been provided by the Court of Appeal. On a narrow interpretation, the Court referred to a High Court judgment that stated whether a person was chargeable "depend[ed] upon there being a contract of retainer between [the lawyer] and the person concerned".[30]

[137] However, where a guarantor had challenged awards including summary judgment and indemnity costs, the Court suggested whilst yet to be "authoritatively

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[28] Clause 26 requires payment of interest on unpaid sums payable under the franchise agreement.
[29] Sections 132(3) and 160 also specify a beneficiary of an estate or trust may complain about a lawyer's bill of costs issued to "a trustee, executor, or administrator".
[30] *Black v ASB Bank Ltd* [2012] NZCA 384 at [93]–[95], referring to *Simpson Grierson v Gilmour* HC Auckland CIV-2008-404-8674, 27 August 2009 at [64]; and to *GM v TT* LCRO 31/2011 (24 November 2011).

decided", "a complaint under s 132(2) is a potential avenue for dealing, in a detailed way, with a challenge to the reasonableness of indemnity costs".[31]

[138] The Court referred to the owner of an apartment in a unit title complex having been entitled to complain about the body corporate lawyer's bill of costs in respect of recovery of levies from the unit owner.[32]

[139] The Court also referred to a High Court decision where the issue was whether a person chargeable was:[33]

> limited to a person, who as a result of a **contractual relationship** with a lawyer or a third party, such as a lessor, mortgagee or guarantor, or as a result of a statutory or regulatory obligation is liable to meet a lawyer's costs or whether, … [emphasis added]

[140] Clause 90.1(f) required Mr and Mrs PF to pay "[a]ny and all costs and expenses incurred" by DEF "in connection with any default and/or breach" of the franchise agreement.

[141] This corresponds with similar provisions contained in mortgage instruments, or in some leases, referred to by the High Court, requiring the mortgagor, or lessee to pay the mortgagee's, or lessor's enforcement costs.[34]

[142] Therefore, subject to a Court deciding otherwise, or to the outcome of the dispute resolution process, Mr and Mrs PF are, for the purposes of s 132(2), persons chargeable and therefore entitled to complain about Mr VJ's invoices.

(ii) Special circumstances, reg 29

[143] Reg 29 of the Regulations provides that unless a Standards Committee determines that there are "special circumstances", the Committee's jurisdiction to consider complaints about fees does not extend to (a) bills of costs rendered more than 2 years prior to the date of the complaint, or (b) fees that do not exceed $2,000.00 exclusive of GST.

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[31] At [99].
[32] At [96] and [97], referring to observations by the District Court in *Body Corporate 183119 v Walden* DC Auckland CIV-2008-044-2283, 27 April 2010 and in the High Court in *Doody v Body Corporate 343562* [2012] NZHC 25 at [82]. That approach has been followed in a decision from this Office where the unit owner's complaint about the body corporate's lawyer's fees was referred back to the Standards Committee for a "detailed examination of the work carried out by" that lawyer: *JG v RS* LCRO 245/2010 (15 March 2012) at [47]–[49], [63], [65].
[33] *Hannam v Herd* HC Auckland CIV-2008-404-5195, 3 December 2010 (emphasis added), cited in *Black*, above n 30 at [98]; see also *KW v LX* LCRO 209/2012 (27 August 2014) at [26].
[34] Clause 90.1(f) - include the costs of "enforcement (including "attempted enforcement" of the franchise agreement.

[144] The term "special circumstances", which was contained in a provision about costs revision in the now repealed Law Practitioners Act 1982, has been considered by the Court of Appeal. In the Court's view, "if the issue is to be related to perceived injustice then the simple risk of injustice should be sufficient", or, "it is a question of where the interests of justice lie in all the circumstances", or, "all that can be said is that to be special circumstances must be abnormal, uncommon, or out of the ordinary".[35]

[145] Multiple invoices that "relate to essentially a single legal service" can be "treated as a special circumstance" for the purposes of the exception to reg 29.[36] For example, (a) consideration of two or more bills of cost "as one bill of costs for the same transaction",[37] or (b) where a lawyer has not done the legal work to which the bill of costs relates, or (c) where a fee greatly exceeds a quote or estimate.[38]

[146] The observation has also been made that special circumstances "may exist" where a lawyer's fees are "so grossly excessive as to possibly amount to misconduct".[39]

Conclusion

[147] Because both Mr VJ's invoices concerned the notice of breach, it is appropriate they be treated as one invoice. This still leaves the combined fees of $1,230 plus GST, less than the $2,000 threshold prescribed in reg 29. For that reason, the further question arises whether there are any other "special circumstances" which would justify a consideration of Mr VJ's fees.[40]

[148] Mr PF contests Mr VJ's position that Mr PF's failure to attend the conference was a breach of the franchise agreement which entitled DEF (a) to serve a notice of breach, and (b) to recover Mr VJ's fees for the preparation and service of the notice, and related issues.

[149] It follows that (a) the preliminary question is whether Mr and Mrs PF were liable to pay DEF's costs of enforcement of the franchise agreement in the first place, and (b) unless or until that question has been determined by dispute resolution, or by a Court, it

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[35] *Cortez Investments v Olphert and Collins* [1984] 2 NZLR 434 (CA), applied in *VG v AB* LCRO 263/2011 (10 May 2013) at [16]–[17]. Section 151(1) of the Law Practitioners Act 1982 reads: a bill of costs could "not be revised by a District Council of its own motion, or referred for revision except by order of a Court"; and (b) the Court could "not make an order for the reference of a bill for revision except in special circumstances".
[36] *AT v ZH* LCRO 127/2013 (26 March 2014) at [62].
[37] See discussion in *Reading v Bracknell* LCRO 81/2009 (18 July 2009).
[38] *ID v SR* LCRO 60/2011 (22 December 2011) at [14].
[39] Webb, Dalziel and Cook, above n 10 at [12.4].
[40] *AT v ZH* LCRO 127/2013 (26 March 2014) at [62]. Rule 9 provides: "A lawyer must not charge a client more than a fee that is fair and reasonable for the services provided, having regard to the interests of both client and lawyer and having regard also to the factors set out in rule 9.1".

would be premature for me to consider whether there are "special circumstances" that would justify consideration of Mr VJ's fees.[41] This is particularly so on review when the Committee noted, but did not address Mr PF's fees complaint.

Decision

[150] For the above reasons, pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Committee to take no further action on Mr PF's complaint is confirmed, but modified as follows:

(a) The decision to take no further action on Mr PF's complaint about the notice of breach is made pursuant to both ss 138(1)(f) and 138(2) of the Act.

(b) The decision to take no further action on Mr PF's complaints about having made personal remarks about Mr and Mrs PF is made pursuant to s 138(2) of the Act.

Anonymised publication

[151] Pursuant to s 206(4) of the Act, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and absent of anything as might lead to their identification.

DATED this 22ND day of September 2020

B A Galloway
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 PF as the Applicant
Mr VJ as the Respondent
[Area] Standards Committee [X]
New Zealand Law Society

[41] *Simpson Grierson v Gilmour* (2009) 19 PRNZ 865 (HC) at [64] and [65]; *Henderson Reeves Connell Rishworth Limited v Busch* [2013] NZHC 2521 at [26] to [29].