LCRO 207/2011
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| **CONCERNING** | An application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006 |
| **AND** | |
| **CONCERNING** | a determination of the Canterbury-Westland Standards Committee 3 |
| **BETWEEN** | **TA**<br>Applicant |
| **AND** | **NC**<br>**NB**<br>Respondent |

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

## DECISION

### Introduction

[1] The Standards Committee declined to uphold a number of complaints made by TA (the Applicant) against law practitioners NB and NC. The Applicant sought a review of the decisions.

### Background

[2] The brief background is that NB (the Practitioner) acted for the Applicant in relation to pursuing his remedies under a licensing contract which the Applicant considered had been breached. The licensing agreement contained an arbitration clause, and much of the work undertaken by the Practitioner related to enforcing that clause.

[3] Before the matter progressed to arbitration, the Practitioner withdrew his services on the basis that the Applicant had not paid the firm's fees. The Practitioner's firm subsequently took legal proceedings, and was successful in the Disputes Tribunal in getting an order against the Applicant for the balance of the fees. NC, a partner of the law firm, represented the firm in that tribunal.

[4] The Applicant subsequently filed complaints against both Practitioners, and although there were a number of elements to the complaint, they essentially covered two matters. The first related to the law firm having pursued him for payment of fees which, he contended, the firm knew he could not afford to pay. Relevant to this was the Applicant's contention that prior to undertaking the retainer, the Practitioner knew, or ought to have known, that he had no funds to pay, and that he was relying on legal aid.

[5] The second matter related to delays by the Practitioner in the progression of work. The Applicant essentially contended that there had been undue delays by the Practitioner in filing a statement of claim under the arbitration clause. He said that the time between the commencement of the retainer, and the filing of the statement of claim, being some eight months, was unreasonable, and compromised the possibility of a successful outcome.

**Standards Committee decision**

[6] The Standards Committee understood that the Applicant's complaint was that the law firm ought to have undertaken the work on legal aid, but the Committee noted that there was no reference anywhere in the documentation that the work was being done pursuant to a grant of legal aid until that was raised by the Applicant some fifteen months after the commencement of the retainer.

[7] The Committee noted that the law firm had sent its letter of engagement which set out the terms upon which services were provided. The Committee further noted that the engagement letter did not contain a statement as to the resolution of complaints or rights of complaint to the Law Society, but did not consider this omission invalidated the letter of engagement in defining the retainer. The Committee rejected the Applicant's contention that the law firm had undertaken the work for his company, rather than him personally (the same submissions had also been rejected by the Disputes Tribunal). The complaint was not upheld.

**Review application**

[8] The Applicant sought a review of the Standards Committee's decision. Accompanying his review application, the Applicant had enclosed a copy of the Standards Committee decision with his hand written comments on some parts of it. Where the Standards Committee wrote that the Applicant had claimed that the firm *"[w]as to have undertaken the work on the basis of a grant of legal aid",* he wrote "*False statement. I claimed that I had approached them for legal aid as I had no money, and presumed they were proceeding on that basis given they accepted the case."*

[9] His review application began with the contention that there had been an oversight on the part of PD (the lawyer who was his original contact with the firm) with regard to discussions of legal aid, information which had not gotten through to the Practitioner. The Applicant claims that it was known to PD from the outset that he was relying on legal aid, and that he had no funds of his own to pay any legal fees. The Applicant contended that the firm had taken on his case *"without any of the usual procedures normally associated with establishing working relationships with new clients which I was expecting.*" In particular he said there were no discussions around costs or statements in his emails about his financial position and/or matters of legal aid as previously discussed. He also said there were no discussions about terms of engagement or other company procedures, and no requests to enable a check on his credit worthiness. He said that he had mentioned legal aid to PD and assumed that the firm had taken on the case as a legal aid one, based on his original request for assistance, which he considered this was "a fair assumption to make". He wrote *"[i]n hindsight, their actions in taking on the case in such a manner without discussion and agreed terms of engagement are misleading if legal aid wasn't to have applied*."

[10] A review hearing took place on 20 June 2012. Since the complaints, and the review applications, arose from the same events the reviews were conducted concurrently. The hearing was attended by both of the Practitioners, and also by the Applicant.

[11] At the hearing the Applicant explained that his complaint was not that the firm had failed to apply for legal aid on his behalf, but the fact that his initial approach to the firm with a request for legal aid was sufficient indication to have alerted the firm that he had no money of his own to pay their fees, and that the firm's acceptance of him as a client was based on that common understanding.

[12] Following the review hearing, the Applicant forwarded copies of further information to my office (information already on the file) that he wished to have highlighted.

[13] I have considered all of the information provided by the parties for the review, which comprised the Standards Committee file, information provided specifically for the review and that arising out of, and subsequent to, the review hearing.

**Considerations**

*Complaints against NB*

(a) Complaint about fees

[14] I have considered all of the information in relation to this particular complaint, and for reasons which follow, I consider that the Standards Committee was correct to not have upheld this complaint.

[15] The Applicant's first contact with the law firm was with another lawyer in the firm, PD. The Applicant claims to have raised the issue of legal aid. However, no mention of this was included in the referral by PD to the Practitioner. The Applicant accepted that this information was not conveyed to the Practitioner, and I conclude that the Practitioner was unaware of any legal aid assistance that the Applicant may have anticipated.

[16] The correspondence exchanged between the Applicant and the Practitioner during the first months also made no mention of legal aid. The Applicant said that the issue of legal aid didn't arise *"until the first account for costs was issued."* I reject this contention because there is nothing in the correspondence which shows that there was any mention at all of legal aid at that time, or later. Examples of the correspondence (below) show that the Applicant gave no indication that he was expecting to have the fees paid by legal aid. Indeed, the reverse was the case.

[17] The early correspondence shows the following. On 9 June 2008 the Applicant had sent an email to PD, which, with reference to a discussion between them, confirmed that he (the Applicant) was a past founding director and a current minority shareholder in L Limited. He wrote that until recently he had two income streams associated with this company, and described what those income streams were. The Applicant contended that this was a clear indicator that his only source of income was those income streams, without which he had no income. I have some difficulty in agreeing with him; there is nothing to suggest that the Applicant's income streams associated with L Limited were his only means of income. Nor was there any mention in that original email of his reliance on legal aid to pursue his remedies against L

Limited. After doing the usual conflict check, PD referred the new client to the Practitioner.

[18] In an early email (25 June 2008) the Applicant wrote to the Practitioner, *"I forgot to ask, could you give me a ball park figure as to the cost of these proceedings*?" to which the Practitioner responded, *"[i]t is difficult to estimate at this stage, but I would say something in the $7,000.00 - $10,000.00 range, assuming a reasonable degree of resistance."* The Practitioner also asked for the Applicant's address details. These emails were exchanged towards the end of June, prior to their first meeting; the Applicant made no mention of legal aid, nor raised any concerns about his ability to pay the estimated fees that had been mentioned by the Practitioner.

[19] On 27 June, having perused information that the Applicant had provided, the Practitioner sent a letter of engagement which recorded the Applicant's instructions under a header, "confirmation of instructions", and also *"set out the terms upon which we will act for you. If any matter requires clarification, please let us know."* The attachments to the letter set out the terms of engagement, and in Section 8, stated that accounts were payable fourteen days after the date of invoice "*unless alternative arrangements have been agreed with you in writing."* Section 9 related to "unpaid accounts" and provided that if there were difficulty in meeting the accounts, to please contact the firm without delay so that payment arrangements might be discussed. It also set out the right of the firm to terminate their representation if accounts remained unpaid beyond fourteen days. This letter of engagement was sent within days of the commencement of the retainer, and made very clear that the terms applied to all legal services provided by the firm unless there were alternative arrangements in writing.

[20] The Applicant said that the letter had been sent "*posthumously",* and that he took no notice of it. He remained insistent that he was entitled to assume that the law firm had agreed to act on the basis that the bills would be paid through legal aid.

[21] I have found no evidence to support the Applicant's position as he has stated it. If he was relying on legal aid there is no hint of this when he enquired of the Practitioner what the fees could be. The letter of engagement made abundantly clear the terms upon which the professional relationship would commence, including this personal liability to pay. The correspondence set those terms out with clarity and invited the new client to contact the firm if any clarification was required. It was unreasonable for the Applicant to completely disregard it and insist on information that he had given to PD in a telephone conversation some weeks earlier.

[22] The Applicant submitted that the matter of legal aid funding was of "crucial importance", yet it would have been obvious to him that the Practitioner did not have information about his legal aid discussion with PD (which he accepts), in which case it is wholly surprising that he failed to ensure that the Practitioner was made aware of this 'crucial' information from the outset, and particularly when the subject of fees was raised. The Applicant cannot rely on his silence. Moreover, as shall be seen below, the Applicant's subsequent actions would have led the Practitioner to believe that he was in fact making arrangement to pay the invoices.

[23] The first account was sent to the Applicant on 23 July 2008. After receiving this invoice, the Applicant emailed the Practitioner (19 August) to say *"I have just returned from a stint in the high country to your account. I will attend to this in the next day or so."* The Applicant paid this in full.

[24] I reject his contention that "the issue of legal aid didn't arrive until the first account for costs was issued". There is nothing on the file to show that the issue of legal aid arose at the time of the first, or subsequent, invoices. It is important to note this because the Applicant informed me that he thought the case had been proceeding on legal aid, and that he realised that this was not the case when he received the first account. However, it is abundantly clear from the information before me that the Practitioner was proceeding on the basis that the Applicant would meet the invoices, and that this was known to the Applicant who paid the first and second invoices without any mention of his financial circumstances or of any expectation of legal aid. There was no evidence to show that the Applicant was relying on legal aid, or had conveyed this expectation in any way to the Practitioner.

[25] I also reject his further contention that it was the Practitioner who elected to proceed with the case and to run up additional costs *"with full knowledge that I had no funds to pay additional fees and that I thought the case had been proceeding on legal aid grounds."*

[26] Moreover, the Applicant acknowledged that he knew no legal aid grant had been made. Far from relying on legal aid, the correspondence clearly shows that the Applicant made some efforts to arrange for payments, at one time also proposing a contingency arrangement. On another occasion he informed the Practitioner that he was attempting to sell another business venture that he had recently established from which funds could be expected (November 2009 email), this being in response to the Practitioner's request for a payment plan from him. The Applicant's email to the Practitioner of 16 November 2009 stated, *"[a]s per the discussions between ... and*

*ourselves regarding payment of the account; I have recently established a new business venture with ... which is where I envisaged the funding for your ongoing services to come from, however it is still early days as yet for the business which is yet to produce profit, therefore those funds are not yet available. In light of this and your firm's request for payment, I have decided to attempt to sell this business to the supplier and am currently in discussions with them about this at the moment, and hoping to have some conclusion by the end of the week.*"

[27] There is no basis for the contention that the firm had agreed to provide service on legal aid, nor any evidence that the Applicant had conveyed this expectation to the Practitioner. Indeed the evidence suggests the contrary.

[28] Eventually the Practitioner withdrew his services, and I have therefore also considered the circumstances in which this arose. By December 2009 the credit control partner in the firm contacted the Applicant pressing for a firm proposal for payment, the Applicant then advising that unfortunately he had no funds but hoped that his current proposal (the sale of a new business venture) would have a positive outcome. By this time the firm had been providing services to the Applicant over a period of eighteen months, during which time there was no suggestion by the Applicant that anyone other than himself was responsible for the legal fees.

[29] In December 2009 and January 2010 it was made clear to the Applicant that a firm payment proposal was required, with a 15 January 2010 email informing him that credit control would pursue the debt if there was no concrete proposal forthcoming. In an email of 23 February, the Applicant informed the credit control partner that he had made a deposit to the account against the outstanding amount of $150, *"effectively putting in place a payment program as stated of an amount that I can afford when I can afford it.*" The credit control partner noted that no payment proposal had been made, to which the Applicant responded *"the proposal is that I continue to attempt to pay it off as I have started to.*" This was considered too vague by the firm.

[30] The Applicant further explained that he was finding it difficult to make ends meet, and that pursuing him would not advance his current position, pointing out that the firm was far more likely to get its due return substantially faster if it focused its efforts back to pursuing the money owed to him (presumably in his legal proceeding). He claimed that when the firm took on the case it was known that he had no income and yet had continued to provide services with that knowledge, adding that the firm had failed to notify him of important information that could well have determined the continuation of the case. The credit control partner sought some clarification of this

statement, and after discussion with the Practitioner, the credit control partner replied (31 March 2010) that the firm remained confident of its position, reminded the Applicant that no proposal had been made, and that the firm was happy to consider a firm proposal from him, and sought his intentions as regards to the outstanding account.

[31] The Applicant responded (31 March 2010) that most businesses had to wait for payment in today's business environment, and it was just a matter of expectation as to how long that wait should be in relation to the client's situation. He wrote "*I am in the process of paying your account therefore that in itself is a proposal being implemented",* but could not give exact timeframes as to how long that process would take. In the event matters were not able to be resolved, and the law firm pressed forward with suing the Applicant for the outstanding fees.

[32] I have considered all of the circumstances leading to the Practitioner's legal pursuit of fees against the Applicant. I have also considered the various explanations forwarded by the Applicant. My review of the email correspondence between the parties indicates clearly to me that; the firm proceeded on the basis that the Applicant had personally undertaken the legal debt; that the Applicant was aware that the Practitioner had no knowledge of any legal aid expectations; that the Applicant continually created the impression that he would pay the Practitioner's fees; and it was just a matter of when, not if, he would pay the invoices. Overall I do not accept that there is any basis for the Applicant's argument that the law firm had undertaken to perform legal work with no assurance of payment.

[33] In these circumstances, and having considered all of the information carefully, it is my view that the Standards Committee was correct to have declined the Applicant's complaint in relation to fees.

(b) Complaint about delay

[34] The second complaint alleged delay by the Practitioner which the Applicant contended compromised his claim. The first contact between the Applicant and the Practitioner was in late June 2008. The statement of claim was not filed with the arbitrator until February 2009, some seven or eight months after initial instructions. The Applicant considered that the claim was straightforward and uncomplicated, and he could see no reason for the delay, and in his view a statement of claim ought to have been ready for filing by the end of June.

[35] In its decision the Standards Committee acknowledged that there may have been some delays on the part of both the Applicant and the Practitioner to respond to

emails, but the Committee considered that the Practitioner had given extensive information and proper advice during the relevant period. The Committee considered that there was no evidence that the Practitioner had failed to keep the Applicant informed about important information.

[36] The Applicant clarified, at the review, that the complaint about delay was the delay in filing the statement of claim with the arbitrator. He had prepared a chronology of events, in which he outlined the various steps that had been taken in relation to his claim.

[37] The first meeting between the Applicant and the Practitioner was on or about 24 June 2008 at which time there was some discussion about whether to pursue the arbitration process or to transfer the matter to the Court. The Practitioner provided an explanation for the steps taken in between receiving instructions and the filing of the claim. He said that it was necessary to obtain as much information as possible as to the quantification of the claim. He explained that because other minority shareholders were also waiting in the wings to take an action against the same defendant involved in this arbitration, one of the significant objectives in pursuing the arbitration claim was to obtain disclosure from the defendant for those other shareholders. He said that the defendant had proved difficult to get information from, and further delays had resulted from the defendant's express refusal to pay his share of the arbitration costs (despite the licensing agreement making liability for such costs the responsibility of both parties) subject to which the defendant agreed to participate.

[38] The evidence shows that there was a regular exchange of emails between the Practitioner and the Applicant from June 2008 to the end of October that year. During August the Practitioner was trying to communicate with the prospective defendant, reporting back to the Applicant (on 3 September) that there would be "no engagement by the other party". The Practitioner advised that they would need to proceed on the basis of obtaining a default determination from the arbitrator. He inquired whether the Applicant was happy for him to proceed this way, in which case the claim would be reworked and run by him for comment.

[39] During October 2008 there was a flurry of email exchanges. The question of whether to proceed against the defendant in the Court or under the arbitration clause was still under consideration, and in his email to the Applicant of 23 October the Practitioner explained that the Court provided better mechanisms for disclosure and also discussed the possible advantages of the Court's equitable jurisdiction. The Applicant responded (25 October) with an enquiry about costs and timeframes for filing,

to which the Practitioner responded (29 October) that costs and timeframes differed little if one party was unwilling. It was also apparent that the quantum being claimed by the Applicant had not been established, with the Practitioner asking the Applicant whether he had any idea of what his claim was worth.

[40] The Practitioner stated that there was a meeting on 30 October 2008 which covered a large range of matters arising from enquiries undertaken thus far in relation to the claim. The Practitioner said that the discussions (at that meeting) covered the defendant being investigated for fraud, diversion of money by the defendant, whether the defendant company was an on-going concern, the risk of destruction of documents, priority of obtaining documents and means of obtaining information, court v arbitration options, police action, possible involvement of another director, and finally the Applicant's proposal for a contingency fee arrangement which was rejected by the Practitioner, noting that the Applicant would consider his position.

[41] It is not altogether clear what happened immediately after that meeting, since there was a gap in communications between November 2008 and February 2009, during which there is no record of activity. However, it appears that there were ongoing attendances by the Practitioner. A letter from the Companies Office (23 February) responded to an objection raised by the Practitioner to the removal of the defendant company from the companies register. On that same day the Practitioner notified the Applicant that the Registrar had agreed to suspend the removal of the defendant company. The Applicant replied the same day, referring to enquiries that he had himself made, and his contact with one of the other shareholders, with questions for the Practitioner about a derivative action. The Practitioner replied immediately, following which the Applicant wrote, "*On that note we should file.*" A final draft claim was then sent to the Applicant for his comment and approval, and after some discussion about the appropriate place for service, it appears that the proceeding was served on the defendant company at its registered address on 24 February 2009. Thereafter the procedures were under the control of the arbitrator whose directions caused further delays which were not of the Practitioner's making.

[42] The Practitioner said that addressing all of the matters took time, and there were also occasions when the Applicant himself was unavailable to respond to his enquiries. This was not denied by the Applicant.

[43] I do not agree that the matter was as straight forward as the Applicant contended. There were difficulties quantifying the claim, and additional problems caused by the lack of co-operation by the defendant (who refused to disclose

information and declined to pay his share of the proposed arbitration), issues arising in relation to other potential claimants seeking to take an action against the defendant, and a decision had to be considered about advantages in pursuing the claim in the Court rather than under the arbitration clause. Any expectation on the Applicant's part that the claim could have been filed in June 2008 was wholly unrealistic. Aside from the procedural issues that needed to be resolved, the Applicant's perception that the claim was 'straightforward is at some odds with the arbitrator's comment that he was conducting what appeared to be *"a reasonably complex arbitration*".

[44] The evidence indicates that throughout the retainer, work continued to be undertaken by both the Practitioner and the Applicant. The Applicant was made aware throughout of the steps being taken by the Practitioner, much of which involved establishing a sound legal basis for a claim against the prospective defendant. None of the Applicant's emails to the Practitioner expressed any hint of the Applicant's dissatisfaction with the time taken thus far to progress matters.

[45] I have considered all of the emails during the relevant period of time, and the additional explanations for delays in filing. While arguably the claim may have been filed sooner, I accept that there were a number of legitimate steps that the Practitioner properly pursued in clarifying the Applicant's objectives. Overall I do not consider that the delays were unreasonable to an extent that gives rise to disciplinary concerns. After filing, a provisional timetabling was set out by the arbitrator and timetabling was then under the control of the arbitrator.

[46] I have also considered the activities of the Practitioner following filing of the claim. Many months followed where the arbitrator was dealing with procedural matters. The Applicant highlighted the arbitrator's statement, "*I am therefore now satisfied that the claim has been correctly served and the arbitration can proceed",* as intimating that there had been some error in service before that, but I noted that this direction and (comment) pertained solely to the arbitrator's own concern to ensure that there was no doubt that the defendant company had been made aware of the claim, which he secured by way of requiring service personally on the director. For a good part of the year the arbitrator issued directions which resulted in further delay, but none of this was under the control of the Practitioner, nor was the Practitioner the cause of those delays.

[47] The Applicant was critical of the Practitioner's role in 'allowing' the company director to conduct the company defence in the arbitration, as he considered that the defendant should be required to have proper legal representation. I do not think that the Applicant understood the correspondence about this matter correctly, but this does

not in any event raise conduct issues that should be scrutinised in a disciplinary forum since it was for the arbitrator to decide matters of procedure, including representation.

[48] My overall view is that the Standards Committee was right to determine that no disciplinary action was required.

[49] At this juncture it is appropriate to add some further comment about the matter of the legal fees. The firm's concerns about the Applicant's non-payment of invoices were becoming more articulate after the claim was filed with the arbitrator. By June 2009 the firm was still awaiting payment of the 23 March 2009 invoice (being the second invoice for $1,766.25), and in early October of that year the parties were still in discussion about outstanding accounts that had not been paid.

[50] Over that time concerns were raised about whether the defendant company was being run down. By the end of August it was clear that the defendant company would not contribute towards costs of arbitration, and the Applicant was informed that the arbitrator would be looking to him to provide security for his costs. Unfortunately he came under increasing financial pressures with the prospect of having to provide security for the arbitrator's costs if the arbitration was to proceed. He could see no reason why he should be made responsible for all costs simply because the defendant company director claimed the company had no assets, suggesting that it was the arbitrator's responsibility to obtain security for his costs, and perhaps requiring the arbitrator to obtain a caveat over the director's freehold house. While the Applicant's concerns are understandable, these were not matters within the control of the Practitioner.

[51] It is abundantly clear from the evidence that the Practitioner explained to the Applicant all relevant issues concerning financial risk, liability for costs and other legal elements of the claim and the arbitration process, much of which unfolded with the defendant company's response to the claim. This included advice that ultimately costs against the unsuccessful party would be a matter for the award, but that recovering any award from a limited liability company would be a matter for the successful party and not something that could be guaranteed. My impression of the matter is that the Applicant was resolved to proceed with the arbitration which he perceived as his only hope of getting certain payments from the defendant company, and was unwilling or unable to squarely confront the issue of legal fees as long as there appeared to be some action on the claim file.

[52] The Applicant's criticisms show that he may not have appreciated the extent to which many of these matters were outside of the Practitioner's control.

[53] Having considered all of the information in relation to how these matters unfolded, and accepting, as did the Committee, that filing of the statement of claim may have been done sooner, there is nothing on the file that indicates that the delays that eventuated would have been avoided had a statement of claim been filed earlier. The circumstances of the claim involved a number of difficulties of which the Applicant was kept informed and I do not accept that any delay in filing the statement of claim could have led to a different outcome.

[54] It is my view that no part of the Practitioners actions compromised the interests of the Applicant. In these circumstances the Standards Committee was correct to have decided to take no further action in respect of this complaint.

*Complaint against NC*

[55] I now deal with the Applicant's complaint against NC, the partner in the law practice who represented the firm in the Disputes Tribunal.

[56] The complaint against NC is based on the Applicant's view that she was employed by the firm to pursue an illegal claim. As a partner, NC was not "employed" by the firm, but was simply representing the partnership on the matter of the outstanding debt, which she was entitled to do.

[57] I reject the Applicant's submission that the firm's action in suing him was "illegal". The Applicant owed money to the firm, and he was unable or unwilling to provide any assurance of payment to the firm, or engage with the firm in a satisfactory manner about payment arrangements. In those circumstances the firm was entitled to withdraw its services, and take such legal action as is available to an unpaid creditor.

[58] I also reject the Applicant's further submissions concerning the motives of the firm in pursuing its legal remedies against him. The correspondence makes abundantly clear that the only reason for pursing the fees was solely due to the Applicant's failure to pay, and failure to have entered into a payment program satisfactory to the firm. Steps were taken against the Applicant only after a degree of forbearance. The firm was not obliged to continue providing services to him on the basis of an uncertain possibility of future payments.

[59] Given the conclusion I have reached in relation to the complaints above, I can find no wrongdoing on the part of NC for having represented the firm in pursuing such

legal action as was open to the firm to take. The Standards Committee was correct to have dismissed the complaint against her.

**Decision**

Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act, the Standards Committee decisions, in respect of both the Practitioner and NC, are confirmed.

**DATED** this 20th day of December 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:

TA as the Applicant
NC as the Respondent
NB as the Respondent
NA as a Director of CCN
The Canterbury-Westland Standards Committee 3
The New Zealand Law Society