LCRO 17/2011

CONCERNING	an application for review pursuant to section193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of Canterbury-Westland Standards Committee 1
BETWEEN	**GZ**
	Applicant
AND	**TE**
	Respondent

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

DECISION

Background

[1] Ms HB and Mr TD were engaged in a relationship property dispute which by 2009 had been ongoing for some years. The parties were legally represented:

a) Ms HB retained Mr GZ as her barrister.

b) Ms HB also retained HC, a firm of solicitors in [South Island], to attend to conveyancing matters.

c) Mr TD retained Mr TC as his barrister.

d) Mr TD retained the firm of TB (Mr TA) to attend to conveyancing matters on his behalf.

[2] At the time of separation from Ms HB, TD was in control of substantial business assets while Ms HB was in occupation of the family home against which was registered a mortgage to Westpac bank.

[3] Attempts to resolve relationship property matters through negotiation were unsuccessful and proceedings were issued. After further negotiations, an agreement was reached which resulted in Consent Orders being made by the Court. One of the Orders was that the family home would be transferred to Ms HB free of the Westpac mortgage (and any other encumbrances).

[4] To enable that to occur, it was necessary to provide the bank with alternative security, and it was agreed that this alternative security would be provided over other property owned by Mr TD, his parents and his brother.

[5] Prior to agreeing to the terms of the settlement recorded in the Orders, Mr GZ wanted to be satisfied that the settlement could be implemented. He obtained a copy of the discharge of the existing mortgage to Westpac bank over the family home, a copy of the new loan agreement referring to the replacement securities, and a copy of the Authority and Instruction form (the A&I) whereby TB were irrevocably instructed to register the mortgage over the replacement security.

[6] In addition, he received a letter dated 17 October 2008 from Mr TA in which Mr TA advised that "we are therefore in a position to file a solicitor's certificate with the Westpac bank so that the discharge of mortgage on [the existing property] can be registered and the new mortgage over the [replacement security] put in place contemporaneously. As the transaction does not involve raising funds from the bank we are in a position to do this immediately we receive confirmation from Mr TC that a satisfactory agreement has been entered into between Mr TD and Ms HB."

[7] Further in that letter, Mr TA informed Mr GZ that he had advised the TD family, being Mr TD's parents and brother, that they should seek independent

legal advice. He also noted that the agreement of the TD family was conditional on a property agreement acceptable to Mr TD being reached.

[8] Relying on the information provided in this letter and the documents which Mr GZ had obtained copies of, Ms HB then agreed to the Orders being made by the Court which included the following terms:

> "2 No later than 24 October 2008:
>
> a. the property at [the family home] shall be transferred unencumbered to the sole name of [Ms HB] such transfer shall be of a "going concern" between two registered entities for GST purposes
>
> 3 [Mr TD and ACU Limited] will forthwith take such steps as are necessary to procure a registered easement in favour of the registered proprietor of [the family home] to secure the current supply of drinking water to the property. The costs of creating such easement (including legal fees and disbursements and survey costs) shall be met by ACU Limited."

ACU Limited was a company controlled by Mr TD.

[9] Ms HB adopted the view that without the water supply easement in place, the property was valueless, and therefore insisted that the easement be registered prior to accepting a transfer of the property. This involved the preparation of an easement plan, and agreement between HC and Mr TA as to the terms of the easement. It was not until April 2009 that these matters were concluded. In addition, registration of the easement required consent of SBS Bank, the mortgagee of the servant tenement.

[10] In the intervening period, Mr TD's winery business had gone into receivership. In a letter dated 28 April 2009, Mr TA advised HC as follows:

> "Last week our client's parents reversed their earlier decision in respect of their preparedness to provide security over the [alternative property] and [Mr TD Senior] has communicated this to your client directly. We understand Westpac also became concerned because of arrears which TD informs us have now been brought up to date. Westpac have also indicated they would require a new valuation due to the changing values of coastal properties"

[11] As a result, Mr TA indicated that his client was unable to comply with the terms of the Orders, and proposed that Ms HB take an immediate transfer of the family home subject to the Westpac mortgage.

[12] On 14 May 2009 Mr GZ sent a fax to Mr TC in which he referred to paragraph 2a of the Order and then states:

> "In my letter of 1 May 2009 I advised that Ms HB would seek an order for specific performance if Mr TD did not complete settlement within seven days.
>
> Upon reflection, such an application is not necessary. Mr TD is currently in default of a Court Order. Ms HB is therefore entitled to have Mr TD arrested for contempt of Court.
>
> Unless this matter is resolved immediately, Ms HB will act without further reference to you or Mr TD."

[13] There is no evidence that there was any correspondence with Mr TA following that letter before 26 May when Mr GZ sent a fax to him. The full text of that letter is as follows:

> 1. Mr TD, his parents, Mr and Mrs TD, his brother, Mr x TD and your firm are currently in contempt of Court.
>
> 2. For your information I enclose a draft Notice of Motion for committal of Mr TD, his parents and brother and your firm. The draft notice is forwarded as a matter of professional courtesy.
>
> 3. I am instructed that unless my client's conveyancing solicitors, HC advise me no later than 5pm Wednesday 27 May 2009 that you have completed the settlement of Mr TD's relationship property obligations, I am to prepare, file and serve the notice of motion for committal and supporting affidavit without further reference.
>
> 4. I look forward to receiving advice from HC that the transactions have settled.

[14] The draft notice of motion for committal sought an order that the defendants be "committed to prison for contempt of Court namely disobedience of an order of the Family Court of New Zealand"

[15] Mr TA responded by fax dated 27 May which was received by Mr GZ on the following day. In that reply fax, Mr TA reiterated the circumstances which were preventing compliance with the Order.

[16] On 29 May, Mr GZ replied, confirming his instructions to continue with the committal proceedings.

[17] In a further letter dated 21 July 2009, Mr GZ noted:

> "Contempt
>
> It is a matter for the Court that orders made in reliance on stated positions are obstructed"

[18] Further correspondence ensued between Mr GZ and Mr TA in which he particularly noted his client's inability to comply with the Orders because Westpac had withdrawn its agreement to accept the replacement securities.

[19] In a letter dated 24 August 2009, Mr GZ wrote to Westpac bank in which he advised the bank that he had instructions "to issue proceedings" against the various parties as well as the bank. That letter did not refer specifically to contempt proceedings.

[20] In any event, matters were settled between the parties by November 2009 and the contempt proceedings were not filed.

The complaint and the Standards Committee determination

[21] Having allowed some time to pass after these events, Mr TE, one of Mr TA's partners, sent an email to Mr GZ on 23 March 2010 in which he referred to what he perceived as the threat to issue committal proceedings by Mr GZ. He made reference to the distress caused to himself and his partners by the threatened proceedings and the disruption to travel plans, as well as to the cost in time and money to which the firm had been put. In addition, the firm had been obliged to consider whether it should continue acting for any members of the TD family given the potential conflict situation which they faced.

[22] Mr TE extended an opportunity to Mr GZ to apologise unequivocally for his actions before lodging a complaint with the Complaints Service of the New Zealand Law Society.

[23] Mr GZ responded on 7 May 2010 advising that the proposal to issue contempt proceedings was not made vexatiously or frivolously. He advised that "it was a considered decision, taken after advice which included an opinion from

Mr HD QC". He held to the view that he had acted in accordance with his professional obligations to the Court, his client, and to Mr TE and his partners.

[24] Mr TE then lodged his complaint with the Complaints Service on 30 May 2010.

[25] The Complaints Service was advised by Mr HE by email on 14 June 2010 that he had been instructed to act for Mr GZ and advised that he had been in contact with Mr TE. He sought a postponement of one month to allow the possibility of a resolution to be explored between the parties.

[26] Mr GZ then wrote directly to Mr TE on 28 June 2010 in which he expressed regret for the distress that the delivery of the draft proceedings had caused to Mr TE, other members of the firm and their families. However he did not resile from his position that at all times he had acted in accordance with his professional obligation and his duty to act fearlessly for his client. He acknowledged that with the benefit of hindsight there were alternative options available to his client and himself and that his client's interests may well have been better served by an alternative course of action.

[27] This somewhat guarded apology was rejected by Mr TE as being far too late and he noted that he regarded this as an attempt by Mr GZ to avoid the disciplinary process. He also sought a copy of the opinion from Mr HD on which Mr GZ advised he had relied.

[28] Mr HE responded to Mr TE confirming that he had advised Mr GZ that it was appropriate to apologise for his conduct and that the apology provided by Mr GZ was carefully framed by him as one which he could sincerely make. Mr HE also advised that the opinion from Mr HD was not a written opinion but "rather advice about the contents of the pleadings and correspondence".

[29] In correspondence with the Complaints Service Mr TE framed the issue generally in this way:

> "Our view is that the issue is simply whether lawyers can utilise contempt proceedings against opposing counsel as another weapon in their armoury in acting fearlessly for their clients".

[30] The matter has proceeded by way of a complaint as this is the process initiated by Mr TE. However, the issue as framed by him could potentially have been referred with the consent of the parties to the Ethics Committee of the New Zealand Law Society. Having said that, the firm remained aggrieved that Mr GZ had not seen fit to provide a full and unequivocal apology, and the matter has continued by way of the complaints process.

[31] The Standards Committee resolved to inquire into the matter and a hearing on the papers was conducted. Both parties provided correspondence and submissions, with Mr GZ being represented by Mr HE. The Committee's determination was as follows:

> "In such circumstances the Standards Committee is satisfied that Mr GZ had not met the standard expected of him by Rule 2.3 and as a result was in breach of the professional standards obligations to fellow practitioners in Rule 10.1
>
> The Committee finds under section 152(2)(b) of the Act that Mr GZ's conduct in this regard was unsatisfactory"

This is a finding of unsatisfactory conduct as that term is defined in section 12(c) of the Act by reason of a breach of the Rules.

[32] The Committee's determination was released as a determination on the facts only with further opportunity to be provided to the parties to make submissions as to penalty.

[33] Mr GZ has applied for a review of that determination.

Review

[34] The review proceeded by way of a hearing held in [South Island] on 13 December 2011 attended by Mr GZ and his Counsel, Mr HE who provided comprehensive oral and written submissions. Mr TE was advised of the time and date of the hearing but elected not to attend or provide any further submissions. His presence was not required.

The Issue

[35] In the introduction to his submissions, Mr HE notes that the Application for review concerns the following question:

> "Was it a breach of professional standards for Mr GZ, in pursuing the interests of his client in the circumstances of this case to inform the partners of TB that contempt proceedings would be filed against them personally for their conduct of the matter?"

[36] As noted above, Mr TE has expressed the question somewhat more broadly when he expresses the issue as being "simply whether lawyers can utilise contempt proceedings against opposing counsel as another weapon in their armoury in acting fearlessly for their clients".

[37] The issue under consideration is not so much whether it was a breach of professional standards for Mr GZ to inform the partners of TB that contempt of proceedings would be filed against them personally, but rather whether it was a breach of professional standards for Mr GZ to propose that course of action and pursue it in the particular circumstances of this case. This decision is not to be taken as a response to the more general question posed by Mr TE.

Scope of review

[38] Section 203 of the Lawyers and Conveyancers Act 2006 provides as follows:

> "Scope of review of final determination
>
> The Legal Complaints Review Officer may, in reviewing a final determination of a Standards Committee, review all the aspects, or any of the aspects, -
>
> a) of any inquiry carried out by or on behalf of a Standards Committee in relation to the complaint or matter to which the final determination relates; and
>
> b) of any investigation conducted by or on behalf of the Standards Committee in relation to the complaint or matter to which the final determination relates (including any investigation conducted by an investigator or any other person on behalf of or with the authority of the Standards Committee)."

[39] It is a broad power and it is accepted that the LCRO must reach his or her own view on the matters complained of, rather than being restricted to correcting any errors made by the Standards Committee.

The Standards Committee determination

[40] The determination of the Standards Committee was that Mr GZ had not met the standards expected of him by Rule 2.3 of the Lawyers and Conveyancers Act (Lawyers; Conduct and Client Care) Rules 2008 and as a result was in breach of the professional standards obligations to fellow practitioners in Rule 10.1.

Those Rules provide as follows:

> "2.3 Proper purpose
>
> 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, interest, or occupation.
>
> 10.1 Respect and courtesy
>
> A lawyer must treat other lawyers with respect and courtesy."

[41] The Committee found that Mr GZ's conduct constituted unsatisfactory conduct.

[42] Unsatisfactory conduct is defined in the relevant provisions of section 12 of the Act as follows:

> "12
>
> b) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including -
>
> I) conduct unbecoming a lawyer or an incorporated law firm; or
>
> II) unprofessional conduct; or
>
> c) conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm, or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 7)"

[43] It was argued for Mr GZ that the test applied by the Committee was whether the course of action embarked upon by Mr GZ was a course of action that would succeed or not, and that this was too high a standard.

[44] The Standards Committee did consider the grounds on which the proposed committal proceedings were brought and noted the Court's approach to the use of such proceedings.

[45] However, whether or not the proceedings were likely to succeed was not the test which the Committee applied per se. Whether or not the proceedings were well founded and therefore likely to proceed is a factor to be taken into account when determining whether the legal process adopted by a lawyer offends Rule 2.3 or not. If the process adopted has no possibility of success, or are not proceedings which would usually be brought in these circumstances, but have the effect of causing unnecessary embarrassment, distress or inconvenience to another person's reputation interest or occupation, then it is a reasonable inference to draw that the process was adopted for that purpose, rather than for the purpose of furthering the objectives of the client.

[46] In addition, having considered the grounds on which Mr GZ relied to bring the proceedings, and the likelihood of success, the Committee came to the view that he should not have pursued contempt proceedings in the circumstances. It considered that by doing so his conduct constituted conduct unbecoming when measured against the test in *B v Medical Council* [2005] 3 NZLR 810 Elias J. In this case Elias J noted that "the best guide as to what is acceptable professional conduct is the standards applied by competent, ethical and responsible practitioners."

[47] This constitutes unsatisfactory conduct by reason of the definition in section 12(b). The Committee's considerations should therefore have lead it to conclude that Mr GZ's conduct constituted unsatisfactory conduct by reason of the fact that such a course of action would not have been adopted by practitioners of good standing or constituted conduct unbecoming or unprofessional conduct.

[48] The decision of the Committee should therefore be modified to include reference to section 12(b). This is the test which Mr HE submits should be applied, and is the test which the Committee did apply.

[49] The Standards Committee also formed the view that Mr GZ's conduct breached Rule 10.1 in that he had not treated Mr TA and his partners "with respect and courtesy" and I do not disagree with that. It follows from the finding of a breach of Rule 2.3, but does not necessarily add to the degree of unsatisfactory conduct.

[50] Mr HE also submits that the Standards Committee erred in the following ways:

a) failed to give proper weight to the matters raised by Mr GZ discussed in the submissions;

b) mistakenly concluding that Mr GZ acted for a purpose other than the promotion of the interest of his client;

c) erroneously took into account the prospects of success of the contemplated contempt proceedings; and

d) failed to recognise the obligation of Mr GZ to follow his client's instructions regardless of the merits of the contemplated proceedings.

[51] As noted in [39] above, this review is not limited to a consideration of perceived errors by the Standards Committee. However, in the course of this decision those errors will be addressed.

Mr GZ's objectives

[52] Mr GZ's objective was to ensure that the Court Order was complied with. He contends that this was his sole objective, but acknowledges that the course of action which he was instructed to take caused distress to Mr TE, his partners and their families. Mr TE viewed the proposed course of action as a "threat" and was incensed by this approach.

[53] I have some difficulty in accepting Mr GZ's contentions. His initial approach was to Mr TC on 1 May 2009. Although I do not have a copy of that communication, it is clear from his subsequent fax on 14 May 2009, that Mr GZ had advised Mr TC that his client would be seeking an order for specific

performance. In the fax of 14 May however, he noted that he considered Mr TD was already in breach of an Order and was therefore in contempt of Court. There was no reference to persons other than Mr TD.

[54] However, in the fax of 26 May 2010 to Mr TA, Mr GZ advised that he considered that not only was Mr TD in contempt of Court, but also his parents, his brother and the partners in the firm of TB were all in contempt of Court. That was reinforced by the draft Notice of Motion enclosed with that fax. It was a significant step to take to include all of the further parties who were not parties to the proceedings or against whom an Order had not been made.

[55] Committal of any of the parties would not have achieved performance of the Court Order. In addition, the further parties alleged by Mr GZ as being in contempt of Court, were not parties to the Order. At the very least, it would be expected that the first step to take, would have been to apply to the Court for Orders requiring those parties to take the steps required of them rather than moving immediately to the position of proposing committal proceedings without any specific Orders from the Court being first obtained.

[56] Mr HE's response to this observation by me at the review hearing, was that the Court would often in the circumstances make an "unless" order - i.e. that unless the party complied within a stated period of time they would be committed to prison. I do not know whether that statement by Mr HE is correct or not, but I do note that the draft Notice of Motion does not seek an Order in those terms. Instead, it seeks an Order that the Defendants be committed to prison.

[57] Imprisonment of the defendants would not have achieved performance of the Court Orders. Some other form of Court enforcement was necessary to achieve that end and I cannot accept that the proposed committal proceedings constituted a proper use of a legal process to achieve that end.

The grounds for contempt proceedings

[58] Mr GZ submits that the decision to pursue committal proceedings was not taken lightly and in his response to Mr TE on 7 May 2010 he advised at paragraph 8 that "it was a considered decision, taken after advice which

included an opinion from Mr HD QC". In fact, Mr GZ did not consult with Mr HD until around 10 June 2009 followed by a meeting with Mr HD on 11 June 2009.

[59] It is important to remember that in his fax of 26 May 2009 Mr GZ advised that unless settlement of the relationship property agreement had been completed by 5.00 pm the following day, 27 May 2009, Mr GZ had instructions to prepare, file and serve the Notice of Motion for committal and supporting affidavit without further reference. It is clear that this step and the statement of the firm intention to proceed, was made well before Mr HD was consulted.

[60] In response to Mr TE's complaint, Mr GZ advised Mr TE that he had sought an opinion from Mr HD. A solicitor being advised of this, would expect that a formal opinion had been sought. Formal opinions require a comprehensive letter of instructions in which all of the facts of the case are imparted to the person being briefed. Instead, the opinion received from Mr HD was a verbal opinion, given in the course of a meeting of approximately one hour, in respect of which no notes or other written material is available.

[61] On the day before the meeting with Mr HD, Mr GZ had sent a brief factual overview to him. Privilege is claimed by Mr GZ in respect of this letter. I do not consider that the content should be withheld from Mr TE but as I did not seek specific submissions in respect of this claim I do not intend to reveal all of the content. However, the section of the letter insofar as it affects this review contains only information that is already known to the parties and I see no reason why that section should not be referred to. It comprises one paragraph of a fourteen paragraph letter and states as follows:

> "So far I have drafted an application to commit Mr TD, his parents and his solicitors (!) for contempt. I sent a draft of that application to Mr TD's solicitors who responded, in part, by suggesting that I was being frivolous and vexatious and that they would seek costs against me personally"

[62] It cannot be stated with any certainty that Mr HD paid particular attention to the fact that the proposed contempt proceedings included the partners of TB. Mr GZ advised at the review hearing that Mr HD indicated that the contempt proceedings were "an option" that was open to him. There is no indication that the "option" was addressed in any detail, or that the proposed

action against the partners was specifically addressed at all. The letter of 10 June sought advice from Mr HD as to "how I might best act for my client in this situation." It was a general request for advice and there is no evidence provided by Mr GZ as to what portion of that meeting focussed on the proposed contempt proceedings against the partners of the law firm.

[63] Prior to the hearing, I requested that Mr GZ bring his file to the hearing, and in particular the correspondence to and from his client as well as Mr HD QC, notes of research, file notes and any other documents that related to the submissions in this regard by Mr HE. Those submissions referred to the "careful research" undertaken by Mr GZ and the detailed steps involved in consulting Mr HD.

[64] Other than the letter to Mr HD to which I have already referred, the documents provided to me comprised a copy of section 112 of the District Court Act and an extract from a Lexis Nexis publication on committal. I would not consider the material provided to be evidence of any in depth consideration of the law relating to committal or a careful examination of all of the circumstances leading to Mr TA's view that his client was unable to perform the Orders as made.

[65] It is therefore somewhat misleading to suggest that the proposed contempt proceedings against the partners of the law firm was only taken after a considered decision including advice tendered in an opinion.

[66] In paragraph 41 of Mr HE's submissions, he noted that "there was a high degree of suspicion on the part of Ms HB that the refusal to settle was not in good faith and that Mr TD (or his family members) were simply reneging on commitments that they had given."

[67] Mr GZ therefore needed to take some form of action which would cause all parties to be made aware that he and his client were determined to take every step to ensure that the Orders were complied with.

[68] It cannot be said however that it is a usual or ordinary step to issue committal proceedings against a solicitor and his partners none of whom are parties to a Court order. Such a step would clearly satisfy Mr GZ's desire to

make sure all persons involved in the process were aware of his and his client's determination to enforce the Orders.

[69] However, it is not unexpected or unreasonable, that Mr TE and his partners should view this as a "threat" designed to put pressure on the firm and its clients, rather than a genuine attempt to promote the interest of Mr GZ's clients.

[70] The Committee took note of the comment by Lord Russell of Killowen CJ in *R v Grey* (1900) 2QB 36, where he said of committal proceedings, that "it is a jurisdiction however, to be exercised with scrupulous care, and to be exercised only where the case is clear and beyond reasonable doubt".

This requires something more than a "high degree of suspicion" before such a course of action is pursued against a fellow practitioner, and was inappropriate particularly given the facts of the matter had been explained in more depth to Mr GZ.

Was there an undertaking?

[71] In the letter dated 17 October 2008, Mr TA stated:

> "We are therefore in a position to file a solicitor's certificate with the Westpac bank so that the discharge of mortgage on [the family home] can be registered and the new mortgage over the [replacement security] put in place contemporaneously."

[72] This was not in the form of an undertaking and Mr TE noted in his letter of 27 July 2009 to Mr GZ as follows:

> "We did not provide you any form of undertaking to settle, as we were conscious that Westpac's offer contained the standard banking provision that it could be cancelled at any time prior to settlement. Our clients deteriorating financial position made this a realistic possibility."

[73] Because of the reliance placed on undertakings by lawyers and their strict enforcement by the Courts and the disciplinary processes, it is usual for any statement which is intended to constitute an undertaking to specifically record that it is intended to be an undertaking. Lawyers are also careful in their wording of undertakings to avoid any misunderstanding. The statement by Mr

TA that he was in a position to file his certificate was correct, but because of his awareness of the bank's requirements he did not frame this as an undertaking. He would certainly have avoided giving this in the form of an undertaking to be complied with at any time in the future. A lawyer familiar with bank documentation and procedures would have been aware that it is common practice for Banks to reserve the right to withdraw or vary a loan offer at any time and would not have taken Mr TA's statement as being anything other than a statement of his ability to take certain steps as at 17 October 2008. To consider that this statement constituted an undertaking to take those steps at any time in the future is not a position that would have been assumed by a reasonably experienced conveyancing lawyer. I do not therefore accept the submission that the statements made by Mr TA in the letter of 17 October constitute an undertaking.

The Orders

[74] It must be noted that the Orders made by consent, clearly contemplated that the property would be transferred immediately, and the issue of the water easement be dealt with subsequently. The Order is dated 28 October 2008, and the Order is that "no later than 24 October 2008" the transfer of the property would take place. The Order then contains a separate and further paragraph that related to the creation of the water supply easement. Given the dates included in the Order, it is inconceivable that the Court anticipated that the easement would be in place at the time the transfer took place.

[75] Had the transfer taken place immediately as contemplated, the problems would not have arisen. Instead, Ms HB declined to take a transfer of the property until the water supply easement was in place. This caused delays, and for every day that went by, the risk that some event would intervene to prevent the transfer of the property taking place would increase.

[76] Again, it would have been apparent to a solicitor familiar with the process required to create an easement that it would take some time to effect that part of the Order. Mr GZ has placed responsibility for the delays on Mr TD and Mr TA for not implementing this process more quickly. This is disputed by Mr TD and Mr TA, and it cannot be stated even on the balance of probabilities

that they were responsible for the delays. In any event, the consent of the mortgagee of the servient tenement was required before registration could be effected. Mr TE advises that by the stage that the terms of the easement were agreed, the mortgagee had issued a Property Law Act notice against ACU Limited, and it was unlikely to provide its consent to the easement.

[77] It is important to note here, that Mr TA's letter of 17 October made no mention at all of the water supply easement. It referred only to the transfer of the property free of the existing security and registration of the new mortgage. As noted previously, the consent of the mortgagee, SBS Bank, was required before the easement could be registered. By the time the terms of the easement had been agreed, SBS had issued a Property Law Act notice against ACU Limited. That information was imparted to Mr GZ at least by 2 June 2009, but even with this knowledge, Mr GZ did not recognise the impossibility of his demands and withdraw the stated intention to pursue the committal proceedings. Instead, he refers again to contempt proceedings in his letter of 21 July 2009.

[78] Lord Russell's comment notes that any committal proceedings should only be exercised "where a case is clear and beyond reasonable doubt". With knowledge of the events that were unfolding after Mr TD's company had been placed in receivership, it should have been apparent to Mr GZ that there were matters beyond the control of the various parties which were conspiring to prevent compliance with the Court Order. However, even after having been advised of these circumstances, he persisted with his proposals to pursue the committal proceedings.

[79] In all of the circumstances, I consider that Mr TE and his partners were justified in viewing the letter advising that proposed committal proceedings would be filed without further reference as unwarranted threats which would not in any way further Ms HB's position. This constitutes an improper purpose, and I concur with the view of the Standards Committee that Mr GZ's conduct constituted a breach of Rule 2.3.

Irrevocable instructions

[80] In coming to this view, I do not overlook the fact that Mr TD's parents had given irrevocable instructions to Mr TA to complete the registration of the replacement mortgage. I do not agree with Mr TA's contention in his letter of 2 June 2009 to Mr GZ that the irrevocable instructions only become binding at the point of registration. The A & I is an irrevocable instruction to the solicitor at the time it is signed to enable the solicitor then to create the e-dealing transaction and the solicitor must be able to rely upon that authority at all times after the e-dealing is created to enable him to subsequently submit the transaction for registration. It follows therefore that Mr and Mrs TD were not able to revoke their instructions as indicated by Mr TA in his letter of 28 April 2009.

[81] However, that became somewhat academic once Westpac had withdrawn its consent to the transaction. Mr TA could not have proceeded to register the Westpac documentation in the face of withdrawal by the bank of its instructions to do so. In these circumstances, Mr TA was also acting for the Bank, and was required to protect the Bank's position as well. The receivership of Mr TD's company, and the resulting uncertain financial position of Mr TD, are matters that Mr TA was obliged to inform the Bank of.

[82] As noted by Mr TA in his letter of 27 July 2009 to Mr GZ, standard banking provisions reserve to the bank the right to cancel an offer of a facility at any time and solicitors who practice in this area would be familiar with such a provision. It was not therefore possible for Mr TD and his family members to enforce a 'contract" against the bank. Even if it were, there must be some doubt as to whether the Orders of the Family Court would have contemplated that Mr TD would be required to bring proceedings against Westpac to require the Bank to fulfil a contractual obligation.

[83] These are all facts which Mr GZ should have accepted as affecting Mr TD's ability to perform the Orders and advise Ms HB accordingly. Instead it seems that he accepted her view that Mr TD and his family were reneging on the agreement and merely being obstructive in their actions. This is not borne out by the facts of which Mr GZ was aware.

Legal process

[84] Mr HE has also submitted that the proposal to institute committal proceedings is not a "legal process" as that phrase is referred to in Rule 2.3. The footnote to Rule 2.3 provides examples of what breaches of that Rule may include. They are: issuing a statutory demand under the Companies Act 1993, knowing that (or failing to make enquiries whether) the debt is bona fide disputed; registering a caveat on a title to land knowing that (or failing to enquire whether) there is a "caveatable interest" on the part of the client to be protected; and serving documents in way that causes unnecessary embarrassment or damage to the person's reputation, interests or occupation."

[85] It must be noted that Rule 2.3 refers to use of "the law or legal processes". It is not restricted to a technical definition of legal processes. The draft proceedings and the stated intention to file these the following day self evidentially involve the use of the law and a legal process for committing those in contempt of Court. To limit the ambit of Rule 2.3 to the actual filing of proceedings in Court would be to unduly restrict the operation of that Rule. In any event, the example provided of "serving documents" would not fall within the restricted meaning of the phrase as proposed by Mr HE. I therefore consider that the action taken by Mr GZ constitutes use of the law or legal processes as referred to in Rule 2.3.

The client's instructions

[86] In the preceding paragraphs I have largely dealt with the various issues raised by Mr HE in his submissions. The only matter that has not been touched on is the submission that the Standards Committee gave insufficient weight to Ms HB's instructions to pursue the committal proceedings.

[87] Mr HE refers to Rule 13.3 which provides that:

> "13.3 Informed instructions
>
> Subject to the lawyer's overriding duty to the court, a lawyer must obtain and follow a client's instructions on significant decisions in respect of the conduct of litigation. Those instructions should be taken after the client is informed by the lawyer of the nature of the decisions to be made and the consequences of them."

It is important to note the second sentence of that Rule. If Ms HB had been advised by Mr GZ that his proposed course of action placed him at risk of breaching the Conduct and Client Care Rules and that he would thereby be exposed to disciplinary proceedings, it is highly unlikely that Ms HB would have instructed Mr GZ to proceed with that proposal. In addition, Rules 4.1 of the Conduct and Client Care Rules enables a solicitor to decline to follow a client's instructions for good cause, which includes instructions that could require the lawyer to breach any professional obligation.

[88] Consequently, once a finding that Mr GZ's conduct constituted a breach of the Rules was made, the submission that Mr GZ was acting in accordance with instructions provides no defence for his conduct.

Conclusion

[89] Having considered all of the material provided to the Standards Committee, and the subsequent material and submissions provided in the course of this review, I have come to the view that in these circumstances Mr GZ's conduct does constitute unsatisfactory conduct as defined in sections 12(b) and (c) of the Lawyers and Conveyancers Act 2006.

Decision

[90] Pursuant to section 211 (1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee is modified to include a finding that Mr GZ's conduct also constituted unsatisfactory conduct in terms of section 12(b) of The Lawyers and Conveyancers Act 2006, but otherwise is confirmed.

Comment

[91] In addressing the comments made by the Standards Committee Counsel for Mr GZ and the LCRO were obliged to number the pages of the Standards Committee determination, and to refer to the position on the page of the comments under consideration.

[92] It would be extremely helpful if all Standards Committees could adopt a format whereby all paragraphs are numbered as is usual with judicial decisions.

DATED this 17th day of February 2012

_____

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:

GZ as the Applicant
TE as the Respondent
The New Zealand Law Society
Canterbury-Westland Standards Committee 1