LCRO 227/2016

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of [Area] Standards Committee [X]
BETWEEN	**YL and QR** Applicants
AND	**TR** Respondent

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

Introduction

[1] Mr QR and Ms YL have applied for a review of the determination by [Area] Standards Committee [X] that their conduct in failing to comply with an order made by this Office constituted unsatisfactory conduct pursuant to s 12(b) and 12(c) of the Lawyers and Conveyancers Act 2006 (the Act).

[2] The Committee imposed a fine of $3,500 on each of the applicants and ordered each of them to pay the sum of $1,000 by way of costs.

Background

[3] On 21 February 2013, the Legal Complaints Review Officer (LCRO) ordered a lawyer employed by the firm CCJ (Mr NI) to reduce his fees for legal services provided to Mr and Mrs TR, to $7,000 including GST and disbursements.[1]

[4] At [94] of the decision the Review Officer said:

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[1] *TR v NI* LCRO 109/2011 (21 February 2013).

> Mr NI is no longer employed by [CCJ], but the effect of this order is that the monies taken by [CCJ] as fees will need to be refunded to the TRs by that firm.

[5] The Review Officer went on to say, at [95]:

> If the parties are unable to agree the amount to be refunded, leave is granted for either party to apply to this Office for the matter to be determined and the order will be amended to record the amount to be repaid.

[6] A copy of the decision was sent to "TT as the Managing Partner of CCJ".

[7] On 21 October 2015, Mr TR wrote to the Lawyers Complaints Service advising that CCJ had failed to comply with the order. The Lawyers Complaints Service treated the letter as a complaint against each of the partners of the firm, Mr TT, Mr QR and Ms YL. On 3 November 2015, the Complaints Service wrote a letter addressed to the three partners to advise of the complaint.

The lawyers' response

[8] On 18 November 2015, Mr TT wrote to the Complaints Service. He said: "This letter responds to all three complaints 13789, 13809 and 13810 listed above". It was signed by Mr TT as "the Managing Partner".

[9] Mr TT submitted:

(a) LCRO 109/2011 was a decision which related to Mr NI only;

(b) there was no order made against CCJ;

(c) "CCJ was not a party to the complaint nor given fair notice of the fact that the complaint or a ruling could adversely affect CCJ";

(d) "CCJ was not given fair opportunity to consider and respond to the alleged complaint or to be present and involved at the Review Hearing";

(e) Mr TT asserted that he "verbally requested the review officer for permission to be present at the hearing. This request was declined"; and

(f) the LCRO had breached the rules of natural justice.

[10] The conclusions drawn by Mr TT were:

> In all the circumstances, it is in breach of s123(b), the rules of natural justice, and therefore not open to the NZLS Complaints Service to make orders or issue enforcement orders against [CCJ] relying on LCRO 109/2011 Legal Complaints Review Officer's decision 21 February 2013.
>
> [CCJ] was not given the opportunity to be heard. The complaint was dealt with by Mr NI, independent of [CCJ]. Mr NI left our employ and did not involve [CCJ] in the defence of this complaint. To now require [CCJ] to refund monies is grossly unfair and contrary to natural justice.

The Standards Committee determination

[11] The Standards Committee posed two questions to be addressed:[2]

- Did the partners of [CCJ] fail to reduce fees to the sum of $7,000.00 including GST and disbursements in accordance with an order made by the LCRO dated 21 February 2013 in decision LCRO 109/2011?
- Whether the partners of [CCJ] have breached section 156(5) of the Act by failing to pay an order made against Mr NI pursuant to section 156(1)(e) of the Act, in circumstances where section 156(5) makes them jointly and severally liable for the amount payable under the order?

[12] The Standards Committee made the following comments:[3]

> Mr TT and the other partners at the firm had all the relevant information to calculate the amount to be refunded to the TRs. The partners did not do so. Instead, it seems, they did nothing but deny they were liable to refund any amounts to the TRs. The partners had every opportunity to object to the finding made by the LCRO or to seek an amendment to the LCRO's decision. The partners instead objected to the jurisdiction of the LCRO and the process followed by the LCRO.
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> … To suggest that the LCRO has no power to make such orders under the Act would seriously undermine the purpose of the LCRO to review decisions of the Standards Committee's.
>
> The LCRO specifically noted in his decision that as Mr NI was no longer employed by [CCJ] the effect of the order is that monies taken by [CCJ] as fees will need to be refunded to the TRs by the firm. That comment is consistent with section 156(5) of the Act …

[13] The Committee went on to note that a "related entity" is defined in s 6 of the Act to include a partnership:[4]

> The order of the LCRO was therefore binding on the partners at [CCJ] and those partners were jointly and severally liable pursuant to section 156(5) of the Act to pay any amount that is payable under the order. While Mr TT wished to emphasise that there was no order to pay an amount to the TRs, the partners' actions were inconsistent with the spirit of the order which was that the TRs were to have their fees reduced to $7,000.00.

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[2] Standards Committee determination, 19 August 2016 at [7].
[3] At [15]–[17].
[4] At [19], [21]–[22].

> …
>
> The partners complained that Mr TR had waited three years before making a complaint that they had failed to comply with the order. The same can be said with respect to the partners' conduct, it has taken a further three years for the partners to properly respond to this matter. That is too long. …
>
> There is no suggestion that Mr TT was making decisions whether to take steps to comply with the LCRO's order without the other partners. Accordingly, it was appropriate for the Committee to make a finding against each of the partners. In the Committee's view, the partners conduct in failing to reduce fees payable by the TRs to $7,000.00 in accordance with an order of the LCRO would be regarded by lawyers of good standing as being unacceptable and amounted to unsatisfactory conduct under section 12(b) of the Act. The partners' failure to comply with the order pursuant to section 156(5) of the Act also amounted to unsatisfactory conduct under section 12(c) of the Act.

[14] Having found that the conduct of each partner constituted unsatisfactory conduct, the Standards Committee:[5]

(a) Ordered, pursuant to s 156(1)(g) of the Act, that the partners refund the sum of $10,423.13 to the TRs;

(b) imposed a fine of $3,500 on each partner; and

(c) ordered each partner to pay the sum of $1,000 to NZLS by way of costs and expenses.

The application for review

[15] Mr QR and Ms YL jointly lodged an application for review of the determination. The submissions made by the applicants are examined in detail in the review section of this decision, but the primary reasons advanced by them for non-compliance with the LCRO orders were:

> 6.14 On 15 November 2015 Mr TT made a submission to the Lawyers Complaints Service "responding to all 3 complaints", denying the complaint, asserting that the orders under LCRO 109/2011 were not applicable for reasons of non-party status. The submission was copied to the applicants after it was filed, and whereas-
>
> (a) The applicants did not have full knowledge of the complaint.
>
> (b) They did not have input into the defence.
>
> (c) They trusted Mr TT to deal with it appropriately.

[5] At [28].

[16] They submitted that the Standards Committee did not have jurisdiction to consider the complaint because the lawyers were not providing regulated services during the time the LCRO order remained unfulfilled.

[17] They also challenged:

> 14.1 The correctness of the imputation upon the applicants of notice of liability for the order under LCRO 109/2011 and deliberate or reckless non-compliance …; and
>
> 14.2 The validity and propriety of the calibration of quantum of [1] the fine under s156(1)(i) of the Act and [2] the costs under s156(1)(n) of the Act …

[18] The applicants provided additional reasons for the review application:

> The Committee wrongly assumed that the partners 'owed' or potentially owed the sum of $10,423.13 to the TRs, rather than the lesser sum of $2,259.90.

[19] This was accompanied by an affidavit from each of the applicants in which they took issue with the amount ordered to be paid by the partners to Mr and Mrs TR.

Delegation/recusal

[20] This review has been undertaken by Mr Vaughan who has been appointed a delegate to this Office by the LCRO pursuant to cl 6 of sch 3 of the Act. The LCRO has delegated Mr Vaughan to report to me and the final determination of this review as set out in this decision is made following a full consideration of all matters by me after receipt of Mr Vaughan's report and discussion.

[21] Following the telephone conference on 19 August 2017, (discussed in the next section of this decision) the applicants requested that Mr Vaughan recuse himself from this review. The grounds put forward to support this request were:

> First, in your letter of 10 August 2017 you state: "For these reasons, I consider the submissions as to jurisdiction do not succeed". If this was meant to be a final determination, we note that this was done in the absence of a full hearing on the point, without the benefit of full submissions and without notice.
>
> Second, LCRO 109/2011, a decision that you gave, is an important part of this case. We note two aspects about your decision-
>
> (a) Paragraph [94] and [95] are (or were) contemplative of further steps, and thus were not "final"; and
>
> (b) In the Decision (the subject of this application for review), SC3 noted that there is no order per se' against either [YL] or [QR] (paragraph 14).

[22] The challenge to jurisdiction was withdrawn immediately prior to the review hearing, thereby removing this reason for the recusal request. During the course of the review hearing Mr QR acknowledged it was useful for Mr Vaughan to continue with the review, because he had been involved with reviews of all complaints made by Mr and Mrs TR in respect of these matters.

[23] As Mr Vaughan is a delegate to this Office the final determination is made by a warranted officer and there was no reason for Mr Vaughan to recuse himself from progressing the review.

The teleconference 19 August 2017

[24] A telephone conference was convened by Mr Vaughan with the applicants, Mr TT and Mr and Mrs TR on 19 August 2017. The telephone conference was convened primarily because Mr TT had commented to the New Zealand Law Society that he wanted to resolve the matter but it was unclear how he was proposing this would happen.

[25] It was established at the commencement of the telephone conference that the amount to be refunded to Mr and Mrs TR had not been paid. It is important to note here that none of the partners made any assertions in the telephone conference that the amount awarded by the Committee to be repaid was challenged.

[26] To the contrary, Mr QR advised they were happy to pay the amount ordered and had agreed with Mr TT just prior to the Standards Committee determination that an offer would be made to the TRs. He advised that he and Ms YL's reasons for applying for a review of the determination was that they were not dealing with the matter and were surprised nevertheless that they had been "pinged" by the Committee.

[27] Mr TT advised that he was not aware of the grounds put forward by Mr QR and Ms YL in their review application, but disputed that he had assumed sole responsibility for dealing with the complaint. He denied the allegation that he did not consult with his partners as to the responses to be made to the Complaints Service.

[28] The TRs confirmed that an offer to pay had been made but was subject to complaints being withdrawn and no further complaints being lodged. They observed that the Standards Committee had commented that this amounted to an attempt by the applicants and Mr TT to "circumvent the complaints process".[6]

[6] Standards Committee determination, above n 2, at [25].

[29] The offer to pay the amount ordered by the LCRO was made in a letter dated 3 August 2016 which read:

> On a *without prejudice* basis and from a cost effective and pragmatic perspective, we propose to pay the sum of $10,423.13 as sought by the TRs, in full and final settlement of the above complaints or any claims or complaints by the TRs.
>
> The above proposal is on the understanding that there will be no further complaints made by the TRs and we will have no further dealings whatsoever with the TRs or the NZLS in relation to the TRs.

[30] Mr QR also referred to the challenge to the jurisdiction of the Standards Committee on the grounds that he and Ms YL were not providing regulated services during the time when the conduct, by omission to pay the sum ordered, took place.

[31] Mr Vaughan advised Mr QR that this ground for review was not accepted and that he would respond to the issue by letter following the telephone conference.

[32] Mr QR also referred to the submissions as to the quantum of the fine and costs and asserted that the applicants were entitled to reasons for the amount. Mr Vaughan advised that this issue would be addressed in the course of the review.

[33] Mr Vaughan noted that a review was a *de novo* consideration of the complaint and the penalties imposed and the outcome could differ in all respects from that of the Standards Committee determination. He requested the applicants to advise whether, in the light of the discussions during the telephone conference, they wished to continue with the application for review.

[34] The applicants subsequently advised by letter dated 25 August 2017, that they wished the review to continue.

Review

Jurisdiction

[35] In the application for review the applicants asserted that the determination of the Committee was *ultra vires* and therefore invalid. They argued in their application for review that "the applicants could not be guilty of unsatisfactory conduct since they were not providing regulated services to the complainant".

[36] In the telephone conference of 19 August 2017 Mr QR referred to that submission and noted that there had been no response from this Office. In a letter

following the telephone conference Mr Vaughan set out the reasons for not accepting that submission. A copy of that letter is attached to this decision.

[37] At the review hearing Mr QR advised that the objection to jurisdiction was not being pursued.

The lawyer's duties

[38] A disturbing feature of the written and verbal submissions of Mr QR and Ms YL, is an apparent reluctance by them to assume personal responsibility for their professional and partnership obligations. Instead, they argue that other people failed to do certain things. Amongst these, they say that:

(a) this Office did not send them individually a copy of LCRO 109/2011;

(b) Mr NI did not take steps to calculate the amount being refunded;

(c) the Lawyers Complaints Service did not contact them personally to advise them of their obligations; and

(d) Mr TT did not fully appraise them of the detail of the LCRO decision or their personal obligations.

[39] The overall impression that emerges from these assertions is that Mr QR and Ms YL did not acknowledge or accept that, as partners of the firm, they had a professional responsibility to ensure that the partnership met its obligations. They took no active, or proactive, steps to ensure that this occurred. Instead, they seemingly took little or no interest in the matter.

[40] They say that they did not realise the duty to comply with the LCRO decision rested with them as individuals nor that they were exposed to sanctions for failing to do so. A failure to recognise their responsibilities is a failing only on the part of Mr QR and Ms YL. All lawyers must make sure they are aware of their professional responsibilities in whatever capacity they practice in the profession of law. No other person has a duty to make sure that they have the requisite knowledge.

[41] The underlying reason for the submission that they should not have a finding of unsatisfactory conduct made against them, and consequent penalties, is that (they say) Mr TT undertook to "deal" with the complaint; consequently they had no knowledge of the outcome of the complaint or the review orders made in LCRO 109/2011.

[42] Mr TT disputed the correctness of that assertion in the telephone conference of 19 August 2017. However, it is not incumbent on either the Standards Committee or this Office to investigate the dynamics of the relationships between partners in a firm. Underlying this, is the principle that all lawyers must assume personal responsibility for their professional obligations and (in this case) partnership obligations (to ensure payment was made). When this was put to the applicants at the review hearing they did not positively refute that proposition.

[43] That proposition stands as a clear principle regarding professional obligations. It is unacceptable for a lawyer to leave it to any other person to respond to challenges to their professional obligations unless of course, that is on a formal basis, where a lawyer instructs counsel to respond to professional standards issues. Even then, a lawyer must ensure his or her counsel follow instructions and respond where necessary, and appropriately.

[44] At the review hearing Mr QR said he stood by his loyalty to Mr TT as his managing partner and hence did not consider he should interfere with the way in which Mr TT was dealing with the complaint.

[45] That is a somewhat odd submission to make. This was not a matter where Mr QR's loyalty to Mr TT was being challenged. Mr QR had a duty, in his own personal interest, to ensure that the complaints were properly addressed and responded to.

[46] Even when it is accepted that the applicants were not aware of the orders made in LCRO 109/2011 until November 2015, they did not take steps to investigate and ensure the orders were complied with.

[47] In affidavits sworn on 25 October 2017 (the day before the review hearing) Mr QR and Ms YL deposed that they were aware of the complaint by Mr TR that the firm had not made payment as required by LCRO 109/2011 by 9 and 10 November 2015. At the review hearing Mr QR said that they acted straight away by authorising (instructing) Mr TT to make the payment immediately. However, that offer was not made until August 2016 and was an offer which was made on a "without prejudice basis" and on the conditions referred to in paragraph [29] above.

[48] Again, Mr QR and Ms YL attempt to disavow any responsibility for the terms of this letter. However, Mr TT had copied them into the letter when he sent it by email to the Complaints Service.

[49] The Standards Committee referred to the offer as being "made in terms that appeared to attempt to circumvent the complaints process". Mr QR objected to this

wording but it is a reasonable inference for the Committee to draw. Compliance with orders made by the LCRO is mandatory and there can be no preconditions set before orders are complied with.

[50] In these circumstances, it was the duty of each partner to take steps to ensure the order was complied with. Mr QR and Ms YL did not do so. The finding of unsatisfactory conduct is, therefore, confirmed. It is relevant to note that the Committee made this finding in terms of s 12(b) of the Act, that Mr QR and Ms YL's "conduct that would be regarded by lawyers of good standing as being unacceptable …".

Service of LCRO 109/2011

[51] At the review hearing Mr QR asserted that this Office had a mandatory requirement pursuant to s 213 of the Act to ensure that a copy of LCRO 109/2011 was provided to him and Ms YL personally.

[52] In making this assertion Mr QR overlooks the provisions of s 213(2A) of the Act. That section provides that the duty to report the outcome of a review to "All persons who practice in partnership with the practitioner" is performed sufficiently by reporting that outcome to "any 1 of those persons who practice in partnership with the practitioner". In this instance "the practitioner" refers to the practitioner to whom there is a duty to provide a copy of the decision of this Office. This Office complied with the obligations to provide a copy of LCRO 109/2011 in accordance with the terms of the Act.

Quantum

[53] The applicants submitted that the Standards Committee was obliged to give reasons for the quantum of the fine imposed and failing to do so was "tantamount to an error of law". They submitted that the fines imposed were arbitrary and therefore excessive, *ultra vires* and invalid. In support of the submissions they referred to *JR55 for Judicial Review (Northern Ireland)* [2016] UKSC 22, [2016] NI 289 at [30]. Mr QR did not provide a copy of this authority.

[54] At the review hearing Mr Vaughan asked if the applicants had conducted a review of Standards Committee and LCRO decisions to provide comparisons of the fines imposed in this instance with the fines in other decisions. Mr QR advised that he had not. His submission therefore rested on the grounds that the Committee had not provided any reasons for fixing the amount of the fine imposed.

[55] Mr QR asked for the hearing to be adjourned to enable the applicants to carry out the review of other decisions in which fines had been imposed. That request was declined but Mr Vaughan advised that if any material was received from the applicants in this regard prior to the completion of this decision, it would be considered. Nothing has been received from the applicants prior to this decision being issued.

[56] The Standards Committee imposed a fine of $3,500 on each lawyer. The maximum fine that may be imposed by a Standards Committee or this Office is $15,000.[7] In *Workington and Sheffield* the LCRO said: [8]

> In allowing for a possible fine of $15,000 the legislature has indicated that breaches of professional standards are to be taken seriously and instances of unsatisfactory conduct should not pass unmarked.

[57] The LCRO went on to say:[9]

> In cases where unsatisfactory conduct is found as a result of a breach of applicable rules … and a fine is appropriate, a fine of $1,000 would be a proper starting place in the absence of other factors.

[58] A failure to comply with disciplinary orders must be viewed seriously. A wilful failure to do so would attract a greater sanction than that imposed by the Committee in this instance. I accept the applicants failed to appreciate they were exposed to disciplinary consequences for themselves, but their failure to do so is not something that is in their favour.

[59] The applicants did not submit the fines imposed on them should be less than the fine imposed on Mr TT. In any event, that is not a submission that would be entertained, as each partner had an equal responsibility to ensure payment was made. In this instance, the applicants' failure to assume personal responsibility and ensure compliance with the order is an aggravating factor.

[60] The level of fine imposed by the Standards Committee reflects the Committee's view of the seriousness of the offence. The Committee includes lawyers and at least one lay person. Determining the quantum of a fine necessarily amounts to the exercise of a discretion which should only be interfered with for clear reasons. In these circumstances, I can find no clear reason to interfere with the level of the fine imposed and the applicants have provided nothing to show that the Committee's view was out of an appropriate range for this offence.

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[7] Lawyers and Conveyancers Act 2006, s 156(1)(i).
[8] *Workington and Sheffield* LCRO 55/09 (26 August 2009) at [66].
[9] At [68].

[61] The fine of the Committee is therefore confirmed.

[62] Similar principles apply to the quantum of the costs orders. Again, nothing has been provided by the applicants that provides a basis on which to interfere with those orders.

Decision

[63] Having considered all of the issues raised on review, the determination of the Standards Committee is confirmed pursuant to s 211(1)(a) of the Act.

Costs

[64] In accordance with the Costs Orders Guidelines published by this Office, where an adverse finding is upheld, it is usual for an order for costs to be made against the practitioners pursuant to s 210(1) of the Act.

[65] Therefore, in accordance with the Guidelines, the applicants are ordered to pay the sum of $1,600 to be paid to the New Zealand Law Society by no later than 6 December 2017. The order is against the applicants jointly and severally. The total amount to be paid by way of costs is $1,600. Pursuant to s 215(3)(a) of the Act, this cost order may be enforced in the District Court.

Publication

[66] This review involves an important principle that all lawyers must take personal responsibility to ensure professional obligations are adhered to. It is in the interests of all lawyers to be aware of that responsibility and for that reason, pursuant to s 206(4) of the lawyers and Conveyancers Act 2006, I direct that this decision (including the letter annexed) be published in an anonymised format.

DATED this 6th day of November 2017

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D Thresher
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr QR and Ms YL as the Applicant
Mr TR as the Respondent
[Area] Standards Committee [X]
The New Zealand Law Society