

**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 5

**BETWEEN**

**MR IC**

Of [North Island]

Applicant

**AND**

**MR QX**

Of [North Island]

Respondent

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

**DECISION**

[1] Mr IC (the Applicant) filed complaints against Mr QX (the Respondent) which were considered by the Standards Committee. The Committee did not uphold any of the complaints.

[2] The Applicant attributes the Standards Committee's finding to a bias against him resulting in an alleged failure to have investigated the complaints properly.

[3] A review hearing was arranged on 6 July 2011. Both parties attended.

*Background*

[4] Both parties are lawyers. The Applicant acted for a plaintiff seeking judgment against a debtor for the non-payment of services. The defendant was represented by the Respondent.

[5] After being served the Notice of Claim, the defendant consulted the Respondent as a first-time client, and informed him of an 'understanding' that they had with the plaintiff as regards payment of the debt. The defendant instructed the Respondent to forward a cheque to the Applicant for the amount stated in the claim as representing the debt, to be offered in full and final satisfaction of the amount claimed. The

Respondent followed his client's instructions, and sent a letter and payment to the Applicant accordingly.

[6] The Respondent's client also asked him to forward a copy of this letter to the plaintiff. The Respondent obliged.

[7] The settlement cheque was not accepted and the Applicant returned it to the Respondent for the reason that the cheque amount did not include costs.

[8] The Respondent informed his clients. There was some discussion between them as to the details of the amount claimed, the defendant apparently informing the Respondent that there were additional amounts added to the claim that exceeded the debt. They were unaware of the details and as a result the Respondent wrote to the Applicant to seek clarification.

[9] The Applicant did not respond promptly. Due to time marching on the Respondent filed a Statement of Defence in the Court to prevent the plaintiff obtaining judgment by default. This successfully halted the proceeding.

[10] It appears that around that time the clients of both lawyers agreed between themselves that the defendant would pay an agreed amount into the bank account of the plaintiffs in full satisfaction of the debt. There is no evidence that either of the lawyers were involved in that arrangement.

[11] However, this left unresolved the matter of the Applicant's costs. The costs he claimed were not only the original amount stated in the Statement of Claim but now included an application for default judgment, this having been filed already by the Applicant, and preparation of an information capsule by the plaintiff.

#### *The complaints*

[12] Arising from the above, the Applicant filed two complaints against the Respondent. The first complaint alleged that the Respondent had breached Rule 10.2 which states: "*A lawyer acting in a matter must not communicate directly with a person whom the lawyer knows is represented by another lawyer in that matter except as authorised in this Rule.*" This was based on the Respondent having sent to the Applicant's client a copy of his letter as instructed by his client.

[13] The second complaint alleged that the Respondent had filed a "bogus defence" for the defendant, which had the effect of preventing default judgment from being entered, and consequently led to the Court not awarding costs. The nub of this

complaint is that the Respondent's actions in filing a defence without cause caused loss to the Applicant or his client.

#### *Review Hearing*

[14] The Applicant filed a review because he considered that the Standards Committee *"had failed to properly investigate this complaint and they have deliberately ignored facts. [the Respondent] wrote directly to my client [name] Limited to engage with them. He initiated the contact. My client then felt obliged to contact him over the issues that related to me recovering the debt."*

[15] It is undisputed that the Respondent had sent to the Applicant's client a copy of a letter he had sent to the Applicant. The covering note read: *"I enclose for your information a copy of a letter sent to your solicitor."* The Respondent stated that this was done at the specific request of his client. In considering this complaint the Standards Committee took into account the intent of the letter and the accompanying cheque and stated: *"The Committee formed the view that in this instance sending a carbon copy of correspondence to [the Applicant's client] did not amount to a breach of the Rules."*

[16] It further appears that the Applicant's client soon afterwards sent an email to the Respondent which he acknowledged. The Applicant's client sent a second email to the Respondent whereupon the Respondent informed the Applicant's client that he could not communicate with her and referred her back to her own lawyer, the Applicant.

[17] Of this second communication the Standards Committee considered there had not been a breach of Rule 10.2. The Committee considered that the Respondent was obliged to answer the email query and the manner in which he did this indicated that the Respondent was aware of Rule 10.2. Accordingly, the Committee decided to take no further action in respect of this part of the complaint because it was not necessary pursuant to Section 138(2) of the Act.

[18] The Applicant was of the view that the Standards Committee ought to have made a finding against the Respondent for having sent to the Applicant's client a copy of the letter he had sent directly to the Applicant.

[19] I put it to the Respondent that he was not obliged to comply with his own client's request to send a copy of the letter to the Applicant's client, and could have suggested to his own clients to forward it to them. The Respondent agreed, and on reflection said

that this is what he ought to have done. I record that the Respondent conveyed his apology directly to the Applicant, and that this was accepted by the Applicant.

[20] However, the Applicant continued that his principal grievance was against the Standards Committee for failing to have made a finding which reflected the facts of the situation, namely that the evidence was undisputed by the Respondent himself, that he had sent a copy of this letter to both the Applicant and the Applicant's client.

[21] In considering this matter I have some difficulty in seeing on what basis the Standards Committee should have described the copy letter sent by the Respondent to the Applicant's client as "*a carbon copy*" rather than dealing with the issue on the facts. While it may be debateable whether forwarding of a copy of a letter in this situation amounts to a 'communication' with the client such as to amount to a breach of Rule 10.2, the Standards Committee did not turn its mind to this issue, electing instead to dismiss the complaint.

[22] Given that the Applicant's main criticism was the Standards Committee's failure to have identified this as inappropriate conduct, it seems that I should correct this omission. I therefore record that the Respondent's conduct, in sending the copy letter to the Applicant's client was inappropriate. The Respondent has acknowledged that the action was inappropriate.

[23] However, it is clear from the way in which he dealt with the subsequent communication from the Applicant's client that the Respondent is aware of his professional obligations. Given that the Respondent has acknowledged the error and apologised to the Applicant, it is my view that no further action is required in respect of this matter.

[24] I now turn to the second part of the complaint which alleged that the Respondent had filed a "*bogus defence*" for his client, thereby defeating the plaintiff's right to obtain default judgment, and incurring further costs for the plaintiff. Although the Applicant did not refer to Rule 2.3 of the Rules of Conduct and Client Care, his complaint appears to be covered by this Rule which states lawyers must use legal processes only for legal purposes.

[25] From the Applicant's perspective a debt was clearly owed to his client and he considered that obtaining judgment ought to have been a straightforward matter. He interpreted the Respondent's actions as a deliberate "sabotage" of the plaintiff's claim, intended to bypass his involvement in the settlement which in the event had the effect of leaving his client with his solicitor's costs unpaid.

[26] The Applicant explained that at some time in the past the defendant had tendered a cheque to him which had bounced. He therefore held the view that his client's debtors were taking such action as they could to avoid paying the debt or alternatively reaching an agreement directly with the plaintiff to avoid paying any additional costs such as the plaintiff's costs in filing their claim. The Applicant saw the Respondent as being in league with his clients in achieving this end.

[27] The Respondent replied that he knew nothing of the prior matters to which the Applicant referred. He said that his first encounter with his clients was when they had been served the proceeding on this occasion, at which time they had consulted him and informed him of a payment arrangement they had with the plaintiff. He then acted on his client's instructions to tender a cheque for the amount of the claim.

[28] After hearing this, the Applicant said he accepted the Respondent's explanation. The Applicant was unaware that the Respondent's contact with his client the defendant was recent, and stated that had he known about this, he would not have perceived the matter in the way that he did.

[29] As noted above, the Applicant (or his client) had declined to accept the payment of the amount tendered and had returned the cheque to the Respondent. The Respondent's client had disputed the amount claimed and not having received an explanation about quantum from the Applicant, the Respondent filed a Notice of Defence on the last day that he could do so before time expired to prevent a default judgment being entered.

[30] Given that the Respondent's client had disputed the quantum of the claim and also contended that there was a payment arrangement with the plaintiff, it could not be said that the respondent had filed "a bogus defence".

[31] The Applicant was also critical of the Court for failing to impose a costs award, although it is difficult to see on what basis this could have been done if the Court accepted that the Statement of Defence was in fact filed in time. The fact that the Applicant disagreed that this was the case is irrelevant and cannot be attributed to the Respondent.

[32] Having heard from both the parties, I agree that this did not raise any professional conduct issues and that the Standards Committee rightly decided to take no further action.

[33] There were some other matters raised in relation to the above complaints, which had not been raised in his original complaint to the Standards Committee. The review process is not intended to consider complaints that have not been placed before a Standards Committee in the first instance. The Applicant nevertheless alleged that the Respondent was involved in, or had knowledge of, the actions taken by the defendant to defeat the legal costs included in the plaintiff's claim. This intended to show that there had been an intention to deprive the Applicant of his fees.

[34] Having heard from both parties I can find no basis for this allegation. Moreover, the Applicant acknowledged that he had discussed with his own clients what the impact would be if they settled directly with the defendant, in particular that they would become personally liable for his (the Applicant's) fees. It seemed to me that this was a complete answer to the issue and I have some difficulty understanding why he claimed that the Respondent's actions had deprived him of his fees, when it appears that the plaintiff had accepted responsibility for them.

[35] Having conducted the review my overall impression was that the Applicant accepts that a number of the allegations that he raised against the Respondent may not have been well-founded in the light of the Respondent's limited knowledge of the history between the two clients.

[36] For reasons given above, I see no basis for altering the Standards Committee's decision.

### **Decision**

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

**DATED** this 17 day of August 2011

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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:

Mr IC as the Applicant  
Mr QX as the Respondent  
The Auckland Standards Committee 5  
The New Zealand Law Society