LCRO 205/2010

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Auckland Standards Committee 4
BETWEEN	**MR IA** of Auckland Applicant
AND	**MR QZ AND MR MA** of Auckland Respondent

DECISION

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

Background

[1] On 30 July 2008, the Auckland District Law Practitioners Disciplinary Tribunal issued its decision, finding Mr IA (the Applicant) to be guilty of misconduct. The Practitioner was censured, fined and ordered to pay costs. A consent order under Section 106(4)(c) of the Law Practitioners Act recorded that: "*By consent an order is made in terms as agreed by counsel for the Society and the Practitioner that:*

> *'The Practitioner shall cease to accept work for a period of 10 years in all fields of practice in relation to making claims or accepting instructions to make claims against [A], [B], [C] or any associated person or entity or any client or employee of [A] or [B] and that the Practitioner will, within seven days of the date of this order, withdraw as solicitor on the record in all existing matters involving A and B and file the appropriate notice accordingly.*'"

[2] The Applicant had been represented by counsel, Mr M. The Applicant surrendered his practising certificate in 2009 and sometime thereafter commenced

working for Mr M's law practice in the role of a law clerk or legal executive. The Applicant's duties in that firm included translation and document drafting, and at some point in time extended to work of that kind on files involving proceedings against the persons mentioned in the Tribunal's Order.

Complaints

[3] When Mr M's law firm accepted instructions from a third party to issue proceedings against B, B's lawyer filed a complaint with the NZLS alleging that the Applicant had breached the order of the Tribunal in that he was undertaking work that involved proceedings against B and B's wife. Two months later B made a similar complaint of his own against the Applicant. The Standards Committee dealt with these complaints together as they involved the same matter.

[4] In response, the Applicant denied he had breached the Disciplinary Tribunal order, advising that Mr M was the solicitor on the record.

[5] In a further letter to the NZLS, B's solicitor wrote that he understood that the Applicant had been taking instructions from various people and issuing proceedings through Mr M's firm.

[6] The Applicant denied this, stating that he had surrendered his practising certificate and could not accept work from clients. He explained that he had referred all matters involving clients who contacted him personally to the law firm where Mr M practised.

[7] Mr M also provided a response on behalf of the Applicant, informing the Society that he had come to an agreement with the Applicant that he should take great care not to breach the undertaking and that his practice would take up any further matters involving B or his related entities. Mr M submitted that it was not correct that the Applicant continued to act against B, but explained that his clients, who had proceedings against B, had a poor command of the English language and

> *[t]he only effective way we have been able to communicate with them is by using [the Applicant] as an interpreter. [The Applicant] was an ideal person to be an interpreter. He is qualified to be an interpreter and prior to his being a lawyer we understand worked as an interpreter. Being a lawyer, he is also familiar with the legal ramifications of this matter.*

[8] Mr M explained that although B was of the view that the matters were being pursued by the Applicant, this was not correct because the action had been filed by Mr M's firm, notwithstanding that the clients had been referred to the firm by the Applicant.

[9] The complaint that the Standards Committee was required to consider was whether the Applicant was in breach of the Disciplinary Tribunal order by preparing documents, in the role of an employee of Mr M, relating to proceedings being taken by Mr M's clients against B.

[10] After traversing various relevant matters, the Standards Committee considered that the relevant sections of the Lawyers and Conveyancers Act were Sections 11 and 14 (because the Applicant was no longer a "practitioner", having surrendered his practising certificate).

[11] Concluding that the Applicant was in breach of the order, the Standards Committee wrote:

> *On a true reading of this order, [the Applicant's] conduct clearly fell within the scope of the order and his actions constitute a breach of the order. [The Applicant] was required to abide by and comply with the order and he should have refused to accept work in connection with [A] or [B or his wife].*

[12] The Committee stated it was satisfied that it was wholly unacceptable for the Applicant to have acted in breach of the order, and considered that the conduct came close to satisfying the test in Section 11 of the Act which would have warranted the matter being referred to the Disciplinary Tribunal for prosecution. However, the Standards Committee concluded that there had been unsatisfactory conduct on the part of the Applicant under Section 14 of the Act.

Review

[13] The Applicant sought a review of that decision which he considered to be wrong.

[14] He considered that the Tribunal's order was made to prevent him from acting against the Complainant and/or any associated entities/people *when acting on his own* because the Tribunal making the order perceived that if he would act again against them *on his own*, he might lose neutrality or impartiality. He noted that he was a sole practitioner at the time the order was made.

[15] The Applicant accepted that he could not accept any work from a client and did not consider that he had 'accepted work' from a client in breach of the order. All he had done, he said, was to refer the clients to Mr M's firm, draft some court documents at the instruction of Mr M, who supervised him throughout that Mr M had signed all the court documents and letters. He did not consider he was in breach of the order.

Review Hearing

[16] The Applicant attended a review hearing on 3 April 2012, this being an Applicant-only hearing that was scheduled and did not require the attendance of the Complainants.

[17] At the review hearing, the Applicant provided some further submissions. He particularly emphasised that the Tribunal's order prohibited him from "accepting work" in all fields of "practice" or "accepting instructions" in relation to claims against the original Complainants. He emphasised that the order prevented him from acting against the Complainants on his own account. He was no longer the holder of a practising certificate and did not accept work on his own account.

[18] The Applicant reiterated that he was not in a position to make any decisions as to what work he would or would not do as when was directed by his employer, Mr M, in relation to preparing documents for work that was being undertaken by Mr M's firm.

[19] At the review hearing, I asked the Applicant what considerations he had given to the scope of the order, prior to embarking on preparation of the documents on a proceeding involving an individual (B) who was clearly within the contemplation of the Tribunal's order. The Applicant said he had reflected on the matter more than a couple of times, and had discussed this with Mr M, and that Mr M persuaded him that preparing documents on his (Mr M's) instructions could not amount to a breach of the Tribunal's order. The Applicant considered that he had little choice, being an employee of Mr M.

[20] It appears that as a pre-emptive step Mr M had already written to the New Zealand Law Society in November 2009 in response to a threat that the matter would be referred to the New Zealand Law Society if the Applicant was permitted to prepare documents for Mr M's firm in the proceeding against B or his family. Mr M had informed the New Zealand Law Society at that time that he did not believe he was acting improperly, and had also sought the advice of another lawyer. He referred the matter to the NZLS, stating:

> *If NZLS considers* [the Applicant] *is breaching his undertaking – and/or that I am assisting him, I will cease acting in the matter and brief counsel. But I would do so reluctantly – I do not consider it necessary and do not believe it is in the best interests of* [the clients]. *I would appreciate the view of the NZLS on this matter.*

Considerations

[21] It may be said that the Tribunal's order could have been drafted in a manner that left no room for argument, but there can be little doubt of its intended breadth. I do not accept the Applicant's proposal that "on his own" should be read into the order. On

the plain meaning of the words, the prohibition is plainly wide enough to prevent the Applicant from taking on any work that involves proceedings against the Complainant, B, and his wife.

[22] At the time that the order was made the Practitioner was still in practice, where to "accept work" is usually understood to accepting instructions. However, there is no basis for a limited interpretation of the scope and intent of the Order. For guidance as to the intention of the scope of the order, I turned to the original Tribunal Order and the Disciplinary Tribunal's decision which, as noted, found the Practitioner to be guilty of misconduct.

[23] The Tribunal's decision is lengthy and detailed, the Tribunal describing the Applicant's pursuit of the Complainants as *"a crusade that had been fought on just about every font that a practitioner could conceive to use*". In examining the tenor of the Tribunal's decision, I have no doubt that the Order which was made was intended to have wide application and to ensure that the Applicant did not undertaken any kind of work that would bring him into contact or a connection with A, B or C, or any associated entity client or employee of A or B. In my view the Tribunal's plain intention was that the Applicant should have no communication or connection of any kind with the Complainant, B or his wife, in respect of any proceeding being taken against the Complainants.

[24] The drafting of proceedings against the Complainants, albeit as an employee for another lawyer, was nevertheless "work" that involved proceedings against one of the Complainants. The Applicant should [not] have undertaken this work, regardless of what that work entailed. Any other view would create a loophole by providing an opportunity for the Applicant to engage in the prohibited activities, under the umbrella of another practitioner or firm.

[25] I have also considered that the Practitioner discussed with his employer, Mr M, whether drafting the court proceedings would amount to a breach of the Tribunal's order. I have already noted that in November 2009, (some two months prior to the formal complaint being made), and following his discussion with B's lawyer Mr M had written to the NZLS to say that he had taken instructions from clients and was filing a statement of claim in the High Court, and due to his work pressures, he had asked the Applicant to prepare documents. He explained that the proceeding was against a person protected by the Tribunal Order, and stated, "*He, of course, cannot act but I see no difficulty in having [the Applicant] prepare documents."* Mr M explained that the purpose of his letter was to seek the NZLS view on the matter of the Applicant's

involvement, and stated, "*If NZLS considers [the Applicant] is breaching his undertaking – and/or that I am assisting him, I will cease acting in this matter and brief counsel."* He concluded with, *"I would appreciate the views of NZLS on this matter*."

[26] I sought from the NZLS a copy of its response (which was forwarded), and I observe that the NZLS was unwilling to offer legal advice, and informed Mr M that it could not prejudice any complaint that might be made.

[27] Because I accept that that the Applicant did discuss his work on the files with his employer, Mr M, who in turn sought some guidance from the NZLS, these circumstances do not indicate that Applicant deliberately intended to act in a manner designed to contravene the Disciplinary Tribunal's consent order. I consider it appropriate to reflect this in a small reduction of the monetary penalty imposed by the Standards Committee.

[28] However, ultimately the judgment was for the Applicant to make. It was ultimately his responsibility to make the correct decision, and any uncertainty on his part ought to have been resolved on the side of caution. Acceding to the instruction of an employer is not sufficient to absolve a lawyer (or former lawyer) from his professional responsibilities.

Decision

Pursuant to Section 211 (1)(a) of the Lawyers and Conveyancers Act 2006, the Standards Committee decision is confirmed.

Amendment to orders

The fine of $5,000 is reduced to $4,000.

In all other respects, the Standards Committee decision is confirmed.

DATED this 18th day of June 2012

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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:

IA as the Applicant
QZ as the Respondent
MA as the Respondent
Auckland Standards Committee 4
The New Zealand Law Society