

LCRO 25/2016

**CONCERNING**

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

**AND**

**CONCERNING**

a determination of the [Area] Standards Committee [X]

**BETWEEN**

**RZ**

Applicant

**AND**

**LB**

Respondent

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

**DECISION**

**Introduction**

[1] Mr RZ has applied for a review of a decision by the [Area] Standards Committee [X] to take no further action in respect of his complaint concerning the conduct of the respondent Mr LB.

[2] The complaint arises from a falling out between Mr RZ and Mr HD when they were the two directors of a company called WMN Ltd (WMNL).

[3] Mr LB acted for Mr HD in connection with that falling out.

**Background**

[4] WMNL was a private company incorporated in June 2014. As well as being the directors of the company, Messrs RZ and HD each held 50 shares in WMNL.

[5] WMNL hired safety [equipment] to the building industry. Under its constitution, the expectation was that business decisions would be made by both directors.<sup>1</sup>

[6] Mr HD had contacts with the building industry thought to open doors for the pursuit of the business. Mr RZ was the better placed of the two to contribute or advance money for the purchase of safety net stock.

[7] According to Mr RZ, he had contributed \$30,000 and Mr HD \$12,500 to the business by the time of the falling out.

[8] The business did not thrive. It was not until January 2015 that an order was received and that was not of any real consequence. By March 2015, Mr RZ and Mr HD accepted that their venture was a failure and should be wound up.

[9] Discussion ensued over the fate of the [equipment] in stock and the division between them of what was left of the business.

[10] A further order for [equipment] left Mr HD more positive but Mr RZ doubted it was genuine. Acting on what he claimed was an agreement already reached with Mr HD for the sale of the existing stock, Mr RZ disposed of that stock.

[11] On 9 April 2015, Mr LB, a lawyer then employed by [law firm], wrote to Mr RZ on the instructions of Mr HD. The letter demanded the return of the safety [equipment] that had been in Mr RZ's care so as to fulfil the supposed further order.

[12] Mr RZ was told that if they were not returned immediately the issue of court proceedings would be considered.

[13] On 22 May 2015, Mr LB commenced District Court proceedings in the name of WMNL for injunctive relief to secure the return of the safety [equipment].

[14] At the first call of those proceedings on 28 May 2015 counsel for Mr RZ questioned counsel instructed by Mr LB to appear for Mr HD, about the authority for and legitimacy of those proceedings.

[15] A follow-up letter that day from Mr RZ's solicitor repeated those concerns. Attention was drawn to rr 5.36 and 5.37 of the High Court Rules 2016. These preclude

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<sup>1</sup> See [34] below.

the filing of documents unless authorised by or on behalf of a party, and treat a filing as a warranty to the Court and all parties of the existence of due authority.<sup>2</sup>

[16] The letter further advised that unless the proceedings were withdrawn, Mr RZ would be obliged to file a cost-incurring response.

[17] Withdrawal did not immediately follow and Mr RZ's lawyer filed a notice of opposition in the District Court on 5 June 2015, in order to ensure compliance with a date set by the Court at first call.

[18] Shortly afterwards, Messrs RZ and HD settled their differences and recorded this in a deed of settlement.

### **The complaint**

[19] Mr RZ lodged his complaint against Mr LB, dated 28 July 2015, with the New Zealand Law Society Complaints Service (Complaints Service).

[20] The substance of his complaint was that:

- (a) Mr LB had wrongfully commenced proceedings in the District Court against Mr RZ in the name of WMNL without Mr RZ's authority, this being necessary as he was a co-director.
- (b) Mr LB had then breached professional standards by being unduly slow in withdrawing or discontinuing the proceedings causing Mr RZ to incur otherwise unnecessary legal costs.

### **The Standards Committee decision**

[21] The Standards Committee delivered its decision on 21 December 2015.

[22] The Committee determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act), that no further action on the complaint was necessary or appropriate.

[23] In reaching that decision the Committee:

- (a) Recognised that any court action by Mr HD should have been derivative – see s 165 Companies Act 1993.

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<sup>2</sup> District Court Rules 2014, rr 5.38 and 5.40 are to the same effect.

- (b) Noted the need to apply to the High Court for leave to proceed in that way.
- (c) “Tended to agree” that there was at least an arguable case for leave to bring a derivative proceeding against Mr RZ.
- (d) Recognised that, in filing proceedings in the District Court, Mr LB “may not have followed the correct process”, but that could not be considered to amount to a breach of professional standards.
- (e) Held, as regards the withdrawal of the proceedings, that “Mr LB was only able to act on the instructions of his client”.
- (f) Noted that the parties had thereafter entered into a settlement agreement by which each party would bear their own costs and “tended to agree with Mr LB that matters relating to Mr RZ’s costs should have been addressed in the settlement or referred to the court for directions. These (were) not matters to be re-litigated within the disciplinary framework”.

### **Application for review**

[24] Mr RZ filed an application for review on 11 February 2016. The outcome sought is that Mr LB be held liable for all Mr RZ’s legal costs from when he first instructed his lawyers until the matter was resolved.

[25] Mr RZ submits that:

- (a) The issue was Mr LB’s lack of authority to commence proceedings in the name of WMNL, not whether he had a case for a derivative action.
- (b) If Mr LB knew what the correct procedure was, then his action in filing in the District Court without leave was a deliberate procedural breach. If he did not know what the correct procedure was, then his conduct fell below professional standards. Either way he (Mr RZ) has incurred legal costs.
- (c) It was no answer on the delay issue for Mr LB to say that he could only act on his client’s instructions. Those were not from WMNL but his client

Mr HD. The lack of authority to file the proceedings rendered maintenance of them untenable.

- (d) Mr RZ had made it clear throughout (including in the settlement discussions) that he sought costs relief not from Mr HD, who would not have known better, but from Mr LB.

### **Mr LB's response**

[26] Mr LB was invited to comment on the review application. He did so on 4 March 2016, advising that he would rely on his 2 October 2015 response to the original complaint which had been accompanied by a statutory declaration from Mr HD.

[27] Mr LB's response to the complaint was lengthy, diffuse, and notable for internal contradictions. I have distilled it down to these points:

- (a) When he was instructed by Mr HD on 2 April 2015, Mr LB checked WMNL's incorporation documentation and found no apparent (to him) impediment to Mr HD, as a director, appointing and instructing legal counsel on behalf of WMNL.
- (b) "Being a director, Mr HD possesses the powers to act on behalf of the company", he wrote. Nothing in the constitution of WMNL had "restricted Mr HD's ability to provide directions on behalf of the company".
- (c) In Mr LB's view, the fact that Mr HD was a duly appointed director was all he needed to give assurance of authority to act for WMNL.
- (d) The proceedings had been issued in the best interests of WMNL.
- (e) Nevertheless, he advised Mr HD that should Mr RZ, being also a director, object to proceedings against himself:

[W]e as lawyers of the company will not be in a position to continue the proceedings, unless derivative action proceedings were commenced ... [which would] incur significant legal fees and court costs ... [I]f proceedings were commenced against Mr RZ there [was] a risk that the company would be made liable for indemnity costs if the proceedings...[did] not succeed.

- (f) Aware by 29 May 2015 that Mr RZ did not consent to the commencement of the proceedings, Mr LB told Mr HD that day that he could not continue to take instructions from him as instructions from the company and, in particular, that:
- the directors' instructions are conflicting ... [so] ... I would be unable to continue proceedings as it would conflict with the instructions of Mr RZ, and I would be unable to withdraw the proceedings as it would conflict with the instructions of Mr HD.
- (g) Mr HD wanted time to think matters through and instructed Mr LB to advise counsel for Mr RZ (as he then did) that there would be a response by the following week, but that he (Mr LB) was not to withdraw the proceedings in the meantime.
- (h) In his view, he could not withdraw the proceedings until, on 9 June 2015, he had Mr HD's authority to do so. In any event, it had been in the interests of Mr RZ to file his notice of opposition and affidavit, and that served "further (to) inform Mr HD how he could proceed in the litigation". Therefore, whether Mr LB contacted Mr RZ earlier or otherwise was an "irrelevant consideration".
- (i) Costs should have been addressed during the settlement negotiations or left open for court direction but no such steps had been taken.

*Mr HD's statutory declaration*

[28] Mr HD had declared that:

- (a) He told Mr LB that he was giving instructions as a director and on behalf of WMNL.
- (b) He was advised by Mr LB that "the most appropriate manner of proceedings would be through derivative proceedings in the High Court and that the costs in doing so [were] likely to be significant, and that there [would] be no guarantee of securing a costs award".
- (c) When the letter of demand proved unproductive "I instructed [Mr LB] to commence the proceedings".

- (d) On 29 May 2015, and after discussion, he instructed Mr LB in clear terms that he did not wish to withdraw the proceedings and to wait until he instructed him further.
- (e) On 9 June 2015, he instructed Mr LB that he wished to negotiate a settlement and “the resulting communications secured a settlement which was mutually agreeable to myself and to Mr RZ”.

### **Review on the papers**

[29] The parties have agreed to the review being dealt with on the papers. This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review based on all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[30] I record that having carefully read the complaint, the response to the complaint, the Committee’s decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party. Based on the information available I have concluded that the review can be adequately determined in the absence of the parties.

### **Nature and scope of review**

[31] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:<sup>3</sup>

... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to “any review” ...

... the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the

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<sup>3</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[32] More recently, the High Court has described a review by this Office in the following way:<sup>4</sup>

A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[33] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

- (a) Consider all the available material afresh, including the Committee's decision; and
- (b) Provide an independent opinion based on those materials.

## **Analysis**

### *WMNL's constitution*

[34] This provided:

- (a) By cl 13.3 that unless fixed by the directors the quorum for the transaction of business was a majority of the directors. Thus, in the absence of any suggestion that the directors themselves had agreed to some modification of this provision, a quorum required both.
- (b) By cl 11.1 that the minimum number of directors, unless otherwise determined, was one, and if there was but one that director had plenary powers—cl 14.1. But, as is common ground, at all material times both Mr RZ and Mr HD were directors.

### *Authority to commence proceedings*

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<sup>4</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].



[35] Rule 5.38 of the District Court Rules 2014 categorically prohibits the filing of a document on behalf of a party unless the solicitor in question is “authorised by, or on behalf of, the party to file [it]”.

[36] Mr LB claims that when the proceedings were filed his client was the company, WMNL. He could scarce assert otherwise given it was to be the plaintiff. But that claim is premised on the fallacious proposition that instructions from Mr HD were effective instructions from the company.

[37] A plain reading of the constitution of WMNL reveals that any significant step on its behalf required the direction of both directors. If, as was the case here, they had fallen out then recourse could only be to the High Court, whether under s 165 or otherwise of the Companies Act 1993.

[38] Mr LB filed the proceedings without any proper authority to do so. And, given r 5.38, the very act of filing them operated to mislead the court in that respect.

*Court process - disposition of proceedings other than by hearing*

[39] Rule 15 of the District Court Rules 2014 empowers the court to strike out a pleading that is frivolous or vexatious or otherwise an abuse of the court’s process. A proceeding is frivolous if it “trifles with the court’s processes”.<sup>5</sup> An abuse arises when a proceeding is brought with an improper motive or to obtain a collateral advantage beyond that legitimately gained from a court proceeding.<sup>6</sup>

[40] Section 44 of the District Courts Act 1947 (then in force) permitted a judge to order a transfer to the High Court of a misfiled proceeding. However, it seems probable to me that a judge faced with proceedings for which there was a complete absence of District Court jurisdiction, and which was known to Mr LB when they were filed, would opt to strike the proceedings out altogether.

*Rule 2.3*

[41] Rule 2.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) calls for attention:

A lawyer must use legal processes only for proper purposes. A lawyer must not use, or knowingly assist in using, the law or legal processes for the purpose of

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<sup>5</sup> *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [89].

<sup>6</sup> At [89].

causing unnecessary embarrassment, distress, or inconvenience to another person's reputation, interests, or occupation.

[42] "Improper" has been defined as incorrect, unsuitable or irregular, fraudulent or otherwise wrongful.<sup>7</sup> What constitutes a proper or improper purpose will be determined by an objective appraisal of the facts of each individual case.

[43] By mentioning the District Court and the lesser cost involved in litigating in that jurisdiction, Mr LB effectively encouraged Mr HD to instruct him to commence the proceedings in the wrong way and in the wrong court: in short to proceed illegitimately. He did so, in my view, with the improper motive of persuading Mr RZ to fall in with Mr HD's wishes.

[44] The subjective view of Mr LB that he was acting in the best interests of Mr HD and/or WMNL cannot serve to excuse in these respects.

[45] In that regard, I do not place particular weight upon Mr HD's statutory declaration, provided by Mr LB as part of his response to Mr RZ's complaint, and on which he relies in response to the application for review.

[46] Mr HD's statutory declaration is couched in formal, almost legalistic, language. For example, Mr HD deposes that

I recall that [Mr LB] and I discussed in what capacity I am providing instructions ... I advised him that I was instructing him in my capacity a director of the Company and that I am providing instructions on behalf of the Company.

[47] There are further references to instructions provided, "proceedings being commenced", "securing a costs award", "a letter of demand", "how I may commence derivative action", "resulting communications secured a settlement which was mutually agreeable".

[48] This is the language of a very well-informed client.

[49] The similarity between the language of Mr LB (and that of many lawyers) in his response to the complaint, and the language of Mr HD's statutory declaration, points strongly to Mr HD having received considerable assistance with its preparation.

[50] I do not suggest that Mr HD's declaration is untruthful. Rather, I regard it as remarkably supportive of Mr LB's position that he was merely following the instructions of an assertive and informed client.

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<sup>7</sup> Bryan A Garner *Black's Law Dictionary*, (9th ed, Thomson Reuters, St Paul, 2009) at 826.

[51] For that reason, I regard it as being largely self-serving of Mr LB and to be treated accordingly.

*Competence and reasonable care*

[52] Mr LB was obliged by r 3 of the Rules to act competently and with reasonable care in providing regulated services.

[53] A lawyer acting with reasonable competence would not have:

- (a) Read the constitution of WMNL as enabling one of two directors to have it embark upon the commencement of court proceedings without the authority of the other director.
- (b) Encouraged a client to pursue a legally untenable course of action, such as was the District Court filing.
- (c) Filed proceedings in that Court when as was obvious, they had no place there.

[54] When these acts and omissions of Mr LB are brought together, the unavoidable conclusion is that he is guilty of unsatisfactory conduct in terms of s 12(a) and (c) of the Act. In particular:

- (a) His conduct in issuing proceedings in the name of WMNL against one of its directors was conduct that fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.
- (b) He breached rule 2.3 by not using legal processes for a proper purpose, thereby causing unnecessary inconvenience to Mr RZ's interests.

*Mr RZ's costs*

[55] The outcome sought by Mr RZ is that Mr LB is ordered to pay the legal fees that he (Mr RZ) incurred in filing a defence to the misconceived proceedings in the District Court.

[56] Mr RZ has provided copies of the invoices that he received from his lawyers for the work they did on his behalf in responding to the proceedings issued by Mr LB. These total \$6,418.11 (including GST and disbursements).

[57] The parties settled the proceedings and recorded that in a settlement agreement dated 17 June 2015, a copy of which is included in the material before me.

[58] Relevantly, the terms of that agreement include the following:

3. The parties will jointly execute a notice of discontinuance to discontinue the proceedings and file the same [in] the District Court [at] [City] immediately upon the execution of this agreement, with no issue as to costs.

...

6. Subject to clause 7 below each party is to bear their own costs in respect of all matters arising out of these proceedings, including the preparation, execution and implementation all this agreement, and neither party shall be entitled to claim against the other for any matters arising out of the Proceedings, this Deed, or [any] matters relating to or arising from same.

7. This agreement is without prejudice to either party's right to lodge a complaint to the New Zealand Law Society in relation to this matter.

8. This agreement constitutes full and final settlement between the parties

...

[59] Read together, it is arguable that those terms do not prevent Mr RZ from seeking costs against Mr LB. The costs limitations in cls 3 and 6 relate to costs between the parties. The parties were Messrs HD and RZ.

[60] That being said, the agreement clearly records Mr RZ's agreement to "bear [his] own costs for all matters arising out of [the] proceedings".

[61] On the other hand, cl 7 of the settlement agreement leaves open the possibility of a complaint against either lawyer. A potential outcome of a successful complaint against a lawyer is that the lawyer is ordered to pay "[compensation] to any person who has suffered loss by reason of any act or omission of a practitioner".<sup>8</sup>

[62] I am not persuaded that the settlement agreement is readily capable of being construed in favour of Mr RZ being able to recover his legal fees from Mr LB. There is uncertainty as between the intended effect of the relevant clauses. In my view, clearer

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<sup>8</sup> Section 156(1)(d) of the Lawyers and Conveyancers Act 2006. The maximum amount that may be ordered is \$25,000; see cl 32 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.

wording would be required before I was prepared to imply a term that Mr RZ can make that claim against Mr LB; for example, reference to a claim for recovery of fees as part of any complaint.

### *Penalty*

[63] I regard Mr LB's conduct as moderately serious. It should have been apparent to him that there was no possible basis for one director to bring proceedings in the name of the company against the other director. WMNL's constitution simply did not allow this to occur.

[64] In filing proceedings, Mr LB warranted to the District Court that he was properly authorised to do so. This was patently incorrect.

[65] The proceedings were designed to bring about acquiescence by Mr RZ to Mr HD's view. That was not a proper purpose.

[66] In my view this conduct is appropriately marked with a fine of \$2,000 and Mr LB is ordered to pay that.

### *Costs*

[67] Where a finding of unsatisfactory conduct is made against a lawyer, a costs award in favour of the New Zealand Law Society will usually be made.

[68] This was a hearing on the papers. The issues were of average complexity.

[69] Consistent with the costs guidelines followed by this office, I consider a costs order of \$1,200 is appropriate.

### **Decision**

[70] Pursuant to s 211(1)(a) and (b) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is reversed and a finding of unsatisfactory conduct substituted.

[71] Pursuant to s 156(1)(i) of the Lawyers and Conveyancers Act 2006, Mr LB is ordered to pay a fine to the New Zealand Law Society in the sum of \$2,000.

[72] Pursuant to s 210(1) of the Lawyers and Conveyancers Act 2006, Mr LB is ordered to pay costs to the New Zealand Law Society in the sum of \$1,200 within

30 days from the date of this decision. That order may be enforced if necessary, in the civil jurisdiction of the District Court.

**DATED** this 9th day of November 2017

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**R Maidment**  
**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 RZ as the Applicant  
Mr LB as the Respondent  
Mr PQ as the Representative for the Respondent  
[Area] Standards Committee [X]  
New Zealand Law Society