LCRO 311/2013

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of Standards Committee
BETWEEN	**HB** Applicant
AND	**JD** Respondent

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

Introduction

[1] HB has applied for a review of the decision by Standards Committee to take no further action in respect of his complaint about JD.

Background

[2] At the time the events leading to this complaint occurred both parties were practising lawyers. JD has subsequently retired from legal practice. JD instructed HB to act for him in relation to steps then being taken by the Legal Services Agency to cancel his legal aid listing approvals. The matter was settled and HB rendered an account totalling $21,674.65 including GST. JD has failed to pay the bill.

[3] It seems that JD's wife approached HB and as a result he offered to reduce the quantum of the bill to $17,000 if it was paid forthwith. This gesture did not result in payment, nor did subsequent discussions with JD (which included HB rejecting an offer by JD to pay the account by monthly instalments of $200) so HB made a formal complaint to the Lawyers Complaints Service.

[4] He alleged that JD was guilty of misconduct within the meaning of the term in ss 7(1)(a)(i) and (ii) of the Lawyers and Conveyancers Act 2006 which defines misconduct as being "conduct …that would reasonably be regarded by lawyers of good standing as

disgraceful or dishonourable", or "conduct … that consists of a wilful or reckless contravention of any provision of [the] Act or of any regulations or practice rules made under [it] ...". The conduct must "occur at a time when [the lawyer complained about] is providing regulated services".

[5] The rule HB alleged was breached is rule 10.7 of the Conduct and Client Care Rules[1] which requires:

> A lawyer who, acting in a professional capacity, instructs another lawyer, must pay the other lawyer's account promptly and in full unless agreement to the contrary is reached, or the fee is promptly disputed through proper professional channels.

[6] In response JD provided some factual background regarding his circumstances and expressed regret at his inability to pay HB. He denied breaching s 7, submitting that while he was "providing regulated services" to his clients as a practising lawyer, he was not providing any to HB, and that his failure to pay the bill did not amount to misconduct as defined in ss 7(1)(a)(i) and (ii).

[7] His submission regarding rule 10.7 was simple: he did not instruct HB "...in a professional capacity" but rather "to act for [him] in a personal matter".[2] HB replied to these submissions.

Standards Committee determination

[8] The matter went before Wellington Standards Committee 1. After summarising the facts the Committee identified the issues as follows:[3]

(a) was JD providing regulated services when instructing HB?

(b) does JD's conduct amount to unsatisfactory conduct?

(c) is JD's conduct capable of meeting the threshold for misconduct?

[9] Starting with issue (a)[4], the Committee looked at the meaning of "legal services" and "legal work" (which are part of the definition of "regulated services" in s 6 of the Act). It concluded that as "legal work" has to be performed "for any other person" (see definition of "legal services"), and because it was satisfied that JD personally was HB's client it was not satisfied that JD could be said to have been acting "for any other

[1] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008
[2] Submissions from JD to NZLS dated 11 Dec ember 2012 at para [33]
[3] Standards Committee determination (25 September 2013) at [7].
[4] The definitions of "misconduct" (s 7(1) of the Act) and "unsatisfactory conduct" (s 12(a)) both require the lawyer complained about to be "providing regulated services".

person" when he instructed HB. Therefore his conduct failed to satisfy the definition of "legal services".[5]

[10] The Committee went on to hold "that the intention of the Act was to cover circumstances whereby a lawyer was acting on behalf of an actual client or other person, which was not the case when JD engaged HB".[6]

[11] The Standards Committee also observed that, as JD held a practicing certificate as a barrister sole[7] at the relevant time, he was not properly able to instruct HB to act for him because of the intervention rule (rule 14.4 of the Rules).

[12] The Committee then considered whether JD's conduct breached any Act, regulation or practice rule that applies to a lawyer thereby constituting unsatisfactory conduct by reason of s 12(c) of the Act.

[13] As noted above JD denied breaching rule 10.7 as he was not acting in a professional capacity when he instructed HB. HB challenged this assertion, submitting that "he was instructed in relation to the LSA and the approvals held by [JD] in his capacity as a barrister and solicitor".[8] HB had also stated that if the instructions were not received from JD in his capacity as a barrister and solicitor then he, HB, would not have accepted the instructions because of the intervention rule.

[14] The Committee concluded that while the matter involving the LSA was tied up with JD's professional standing "it was not satisfied that it followed JD was therefore acting in a professional capacity when instructing HB to act for him".[9] It found that JD was acting as a client, not in a professional capacity, and not as an instructing solicitor. As noted, JD held a practicing certificate as a barrister sole.

[15] The third and final question posed by the Standards Committee was whether JD's conduct in not paying the fee could amount to misconduct. The Committee noted that the s 7(1)(b)(ii) definition did not require conduct in the course of supplying "regulated services" (which it earlier found JD was not providing) and summarised the relevant facts and positions of each party before declaring it "was not satisfied that there was sufficient evidence to show that JD had acted wilfully or recklessly in relation to the debt … or that the fees remained unpaid due to any other reason than JD's current financial state and overall impecuniosity".[10] His failure to pay was "careless

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[5] Above n 3, at [13]-[16].
[6] At [17].
[7] HB thought that JD held a practising certificate as a barrister and solicitor
[8] At [26].
[9] At [28].
[10] At [38].

and substandard" but not "misconduct" as defined. The Standards Committee therefore determined to take no further action.

Application for review

[16] HB has sought a review of the Standards Committee decision. His reasons for seeking a review are threefold as follows:[11]

> (i) the Standards Committee was wrong in treating [his] complaint as being under s 132(1)(b) and consequently misdirected itself as to the proper meaning and effect of the term "regulated services" within ss 7 and 12 of the Act;
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> (ii) that by reason of the error referred to in (i) the Standards Committee failed to properly consider whether JD's conduct amounted to misconduct under s 7 or unsatisfactory conduct under s 12. In this regard also the Standards Committee failed to properly appreciate and take account the evidence before it which was relevant to establish misconduct under s 7 or unsatisfactory conduct under s 12;
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> (iii) the Standards Committee was wrong in concluding that JD's conduct was not at a level required for a finding of misconduct under the Act.

Review

[17] This review has been conducted on the papers in accordance with s 206(2) of the Act with the consent of both parties.

Section 132(1)(b)

[18] The Committee first considered whether or not JD was providing regulated services. However, it considered this question in relation to s 132(1)(b) of the Act, which provides:

> (1) Any person may complain …about –
>
> (b) the standard of the service provided, in relation to the delivery of regulated services,−
>
> (i) by a practitioner …

[19] HB correctly points out that he did not anywhere in his letter of complaint complain about the standard of services provided by JD in relation to the delivery of

[11] Letter HB to LCRO (15 October 2013) at [2.1].

regulated services. He reiterates that his complaint "was that JD was guilty of misconduct in failing to pay [his] fees …" [12]

[20] HB submits that the Committee was therefore wrong in treating his complaint as a complaint pursuant to s 132(1)(b).

[21] I agree with this submission and with HB's submission that his complaint should be considered to be a complaint pursuant to s 132(1)(a). This simply provides that:

> (1) Any person may complain … about−
>
> (a) the conduct −
>
> (i) of a practitioner or former practitioner;

[22] HB asserts that because the Committee determined JD was not providing regulated services it failed to consider whether JD's conduct constituted unsatisfactory conduct pursuant to s 12(b) of the Act.[13] Section 12(b) refers to conduct "that would be regarded by lawyers of good standing as being unacceptable" and includes conduct unbecoming and unprofessional conduct.

[23] HB submits that JD was providing regulated services during a period of six months when he failed to pay HB's bill. He contends that the application of s 12(b) is not restricted to conduct by the lawyer providing the regulated services, but applies equally to the present circumstances where JD was providing regulated services to his clients. HB submits that in these circumstances JD was obliged to meet the standard of conduct required by s 12(b). Unfortunately, HB has not referred to any decisions of a standards committee, this Office, the Tribunal or the courts, to support his submission and I am unaware of any.

Can s 12(b) apply to conduct of a lawyer unconnected with the supply of regulated services?

[24] Section 7 of the Act (which defines misconduct) differentiates between conduct that occurs at a time when a lawyer is providing regulated services (ss 7(1)(a) and (b)(i)), and conduct unconnected with the provision of regulated services (s 7(b)(ii)). Section 12(b) uses the same terminology as s 7(1)(a) in that it refers to conduct "that occurs at a time when [a lawyer] is providing regulated services".

[25] If s 12(b) was intended to apply to conduct unconnected with the provision of regulated services, it would be expected that the same wording as is used in

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[12] At [2.3].
[13] At [2.8].

s 7(b)(ii) would appear, namely, "conduct … unconnected with the provision of regulated services".

[26] This is a clear indication that s 12(b) is intended to apply only to the conduct of a lawyer which is connected to the provision of regulated services. The conduct HB complains of was not connected with the provision by JD of regulated services.

[27] In s 12(a), the focus is on the competence and diligence of the conduct under scrutiny. That must necessarily refer to the competence and diligence of the lawyer in providing regulated services to a client. Section 12(b) uses the same terminology, but instead, refers to conduct that would be unacceptable to lawyers of good standing. There is no good reason to apply this to anything other than conduct of the lawyer committed in the course of providing the regulated services.

[28] There are other indicators that HB's interpretation is not correct.

[29] The purposes of the Lawyers and Conveyancers Act 2006 as expressed in s 3 are:

> (a) to maintain public confidence in the *provision of legal services …*
> (b) to protect the *consumers of legal services …*
> (c) to recognise the status of the legal profession…
>
> (emphasis added)

The emphasis is on the conduct of a lawyer when *providing* legal services to a *consumer.*

[30] HB notes that the Conduct and Client Care Rules are made pursuant to ss 94 and 95 of the Lawyers and Conveyancers Act. It is relevant to note that s 95 (a), (b) and (c) all refer to duties of a lawyer or conveyancing practitioner to their clients, or in providing regulated services to their clients.

[31] It is also helpful to look at the Conduct and Client Care Rules when considering this issue:

- Rule 3 is expressed to be applicable "in providing regulated services to a client".
- Rule 3.7(d) exempts from the operation of rules 3.4 and 3.5 regulated services "rendered by an in-house lawyer to his or her employer …"
- Rule 4.2 obliges a lawyer retained by a client to "complete the regulated services required …"

- Rule 5.5.1 relates to the provision of services to clients "other than regulated services".

[32] I have not referred to all instances where the Conduct and Client Care Rules relates to regulated services, but these are examples. In each case, the reference is to specific conduct of the lawyer which occurs in the course of providing the regulated services to a client, and it is the conduct of the lawyer towards the client that is the subject matter of the obligation.

[33] For the above reasons, I do not agree with HB's interpretation of s 12(b) and instead confirm the commonly applied interpretation, that s 12(b) is only applicable to conduct of a lawyer that is connected to and occurs in the course of that lawyer providing regulated services. JD was not providing regulated services to HB.

[34] Although the Committee treated the complaint as being a complaint pursuant to s 132(1)(b) of the Act, I do not consider that this has resulted in any error by the Committee when it determined that only s 12(c) could apply to JD's conduct.

Rule 10.7

[35] Rule 10.7 of the Conduct and Client Care Rules requires that

> A lawyer who, acting in a professional capacity, instructs another lawyer, must pay the other lawyer's account promptly and in full unless agreement to the contrary is reached , or the fee is promptly disputed through proper professional channels.

[36] The Standards Committee accepted JD's submission that he instructed HB in his personal capacity and noted that this was no different from circumstances where for example, JD instructed HB to act for him in relation to a driving offence.

[37] In paragraph 2.9.1 of his letter dated 15 October 2013, HB submits that the Standards Committee had overlooked the definition of a "lawyer" in s 6 of the Act, and had therefore erred in its interpretation of the rule. This submission seems to be, that because JD was a lawyer and instructed HB to carry out work for him that related to his profession, he was therefore acting "in a professional capacity". HB argues that the subject matter of the instructions affected JD's ability to undertake legal work, and that meant that rule 10.7 was applicable.

[38] If HB's contention is accepted and using the reference to a driving offence, it could be argued that if JD was at risk of losing his licence and was unable to get to court to appear for his clients, then this too would mean that HB had been instructed by JD "in a professional capacity." I do not agree.

[39] It cannot be disputed that JD was a lawyer at the time he instructed HB. He held a practising certificate and by virtue of the definition in s 6 of the Act this meant that he was a lawyer for the purposes of the Act, and by implication, the Conduct and Client Care Rules.

[40] HB submits that the Committee failed to take into account the point made by him in paragraph 4(i) of his letter of 18 December 2012. In that paragraph, HB submits that the steps being "taken by the Legal Services Agency to cancel [JD's] listing approvals were taken against him in his capacity as a practising Barrister and Solicitor who held the approvals, not simply in his personal capacity".

[41] Rule 10.7 refers to the act of instructing another lawyer in a professional capacity and that was the focus of the Standards Committee determination. The most common application of this rule is where a solicitor instructs a barrister on behalf of a client. HB's submission is that the subject matter of the instructions determines whether the rule applies or not. I do not accept that and agree with the Committee when it stated that "it was not intended that rule 10.7 should be extended to fit the current circumstances".[14]

[42] The true and intended meaning of the rule is provided by reference to its most common application, which is where a solicitor instructs a barrister on behalf of a client. The current circumstances do not fit within those parameters.

Misconduct

[43] HB's third ground of review is that the Committee was wrong in concluding JD's conduct was not at a level required for a finding of misconduct.

[44] Having concluded that JD was not providing regulated services in the sense submitted by HB, it follows that the definitions of misconduct in ss 7(1)(a) and (b)(i) are not applicable. The Committee was therefore correct to confine its discussion to considering whether a charge of misconduct on the basis of s 7(b)(ii) was appropriate. In other words, whether or not JD was a fit and proper person to engage in practice as a lawyer.

[45] In this regard, JD's failure to pay HB is no different from a failure to pay any other creditor. The Committee accepted that this was because of JD's impecunious state. HB says that JD should be required to swear an affidavit as to his assets and liabilities, and that JD's wife had indicated that JD was in fact able to meet this debt. HB elevates his complaint to the level that he alleges JD has acquired credit by deceit and submits that for this reason the Committee should have laid a charge of misconduct against JD.

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[14] Above n3, at [29].

[46] In the usual course of events HB would be able to sue JD, and seek an order from the court to have JD examined as to his assets and liabilities. Presumably, he is unable to pursue JD through the courts because he does not have a third party instructing solicitor, but the disciplinary process should not be considered to be an alternative to help HB achieve his ends. Although JD did not request an estimate, it would have been desirable for him to discuss his potential fee with JD. HB says that if JD had suggested his fee would be in the region of $5,000 he would have quickly disabused him of this. Both parties have displayed a lack of prudence in not addressing the likely fee, but that does not mean JD should face a charge of misconduct.

[47] HB points to the fact that JD has not even paid the $5,000 that he thought would be the fee in support of his allegations that JD has obtained credit by deceit. HB alleges JD has committed a crime. If he holds firmly to that view then he ought to make a complaint to the Police, which is the proper body to investigate alleged crimes.

Is there a threshold for misconduct?

[48] HB submitted that the Committee had misdirected itself when it posed the question as to whether JD's conduct was capable of meeting the threshold for misconduct.[15]

[49] He refers to the judgements in *Hart v Auckland Standards Committee 1 of NZLS*[16] and *Orlov v NZLS*[17] where the Courts disagreed with Heath J in *Orlov v New Zealand Law Society*[18] when he held that there was a threshold to be met such as had existed under the Law Practitioners Act 1982[19] for conduct to be referred to the Lawyers and Conveyancers Disciplinary Tribunal.

[50] Whilst the Courts have confirmed that Standards Committees may refer any matter to the Tribunal, Standards Committees have a role to play in determining which matters should be referred to the Tribunal. In the *Orlov*[20] judgment, the Court provided examples of the types of cases that, whilst not potentially attracting suspension or strike-off, could be referred to the Tribunal. These included cases involving complex issues of law or fact, or likely to result in significant precedent. HB may consider this matter to be such a case.

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[15] Above n 3 at [4].
[16] *Hart v Auckland Standards Committee 1 of New Zealand Law Society* [2013] 3 NZHC 83.
[17] Orlov v New Zealand Law Society [2013] NZCA 230.
[18] Orlov v New Zealand Law Society [2012] NZHC 2154.
[19] Section 106 Law Practitioners Act 1982 – conduct to be of sufficient gravity to warrant referral to the Tribunal.
[20] Above n 17 at [54](h).

[51] However, the subject matter of this case is very specific, and one could say, unique. In the *Orlov* judgement, the Court noted that "[t]he oversight of the LCRO should also assist in protecting the resources of the Tribunal and prevent it from being overwhelmed by petty or trivial cases".[21] Whilst I do not regard this matter as "petty" or "trivial", I do not regard it such as to require the attention of the Tribunal. It is a matter that was well within the category of cases that should be dealt with by the Standards Committee, subject to review by this Office.

[52] In summary therefore, a charge of misconduct against JD is not warranted.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed as modified by this decision .

DATED this 17th day of December 2014

O W J Vaughan
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:

HB as the Applicant
JD as the Respondent
Standards Committee
New Zealand Law Society

[21] At [54](d).