

LCRO 282/2014

CONCERNING

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

AND

CONCERNING

a determination of the Standards Committee

BETWEEN

DL
Applicant

AND

Mr VM and Mrs VM
Respondents

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

DECISION

Background

[1] Mr DL has applied for a review of a determination by the Standards Committee that his conduct in issuing proceedings to recover legal fees while the Legal Complaints Review Officer (LCRO) was reviewing a Standards Committee determination on those costs was unsatisfactory. At the time Mr DL took those steps, he was a partner in [Firm A], a firm of barristers and solicitors.

[2] [Firm A] had acted for [Company A] which was placed in liquidation on 31 August 2011. Mr VM was a director of [Company A].

[3] The complaint now under review arises from another complaint by Mr VM (complaint 3550) against a Mr HC, also formerly a lawyer with [Firm A]. Central to that complaint was Mr HC's advice on debt recovery which did not lead to a successful outcome for [Company A].

[4] On 1 March 2012 the Standards Committee censured Mr HC and reduced [Firm A]'s legal fees. Mr HC then applied to the LCRO for a review of that decision. He did not specifically challenge the Committee's finding with respect to fees.

[5] On 12 April 2012, before the LCRO had completed its review and issued a determination, Mr DL wrote to Mr VM demanding payment of the balance of outstanding accounts and the costs order. Mr DL attached a draft notice of claim to his letter.

[6] The LCRO determination with respect to Mr HC was issued on 21 March 2014. The LCRO overturned the censure order, and confirmed the reduction of [Firm A]'s fees, although increasing the quantum (LCRO 71/2012).

The complaint

[7] Mr and Mrs VM laid a complaint against Mr DL on 7 June 2012, the substance of which is:

- (1) Mr DL attempted to recover fees while the complaint relating to those fees were the subject of review by the LCRO; and
- (2) Incorrect information related to transfer of funds was provided to the liquidator.

Standards Committee decision

[8] The Standards Committee delivered its decision on 29 October 2014. The Committee determined that Mr DL had acted inappropriately and had contravened his professional obligations because:

- (a) His letter and the attempt to recover fees while those fees were the subject of an LCRO review amounted to a breach of s 161 of the Lawyers and Conveyancers Act 2006 (the Act). Mr DL was or ought to have been aware that the LCRO had been asked to review the costs owed by [Company A], and that [Company A] disputed the amount of the costs. The Committee concluded that Mr DL had no reasonable basis to threaten the commencement of proceedings in relation to those costs.
- (b) The Standards Committee also concluded that as Mr DL was aware or ought to have been aware that Mr VM had not signed the letter of

engagement, or agreed to act as guarantor, he had no reasonable basis for asserting that Mr VM was personally liable for the debt.

[9] The Committee concluded that Mr DL's actions constituted unsatisfactory conduct for those reasons.

[10] In relation to the other complaints by Mr and Mrs VM, the Standards Committee recorded that a number of issues raised related to Mr HC's representation of [Company A], and had previously been considered by the Standards Committee and the LCRO.

[11] In relation to the complaint by Mr and Mrs VM that Mr DL had provided information to the liquidator and that the information was not correct, the Standards Committee was satisfied that Mr DL had a statutory duty to provide this information and that any inaccuracy was inadvertent. The Committee concluded that Mr DL's actions in relation to this aspect of the complaint did not reach the threshold for any disciplinary action.

[12] The Standards Committee did not consider it appropriate to make any orders of publication of Mr DL's name or impose orders for compensation or costs in relation to the finding of unsatisfactory conduct.

[13] Mr DL disagreed with the determination, and applied for a review on 9 December 2014.

Nature and Scope of Review

[14] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:¹

... 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

¹ *Deliu v Hong* [2012] 158, [2012] NZAR 209 at [40]-[41].

the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[15] More recently, the High Court has described a review by this Office in the following way:²

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.

[16] 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 consider the available material afresh and provide an independent opinion based on those materials.

Review on the papers

[17] Section 206(2) of the Act allows an LCRO to conduct a review on the basis of all the information available, if the LCRO considers that the review can be adequately determined in the absence of the parties. This is one such matter, and the parties have agreed to this review being dealt with on the papers.

Review application

[18] Mr DL would like the unsatisfactory conduct finding reversed, and submits that:

- (1) He did not breach s 161 of the Act because he had not issued proceedings and had only threatened them against Mr VM.
- (2) He was not aware of Mr HC's submissions on costs because Mr HC had left [Firm A] and New Zealand.
- (3) The document he relies on as the basis of a claim against Mr VM personally, is not a guarantee but a contract of retainer. He also argues that Mr VM can also be deemed to be bound by the terms of the retainer, as a director of [Company A].

² *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

- (4) He considers the Committee did not take his submissions sufficiently into account.
- (5) He also said that the time elapsed between the complaint and the Standards Committee determination was unfairly long, being over two years.

[19] As to the latter, a connection is implied between Mr DL's resignation from partnership and break from legal practice and delays in complaints made and review applications by Mr and Mrs VM being determined under the Act. This Office is not well placed to comment on any unfairness delay may have caused where, as here, a practitioner links perceived unfairness to delays in the process of review by this Office. That point cannot be advanced further in the course of this review.

[20] Mr and Mrs VM do not wish to file further submissions, and rely on their submissions to the Standards Committee.

Analysis

[21] Mr DL has not adduced new evidence in support of his application for review, which I have carried out on the basis of the information provided to the Committee, and the additional material provided on review. The primary focus of this review is on the operation of s 161 of the Act on the present facts.

Did Mr DL's threat to issue proceedings constitute a contravention of s 161?

[22] Section 161 of the Act says:

161 Stay of proceedings for recovery of costs

- (1) If, under section 141, a Standards Committee gives notice to a practitioner or former practitioner or an incorporated firm or former incorporated firm that it has received a complaint under section 132(2) about the amount of a bill of costs rendered by that practitioner or former practitioner or incorporated firm or former incorporated firm, no proceedings for the recovery of the amount of the bill may be commenced or proceeded with until after the complaint has been finally disposed of.
- (2) Where a Standards Committee makes a final determination on a complaint made under section 132(2), it must certify the amount that is found by it to be due to or from the practitioner or former practitioner or incorporated firm or former incorporated firm in respect of the bill and under the determination.

- (3) The certificate of the Standards Committee or, as the case may be, the decision of the Legal Complaints Review Officer on a review of the determination is final and conclusive as to the amount due.
- (4) For the purposes of this section, a complaint is finally disposed of—
 - (a) if—
 - (i) the Standards Committee has made a final determination on the complaint or has, under section 138, decided to take no action, or, as the case may require, no further action on the complaint; and
 - (ii) the complainant has not, within the time allowed, applied to the Legal Complaints Review Officer for a review of the determination or decision; or
 - (b) if the Legal Complaints Review Officer has conducted a review of the determination or decision made by the Standards Committee on the complaint and has reported the outcome of the review to—
 - (i) the complainant; and
 - (ii) the practitioner or former practitioner or incorporated firm or former incorporated firm; and
 - (iii) the Standards Committee.

[23] The focus of s 161 is on quantum. The question of liability for a bill of costs is dealt with under s 132(2) of the Act. Only a person who is chargeable with a bill of costs has the statutory entitlement to complain about the amount of the bill. There is no question on [Company A]'s part that it is a person chargeable with [Firm A]'s fees. It has accepted as much by making a complaint.

[24] However, if Mr DL is correct about the question of liability, Mr and Mrs VM could also have laid a complaint about fees under s 132(2), because on Mr DL's view, they are both persons chargeable for the purposes of s 132(2). However, no complaint has been made by Mr or Mrs VM pursuant to s 132(2). The legal question of who is liable for paying the fees arises, Mr DL says, as a result of the contract of retainer. He says that Mr and Mrs VM may be liable, and for the purposes of the Act would be parties chargeable, by virtue of the terms of engagement.

[25] The question of liability is not one that this Office can determine on the present facts. Potential liability arises as a product of s 132(2). Mr and Mrs VM dispute liability. In the circumstances, neither of them would wish to acknowledge a statutory entitlement to make a complaint about the amount of fees. The VMs' position on liability rests on the premise that only [Company A] can do that. [Company A]'s right to challenge the quantum of [Firm A]'s fees was determined in LCRO 71/2012 pursuant to

s 161(4)(b). There is no evidence of [Company A] or the liquidator having taken any further challenge to that decision.

[26] Section 161(1) precludes a practitioner from commencing or proceeding with proceedings for the recovery of the amount of a bill until a complaint about the amount of the bill has been finally disposed of. That restraint would be triggered on the present facts by Mr and Mrs VM personally making a complaint pursuant to s 132(2) and Mr DL receiving notice of that from NZLS pursuant to s 161(1).

[27] The evidence is that Mr DL wrote to Mr VM demanding payment of the balance of outstanding accounts and the costs order on 12 April 2012. Mr DL is said to have attached a draft notice of claim to his letter. There is no evidence of Mr DL having commenced or proceeded with a proceeding against Mr or Mrs VM. A notice of demand attaching draft proceedings is not the commencement of a recovery proceeding. It is a necessary precursor.

[28] I take it that the amount of the claim in the draft notice of claim was a notional amount, pending determination of LCRO 71/2012.

[29] That view is not well aligned with the view expressed by the Committee. I accept that Mr DL was or ought to have been aware that the LCRO review was underway with respect to the costs for which [Company A] had accepted it was a person chargeable, by making a complaint about the amount of those costs.

[30] However, Mr DL was coming from a different angle. [Company A] was in liquidation so Mr DL would have appreciated the risk of recovery was only likely to reduce as time went by. His view based on the legal obligations that he considers arise from the terms of engagement, must have been that Mr and Mrs VM should be on notice that if the company could not pay, [Firm A] would seek to recover its fees from them personally. Mr DL must be taken to have been well aware of the restraint imposed on recovery by s 161. However, the commercial pragmatism of advising the VMs that the firm would look to them as persons chargeable was a sensible approach, given the trigger for restraint under ss 132(2) and 161(1).

[31] Putting Mr and Mrs VM on notice that [Firm A] considered they were persons chargeable called on them, independently of the company, to challenge [Firm A]'s fees if they could. The quantum of [Firm A]'s fees having been determined in LCRO 71/2012, however, I doubt that option would have been open to them.

[32] I accept that the letter of demand and draft proceedings were a prompt, but I do not consider they fell within the parameters of s 161(1). There is no evidence of a

complaint by the VMs, notice being given, or of Mr DL having commenced a proceeding or proceeded with recovery of the amount of the bill from the VMs personally. The issue of a letter of demand is simply a precursor to the commencement of proceedings.

[33] The responsible attitude for a practitioner in Mr DL's position, both to those to be charged with potential liability and to his partners, was to put the VMs on notice of a potential claim.

[34] Unlike the Committee, I consider that Mr DL had a reasonable basis on which to make demand, prior to the commencement of a recovery proceeding. I do not consider s 161 prevents precursor steps being taken, although that must of course be done in a professionally proper way.

[35] In this case, Mr DL wrote directly to Mr VM. Unfortunately, he did not suggest to Mr VM that he seek legal advice before taking any steps in response to his letter. In many circumstances it would be appropriate to include advice to seek legal advice.

[36] However, Mr VM was not a novice in dealing with debt recovery. He was a director of a company that had been through lengthy debt recovery proceedings and ended up in liquidation. He had experience. He cannot have been unaware of the role lawyers play, or ability to seek legal advice or the need to do so in the circumstances. Having received a response from Mr VM's lawyers, there is no evidence of Mr DL having directed any further inquiries to Mr or Mrs VM.

[37] Questions around whether the letter of engagement had been signed, agreements to act as guarantor, and assertions around personal liability are legal matters beyond the jurisdiction of this Office to determine. It would be difficult for the VMs to maintain they did not receive advice in relation to their position. It is difficult to see how s 161 prevents Mr DL from pursuing the legal question of liability against Mr or Mrs VM personally when the only question before the Committee or this Office was that of quantum on a complaint brought by [Company A]. Mr DL says there is a contractual basis on which he can claim the VMs are liable. It is not for this Office to determine the strength of that claim.

[38] In the circumstances I consider there is a basis on which to reverse the determination of unsatisfactory conduct made by the Committee. It is not clear to me that Mr DL could not rely on the letter of engagement to determine the question of liability. He may yet be able to do so.

[39] For the reasons discussed above I have reached a different conclusion from that formed by the Standards Committee on this issue. I do not consider that Mr DL's actions constitute a contravention of s 161 or fall within the definition of unsatisfactory conduct set out in s 12 of the Act.

[40] The determination that Mr DL's conduct was unsatisfactory is therefore reversed on review. Any orders made pursuant to s 156 as a consequence fall away.

Did the Standards Committee adequately consider Mr DL's submissions?

[41] I consider it more likely than not that the Committee did consider Mr DL's submission, but has a different view than mine on how s 161 applies to the present facts.

[42] The Committee's determination refers to the submissions of both parties and addresses all issues raised. The fact that the Committee found in Mr DL's favour in relation to the complaint that he provided the information to the liquidator is a reasonably clear indication that the Committee did consider his submissions as well as those of Mr and Mrs VM.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination that Mr DL's conduct was unsatisfactory is reversed. The decision is otherwise confirmed.

DATED this 17th day of May 2016

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 DL as the Applicant
Mr & Mrs VM as the Respondents
Mr RN as a Related Party
The Standards Committee
The New Zealand Law Society