LCRO 179/2010 and 180/2010

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the National Standards Committee
BETWEEN	**MR IP** of Auckland Applicant
AND	**SI** Respondent (LCRO 179/10) of Auckland
AND	**SH** Respondent (LCRO 180/10) of Auckland

DECISION

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

[1] This decision covers a review of two decisions of the National Standards Committee on complaints made by Mr IP(the Applicant), against Mr SI and Mr SH (the Practitioners). The same complaint was made against both Practitioners in relation to the same item of correspondence, and it is appropriate that this review cover the Standards Committee decisions in relation to both of the Practitioners.

Background

[2] The parties to this review are all lawyers. The Applicant acted for H who claimed to have been injured by a product made by the company that was represented by the

Practitioners. The company's extensive enquiries had concluded that the incident was not the result of its product, but due to the way the product had been stored. The Practitioners denied any wrongdoing or liability on the part of their client company.

[3] There were exchanges of correspondence between the Applicant and the Practitioners in relation to this matter. A particular letter written by the Applicant to the Practitioners' firm on 16 September 2009 led the Practitioners to lodge a complaint against the Applicant with the New Zealand Law Society (NZLS). The Applicant was notified of the complaint and invited to respond.

[4] In his reply (of 6 October 2009) the Applicant not only responded to the Practitioners' complaint, but raised complaints of his own against the Practitioners. His complaints concerned a letter sent to him by the Practitioners on 9 September, the week before his reply to them (which became the subject of their complaint). The Applicant asked the Standards Committee to accept this as a separate complaint of his own against the Practitioners.

[5] The parts of the Practitioners' letter that the Applicant objected to were paragraphs 8 and 9 which were as follows:

> 8. *"In the event that your client brings a claim against our client, it will be opposed and our client will seek indemnity costs in opposing any application. This letter and earlier correspondence, will be produced to the Court in support of any application. In view of the lack of any merit in any claims against our client, which could only be viewed as an abuse of process, our client has confirmed that it will instruct us to file an application against you and co-counsel for bringing any such claim.*
>
> *9. We note that whilst many firms make indemnity costs warnings as a matter of course, this firm does not do so. However, in the clear circumstances of this case we have been instructed to do so. We note this so that you and your client are fully aware of the matters."*

[6] All of the complaints were considered by the National Standards Committee which determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006, that no further action was necessary or appropriate having regard to all the circumstances. The Committee expressed the view that the Applicant's complaint lacked merit and support.

Review application-procedure

[7] The Applicant applied for a review of the decisions and asked to be personally heard in respect of his applications. An Applicant-only hearing was arranged and attended by the Applicant and one of his staff in support. He objected to the Applicant-only hearing, which he considered denial of his rights to proper process.

[8] By virtue of s 206 of the Lawyers and Conveyancers Act 2006 the LCRO may regulate his or her own procedures as considered fit, subject to complying with the rules of natural justice. While the LCRO Guidelines set out the usual pathways for the review process, they are not exhaustive and cannot address all circumstances in which review applications are made.

[9] The nature of an Applicant-only hearing is explained in the LCRO Guidelines, a copy of which was sent to the Applicant. In this case the Applicant sought to be personally heard on his review application, as he was entitled to do. I considered that an Applicant-only hearing was sufficient as a first-step. I also add that there is nothing to prevent further enquiry being undertaken by the LCRO following an Applicant-only hearing, or a further hearing should that be considered appropriate.

[10] Having heard from the Applicant, reviewed all of the information on the Standards Committee file and that provided for the review, I considered that there was no need to make further enquiry, also taking into account the Practitioners' advice that they stood on submissions already made and had nothing further to add.

Review application

[11] The Applicant based his review application on three grounds. The first was a jurisdictional concern about his complaints file having been transferred from a regional standards committee to the National Standards Committee. He stated that no proper explanation was given for the transfer which he described as "mysterious", suggesting that the complaints were *"transferred to the National Standards Committee apparently on some secret Board direction."*

[12] The reason that the National Standards Committee dealt with the complaint is because of a resolution made by the New Zealand Law Society Board that this, and all future complaints involving this Applicant, are to be referred to that Committee. This resolution followed numerous complaints of a serious nature having been made by the Applicant against a number of individuals involved in the Auckland complaints service. The resolution is in the nature of a standing order.

[13] The evidence showed that the Applicant had in fact been sent a copy of that resolution. I therefore do not accept that he could have been unaware of the reason for the transfer of his complaints to the National Standards Committee despite his suggestion that no explanation had been given to him.

[14] The second ground of review alleged that the Standards Committee had not provided reasons for its decision to take no further action on the Applicant's complaints. He considered that he had provided sufficient information to have lead to an adverse finding

against the Practitioners. In his view a Standards Committee had an obligation to justify its reasons for deciding to take no further action. He attached to his review application a lengthy discourse on the importance of a judicial or quasi judicial body providing reasons for a decision.

[15] In this case the Committee's decision comprised a summary of the exchanges that had occurred between the Applicant and the Practitioners, and ended with the conclusion that no further action was necessary or appropriate. The Committee may have assumed that the description of the discourse was a sufficient explanation for its decision to take no further action. Any omission in providing reasons can be cured by the review process.

[16] The third ground of review alleged that an error of law had occurred. The Applicant submitted that the Standards Committee's decision was unreasonable and failed to take into account the Applicant's submissions and evidence of the breaches of the Practitioners. He referred to a document he had attached entitled *"United Nations Basic Principles of the Rules of Lawyers"*, which, he stated, emphasised the importance of lawyers to be able to fearlessly pursue their clients' cases.

[17] The Applicant particularly objected to paragraph 8 of the Practitioners' letter, focusing on the words, *"which could only be viewed as an abuse of process"*. He disputed this, his view being that any accusation that his client's claim lacked merit was, in advance of any claim being filed, precipitous. He pointed out that at the time the letter was written no proceedings had in fact been filed, and that the Practitioners could not then have known whether the proceeding was meritorious or not. He considers that there is clear evidence of unprofessional conduct by the Practitioners.

Considerations

[18] What is plainly clear from the exchanges between them is that the Practitioners took the view that there was no proper basis for any claim as the investigations undertaken had fully exonerated their client company. Their costs warning was clearly intended to alert the Applicant to their client's intention to pursue indemnity costs against him personally should matters proceed to a court action. Their position was that the cost consequences set out in their letter were matters that any competent lawyer would be aware of as they are "*a natural incident to the justice system*", adding that costs warnings of this nature would not have been unexpected in the circumstances in which the Practitioner was writing to the firm's client.

[19] It is equally clear that the Applicant intended to pursue the matter for his client, H. News of the prospective claim was reported in the media on 31 August 2009 which reported the Applicant as stating that H was exploring all his options. The Applicant's email

to the Practitioners of the same day showed that he was pressing for a negotiated settlement. In reply the Practitioners wrote (9 September 2009) that their client would not be cowed by such threats, and the last two paragraphs of that letter (cited above) eventually became the subject of complaints by the Applicant after the Practitioner's had filed their complaints about correspondence the Applicant had sent.

[20] The Applicant's position was that the Practitioners' threat to seek costs against him for abuse of process was precipitous as the merits or otherwise of the claim could not be known in advance of any proceeding having been filed. He rejected that his client's case was hopeless, also submitting (citing the authority of the Privy Council in *Harley v McDonald* [2002] 1 NZLR 1 (PC)) that pursuing a hopeless case does not amount to an abuse of process such as will lead to the making of a costs order against counsel. His submission was that a costs order against counsel could only arise where there was a serious dereliction of counsel's duty to the Court, which in his view did not in any event extend to pursing a hopeless case.

[21] Their Lordships in *Harley* considered the proposition that a barrister who pursues a hopeless case - not appreciating it to be hopeless - displays such a degree of incompetence as to amount to a serious dereliction of duty to the court. They considered the proposition, without more, to be unsound. In short, their Lordships considered it would be unwise to treat the pursuit of a hopeless case as a demonstration of incompetence. Their Lordships did not attempt to provide a precise definition of what amounts to 'serious dereliction of duty', but opined that it was open to courts to penalise incompetence which leads to a waste of the courts time, or some other abuse of its process resulting in inevitable cost to litigants. On this view *Harley* could not be considered as authority for the Applicant's submission that wasting the Court's time in the pursuit of a hopeless case can never amount to a breach of a lawyer's duty to the court. *Harley* clearly does not go that far. It does not exclude the possibility that circumstances surrounding such a proceeding could give rise to enquiry into counsel's professional obligations to the court and whether an indemnity costs order could be made against counsel.

[22] However, this review does not require consideration of whether there has been a breach of a duty to the court by anyone. No proceedings were filed, and no costs were sought by the Practitioners.

[23] The question is whether the Practitioners' conduct was a breach of the rules governing the professional conduct of lawyers. This is to be considered with reference to Rule 10 of the Rules of Conduct and Client Care which requires a lawyer to promote and maintain proper standards of professionalism in the lawyer's dealings. The Applicant's

view is that the letter sent to him by the Practitioner is a sufficient basis for an adverse finding to be made.

[24] Rule 10 states:

> 10. A lawyer must promote and maintain proper standards of professionalism in the lawyer's dealings.
>
> 10.1 A lawyer must treat other lawyers with respect and courtesy.

[25] Litigation in an adversarial legal system by its nature, often involves vigorous exchanges between the lawyers for opposing parties and it is not uncommon that a lawyer will seek to deter or discourage any potential proceedings being issued against his or her client. This reality is reflected in the Applicant's own words when he wrote to the Practitioners that *"I would expect a litigation lawyer to be able to handle communications of an adversarial nature,..."*. However, this cannot exonerate conduct that crosses the threshold of what may be considered acceptable.

[26] Where it is perceived that there is no sound legal basis for a legal claim, there is no objection to a lawyer Practitioners putting a prospective claimant on notice, via his solicitor, that costs will be sought if the claim is pursued through the court. It is a different matter when costs are threatened against counsel personally. I do not agree that this could be described as *"a natural incident to the justice system".* Law practitioners are advocates for their clients and any costs warning would be expected to be directed at the client. Warnings or threats that costs will be sought against counsel personally are not appropriate as a general deterrent to proceedings being issued and it would be of concern were such warnings to become commonplace.

[27] When considered in a disciplinary context, the circumstances surrounding such a warning will determine whether a lawyer has crossed the line of acceptable conduct in any given case. The scheme of the Lawyers and Conveyancers Act 2006, and particularly the definition of 'unsatisfactory conduct' as set out in s 12 of the Act, references the acceptability of conduct to the views of lawyers or members of the public. Judgments about professional conduct are made by Standards Committees for the New Zealand Law Society, which are comprised of practising lawyers and with lay representation. Traditionally Courts have been reluctant to interfere with findings of a disciplinary body which is tasked with making such a decision.

[28] In this case the Standards Committee decided to take no further action on the complaints. It may be that the Committee considered the decision was sufficiently explained by the text of correspondences exchanged between the parties which showed the mutual nature of the exchanges, and the timing of those complaints. However, it would

have been helpful if the Committee had provided some further explanation for its conclusion that the complaints '*lacked merit and support'.*

[29] In the course of this review I have taken into account all of the information included in the Standards Committee file and the additional submissions of the Applicant that are relevant to the complaint. I also take into account that an application against counsel for indemnity costs is an application that may lawfully be made, either during the course of a proceeding or at the conclusion of a substantive hearing. If the issuing of an advance warning that such a step may be taken is to result in a disciplinary finding, there must exist elements that justify such an outcome.

[30] At the time the warning was issued no proceeding had in fact been filed, a point made by the Applicant whose view is that until proceedings were filed it could not be said that the claim lacked merit. I do not agree that the merits or otherwise of a claim could never be assessed by a prospective defendant where proceedings are threatened. Preliminary exchanges between the parties usually sets out the basis of a claim, and making an assessment can be fundamental to the way that a matter proceeds, and is often the foundation for a settlement. In the present case the basis of the claim, and the positions of the parties, was set out in that correspondence.

[31] The question of whether there was a breach of professional standard is linked to whether there was a reasonable basis for a warning of this kind to have been given. This must be considered in terms of whether the belief that there was no proper basis for a claim was reasonably based. That is, account must be taken of the circumstances leading to the warning being given.

[32] In this case the costs warning directed at both the prospective plaintiff and his counsel (the Applicant) was given in the circumstances where the Practitioners' client company vigorously denied any wrongdoing after having undertaken an extensive investigation into the allegations raised by H. The company steadfastly held the position (described as "*clear circumstances*") that there was no proper basis for any claim against it. There is nothing to suggest that the warning was conveyed by the Practitioners in bad faith, and it could not be said that there was no reasonable basis for the view held by the company, and the basis of it was explained. I also noted that the Practitioners' letter had stated that indemnity costs warnings were not routinely made by that firm.

[33] The Practitioners referred to the warning having been conveyed at the instruction of their client. A lawyer cannot justify what could otherwise amount to a breach of a professional rule by reference to having being instructed to do so by a client (Rule 4.1). If a costs warning was issued without any reasonable basis for the belief in the futility of a proceeding, and where it might reasonably be concluded that the warning was given for no

purpose other than to apply improper pressure to refrain a would-be claimant from issuing proceedings, this may well amount to a breach of Rule 10.

[34] That is not the case here, and I have noted that the warning was conveyed in circumstances where the possibility of an indemnity costs claim against counsel could reasonably have been entertained. Such circumstances do not, in my view, give rise to disciplinary concerns for the Practitioners when alerting the Applicant to the prospect of such a claim. It was then open to the Applicant and his client to assess the significance of the warning, and to respond accordingly.

[35] Although the Applicant argued that the costs warning was intended to intimidate him, he acknowledged that the warning would not have deterred him from filing a claim. I consider it most unlikely that the warning made in this case would have had the affect of deterring counsel from filing proceedings.

[36] For the reasons given, I do not find that the Practitioners breached the professional obligations imposed by Rule 10.

[37] This does not necessarily mean that a complaint of this kind will always lack merit, since a warning of this kind may, in different circumstances, give rise to questions about the lawyer's professional dealings.

Decision

Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 both of the decisions of the Standards Committee are confirmed.

DATED this 27th day February 2012

_____

Hanneke Bouchier
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:

IP as the Applicant
SI as the Respondent
SH as the Respondent

The National Standards Committee
The New Zealand Law Society