

**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

**BETWEEN**

**SB**

Applicant

**AND**

**MT**

Respondent

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

**DECISION**

**Introduction**

[1] This is an application for review of a decision of the Auckland Standards Committee which considered a complaint by MT (the Respondent) against SB (the Practitioner). The Standards Committee did not uphold the complaint against the Practitioner but he nevertheless sought a review of aspects of the Committee's decision. His concerns related to the Committee's findings in relation to "the factual and legal framework" which he believed unfairly reflected on his professional standing. He wondered whether the Standards Committee had received his submissions in time before it reached a decision.

**Background**

[2] The relevant background is that the Practitioner acted for a landlord who leased two adjacent commercial properties to two tenants under Deeds of Lease. These leases contained the usual clause providing for the tenant to meet the landlord's legal costs. The tenants agreed, with the consent of the landlord, to swap premises. The Practitioner prepared the relevant documents and issued his invoices, but one of the

tenants (the Respondent in this matter) claimed that the lease matter was an informal arrangement which needed no legal documentation.

[3] When the tenant refused to pay the Practitioner's legal fees the Practitioner took action directly against the tenant (a company) to recover the fees (of \$1,764.25). The Practitioner issued a statutory demand, and when liquidation proceedings were filed in the High Court the tenant paid the bill on a 'without prejudice' basis pending resolution of the dispute, and the winding up proceedings were withdrawn.

[4] Soon after the tenant (through the Respondent) lodged a complaint to the New Zealand Law Society, seeking repayment of that sum plus his legal costs.

[5] The Standards Committee identified the complaints as alleging overcharging (LCC Rule 9), use of legal processes inappropriately (LCC Rule 2.3) and discourtesy (LCC Rule 10.1).

[6] Although the Committee did not uphold the complaints (referring to pre-1 August 2008 conduct that did not reach the section 351 threshold and there being no 'special circumstances' in this matter to raise its jurisdiction to consider a bill of costs below \$2,000) the Committee nevertheless commented, with disapproval, on various aspects of the Practitioner's conduct in relation to the debt enforcement action, and the tone of his correspondence.

[7] This review has focused on those aspects of the Standards Committee decision that were raised by the Practitioner for the review, which I have noted focused on the comments made by the Committee:-

At [24] - The Committee noted that [the tenant company] was not [the Practitioner's] client, and it was inappropriate for him to have taken enforcement action against that company to recover his costs. The Committee considered that if he failed to receive payment of his costs from the tenant...under the indemnity provisions of the lease he should have sought payment from his client landlord; and that any ensuing enforcement action should have been brought by or on behalf of that landlord.

At [25] - The Committee considered that [the Practitioner] had a misconception as to the appropriate procedure and that he should have been aware of the risk of contravening LCCC Rule 2.3 when he was, or should have been, aware that there was a legitimate dispute as to the debt.

At [26] - The Committee noted the correspondence from [the Practitioner's] client landlord, but did not find the endorsement persuasive.

At [27] - The Committee was disappointed with the tone of [the Practitioner's] correspondence with the Society and with [the Respondent's solicitor], which it considered to be discourteous and intemperate. The Committee noted that it was inappropriate for [the Practitioner] to make such comments about a fellow

practitioner and recommended that [the Practitioner] apologise to [the Respondent's solicitor].

## Discussion

[8] This review is undertaken on the papers pursuant to section 206 of the Lawyers and Conveyancers Act 2006.

[9] The Respondent declined to participate in the review process, other than to observe (through his lawyer) that the disputed payment has not been returned by the Practitioner, nor has he made the recommended apology to the Respondent's lawyer.

[10] In paragraph [24] the Committee had questioned the appropriateness of the Practitioner having issued proceedings directly against the Respondent's company (the tenant). The Practitioner (in brief summary) submitted that there was "*sufficient privity of contract*" between his firm and the Respondent's company to justify his proceedings against it. For the review he asserted that "*the Landlord assigned any resultant debt to [his] firm.*"

[11] The outcome he sought was that a finding should be made that there was sufficient privity of contract, or alternatively a finding that the debt was equitably assigned to his firm to allow for payment to be sought directly from the tenant.

[12] It is my view the Standards Committee correctly rejected the Practitioner's suggestion that the tenant's lease obligations (to pay solicitors fees) indebted the tenant directly to the landlord's solicitor. The Deed of Lease creates no contractual relationship between the tenant and the landlord's solicitor. The Lease (cl 6.1) requires the tenant to pay the landlord's reasonable legal costs. The statutory demand (prepared by the Practitioner's firm) described the debt as arising from services provided to the tenant, but it is more accurate to say that the service was provided to the landlord, and presumably at the landlord's request. While it is not uncommon practice for the landlord's solicitor to directly bill the tenant, the clause itself does not create contractual privity such as would allow the solicitor to sue the tenant, as opposed to pursuing the client landlord if the bill remained unpaid.

[13] The Practitioner had not put to the Committee that the debt had been assigned to him, in law or in equity. If the Practitioner's legal right to sue (the tenant) arose from an assignment I would have expected evidence of the assignment to have been

forwarded to the Standards Committee, and also referred to in the Practitioner's statutory demand.

[14] It was my understanding that the Practitioner relied on a letter sent by the landlord to the tenant to support the submission that there had been an assignment. I noted that the purpose of that letter (written by the landlord) was to give notice to the tenant of the termination of the tenancy. A concluding paragraph noted that the tenant company "*is indebted to our solicitor for the costs associated with the premises swap and we have been asked to reserve his position in respect of these costs in full.*"

[15] Aside from the landlord's error in suggesting that the tenant was (legally) indebted to the Practitioner, it is material to note the landlord's on-going involvement with regard to reserving the Practitioner's position as to the outstanding costs. I do not see this as evidence of any assignment of debt, and I further noted that the tenant's solicitor had questioned the Practitioner's statutory demand on the ground that the tenant had no liability to the Practitioner. This further indicates that the debtor tenant had not received any notice of an assignment.

[16] There was a further letter on file from the landlord who had written to the Standards Committee to express his concern about the complaint against the Practitioner, also explaining the background, which included his advice to the tenant about the tenant's liability to pay the legal costs. I do not see that the Standards Committee had any issue with the tenant's liability for the legal fees, but in terms of the Deed of Lease the liability was to the landlord. The material issue for the Committee was whether the Practitioner had the legal right to sue the tenant directly.

[17] For the review the Practitioner also suggested that there had been an equitable assignment. This impliedly recognised that the formality for a legal assignment had not been met. There is nothing to suggest that the Practitioner had suggested an equitable assignment when the statutory demand was challenged by the tenant's lawyer. But in any event, had he relied on an equitable assignment it would have been necessary to have joined the assignor to the proceeding. However, the Practitioner pursued the matter as if he was the original creditor.

[18] In conclusion, I have been unable to find any support for the contention that there was any assignment of the debt. In the circumstances the Practitioner ought not to have issued proceedings directly against the tenant. Therefore I do not consider that the Committee's criticism of the Practitioner was unfair or unreasonable in the circumstances.

[19] The Practitioner was also critical of the comments in paragraph [25] of the Committee's decision, that he should have been aware that there was a legitimate dispute to the debt. The Practitioner referred to the amount and timing of his correspondence attempting to get the fees paid to support his position that the enforcement steps he took were appropriate in the circumstances.

[20] The material on file indicates that the statutory demand was served on or about 4 May 2010. The liquidation proceedings were apparently later filed in the High Court on or around 25 June 2010, after the Practitioner had been informed that his account was under dispute. It cannot therefore be said that the Practitioner was unaware that the invoice was being disputed prior to the date of filing. In this light the Committee's observations are supported by the evidence.

[21] The Practitioner also disagrees with the Committee's conclusion about the "tone" of his correspondence with the Society and the Respondent's solicitor. In so doing he made "*no apology for asserting [his] position forcefully*". Having read all correspondence on file I have come to the view that, while much of the Practitioner's correspondence displays appropriate courtesy, there are grounds to justify the Committee's comments. It was a judgment call, but ultimately the Committee was entitled to its opinion and has the right to express it on behalf of the profession at large.

[22] My overall impression was that the Committee's remarks were intended as helpful signals to assist in encouraging best practice among lawyers, given that no disciplinary finding followed. I do not accept that this reflected any bias against the Practitioner, and I see no basis for amending the Committee's decision.

[23] For the review the Respondent wrote that the Practitioner has not given the apology that was recommended by the Committee, nor returned the money paid by the Respondent's client.

[24] Given that the Committee made no adverse finding against the Practitioner, it was not open to the Committee to make any orders against the Practitioner under section 156 of the Lawyers and Conveyancers Act. (A recommendation that is not followed is not cause for disciplinary action.) For the same reason no order could be made for the monies paid to the Practitioner to be returned to the Respondent. That remains the position.

[25] It nevertheless remains open to the Practitioner to reconsider whether some form of acknowledgement (in the form of an apology) is appropriate, particularly in the light of the further comments and observations that have been made.

**Decision**

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

**DATED** this 23<sup>rd</sup> day of October 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:

SB as the Applicant  
MT as the Respondent  
The Auckland Standards Committee  
The New Zealand Law Society