LCRO 32/2012

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Nelson Standards Committee
BETWEEN	**MR OP** Applicant
AND	**MR PQ** Respondent

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

DECISION

Background

[1] Mr OP (the Applicant) was unsuccessful in his appeal of a decision by the Disputes Tribunal that had ordered him to pay the balance of the Practitioner's fees.

[2] The Practitioner (or his firm) subsequently pursued bankruptcy proceedings against him and eventually the Applicant was made bankrupt.

[3] The Applicant's complaint arose out of the above. In his view the bankruptcy proceeding was bullying and unjustifiable given the small amount involved (which was less than $2,000). The Applicant acknowledges that the Practitioner may well have been within his legal right to take such action, but in terms of the Practitioner being a lawyer, and within the Code of Ethics imposed on lawyers, he considers that the Practitioner's conduct was heavy-handed, unreasonable and unjustifiable.

[4] The Standards Committee did not uphold the complaint, and noted that prior complaints by the Applicant about the quantum of fees and quality of legal services had not been upheld. The Committee accepted that the firm had exercised its available legal

remedies to try and enforce payment of the balance of moneys owing, together with additional costs arising from the enforcement action. The Standards Committee could see no basis for criticism of the Practitioner or his firm for doing so.

Review application

[5] The Applicant was aggrieved that his complaint had been considered by a local Standards Committee which he doubted would give him a fair hearing. He thought there had not been a thorough investigation, and was unhappy that he had not been contacted which would have created an opportunity for him to have clarified a number of details.

[6] He contended that the Standards Committee had confused two separate debts, i.e. the original debt (which he said he had paid off), and the second debt that was, and is, disputed he alleged.

[7] He also wondered whether the Standards Committee's dismissal of his prior complaint had left the Committee with a negative view of his credibility.

[8] Ultimately, the Applicant is of the view that being bankrupted by a lawyer for unpaid fee reflects poorly on the profession, and is not in the public interest. He argued that in comparison with the treatment he had received from other lawyers in that firm, that the Practitioner had dealt very harshly with him and had pursued the debt in a bullying manner, finally bankrupting him. He claimed that the Committee had not given serious considerations to the points that he had made.

[9] He further claimed that he had been paying the debt, and had always been prepared to discuss a solution with the Practitioner or his firm.

[10] The factors that the Applicant sought to have considered in the course of the review included the following:

- That the amount was always in dispute.
- That the firm's acceptance of his periodic payments established a payment arrangement by agreement.
- That the firm had other (less harsh) ways of attempting to satisfy the claim (e.g., mediation, Disputes Tribunal, collection agency).

These are not all of the factors, but are the main matters that he discussed at the review hearing.

[11] A review hearing was held, attended only by the Applicant. The Practitioner was given the opportunity to attend but was not required to do so.

[12] The review offered a full opportunity for all matters to be discussed.

Considerations

[13] Dealing first with the allegation that two different amounts were involved and that the second debt was disputed, the Standards Committee cannot be criticised for disagreeing with this submission. The additional amounts (which were added to the original debt) related to standards costs associated with enforcement actions taken by the Practitioner, and were identifiable as such in the demands made to the Applicant. These were not separate debits that were independent of the original debt.

[14] Dealing next with the conduct complaints, in light of the Applicant's submissions, both in his written review application and as discussed at the review hearing, I considered the complaint not only in terms of section 12 of the Lawyers and Conveyancers Act 2006 but also, in part, pursuant to Rule 2.3 of the Conduct and Client Care Rules, for the reason that a number of his submissions questioned whether the Practitioner had pursued his bankruptcy for a proper purpose.

[15] Rule 2.3 states:

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

[16] The evidence showed that the Applicant had initially been paying the Practitioner's fees in small regular amounts. This was not reflective of any specific agreed arrangement, but for the duration that these payments were being made, no action was taken by the firm, and it is reasonable to conclude that this created an expectation on the part of the Applicant that this was acceptable to the firm.

[17] At some point the Applicant decided he had paid enough and declined to make any further payments. The firm's response was to inform the Applicant that it required payment of the amount in full in order to avoid legal process. Subsequently the Practitioner took the matter to the Disputes Tribunal which upheld the Practitioner's fees. The Applicant appealed that decision but was unsuccessful.

[18] The Applicant submitted that there were other, less harsh, means that the Practitioner could have used to pursue the debt, mentioning the Disputes Tribunal as an example. In this regard I note that the Practitioner had in fact taken the matter to the Disputes Tribunal and been successful. That the Applicant appealed that decision is evidence of his dissatisfaction with that outcome.

[19] The Applicant's unsuccessful appeal added further costs to the original debt. The Practitioner and the Applicant reached an agreement about how the debt would be paid (which included costs agreed at a sum less than the applicable scale). The Judge recorded this agreement in a Consent Order dated 4 November 2010 which stated that the amount to be paid by the Applicant was fixed at $2,955.63, and that this sum would be paid by instalments as agreed between the parties, with payment to be completed by 31 January 2011.

[20] Although he later claimed (in a letter to the High Court) he had been pressured into this agreement, there is no evidence that the Applicant did not freely enter this agreement. He did not meet the deadline and at the end of January there remained an amount owing of $1,945.63.

[21] On 21 March the firm's credit controller wrote to the Applicant to say that a bankruptcy notice would be sent to him if he did not pay the outstanding balance. On the same day the Applicant sent an email informing the firm that he had an "appeal" before the New Zealand Law Society. (He also claimed the amount was incorrect). The Applicant filed a complaint with the New Zealand Law Society on 28 March alleging that he was being charged excessively, and being threatened with bankruptcy (and other matters) but was informed by the Standards Committee (with reference to its previous decision in file ref: 3664) that the same complaint could not be investigated a second time.

[22] The Applicant paid further small amounts in April, May and June 2011, and at the end of June there remained an outstanding debt of $1,595.63.

[23] A bankruptcy notice was served on the Applicant which required payment of the debt, to which was added the cost of service. The Applicant sent emails to the High Court, advising the Registrar that it was his sincere wish to resolve the matter without going to Court, at the same time pointing out that there were errors, and added that if the law firm was unhappy with his efforts regarding payment then they should contact him. He added that the amount owed remained in question. The letter was copied to the Practitioner.

[24] My observation on the above is that the firm had informed the Applicant that it was unhappy with his efforts, and warned him of the consequences of not paying the debt.

[25] In mid June 2011 the Applicant wrote again to the High Court to say he was prepared to enter into a 'new formal agreement', but that he had not received a response from the firm, and asked that his letter be considered as a cross claim. On 24 June 2011 the Registrar responded (cc'd to the firm) to say that the letter did not comply with the High Court Rules or forms, and the suggestion was made that the Applicant contact the (local)

Community Law office. (There is no evidence on the file to show that he sought this assistance.)

[26] On 29 June the Practitioner then sent the Applicant a further email to inform him of the outstanding amount, and stated that if the Applicant was unable to pay the full amount due, then bankruptcy was a legitimate option that the firm was entitled to pursue. He informed the Applicant that if a bankruptcy petition were to be filed, additional costs of $1,310 would be incurred as a result. The Practitioner wrote:

> You have said you would like to resolve this without going to court. Given the significant history involved, we are not interested in a long-running payment over time – you did this previously and then resiled from it. Please make your best offer to make full payment by Monday 4 July otherwise we will file the petition.

[27] The Applicant did not respond to this letter, but it appears that he made two further payments ($50 on 1st July and $100 on 14 July). On 29 July he was served with notice of the filing of a bankruptcy application.

[28] On 14 August the Applicant wrote to the firm's accounts department, stating that he had recently stopped making payments, had experienced a major set-back in his financial situation, and was unable to make further payments at that time. He added, "*For what it is worth, I believe that I have paid what is rightfully owing to your company*." In the next sentence he added, "*As I have said, I remain willing to discuss this matter, given reasonable notice*."

[29] The Applicant did not respond to the Notice of Bankruptcy, and there is no evidence on the file of further contact between the parties. In early October 2011 the Court declared the Applicant bankrupt.

[30] The above sets out the chronology of actions taken by the Practitioner, his firm and the Applicant in relation to the debt (insofar as that information has been provided).

[31] There is no part of the Practitioner's actions that is inconsistent with an unpaid creditor pursing his lawful remedies, and the Standards Committee was correct in its view.

[32] However, I have understood the essential complaint to be that pursuing the Applicant into bankruptcy for a relatively small debt was an 'extreme' action which should be viewed as 'bullying', and was not the kind of conduct that could reasonably be expected of a professional. The Applicant wrote that the Practitioner's knowledge of the law gave him an advantage in pursing proceedings in the court but that this kind of behaviour gives the public a less than positive opinion of lawyers.

[33] In considering the complaint the Practitioner's conduct needs to be considered not in isolation, but in the context of the events as they arose. This requires consideration of all the circumstances leading to the Applicant's bankruptcy, including the Practitioner's response to actions taken, or not taken, by the Applicant himself.

[34] There are certain difficulties with the position taken by the Applicant. First, I do not accept his assertion that that he continued to make payments. While periodic payments were made at the start, these were stopped when the Applicant thought he had paid enough. Although some further payments were made later, these were small amounts and throughout the months that the debt was being pursued by the Practitioner (prior to bankruptcy) the Applicant made it abundantly clear, by words and by his actions, that he disagreed with the fees and that he was unwilling to follow any regular payment plan.

[35] Second, I do not accept that the Applicant was unaware of the threat of bankruptcy. In his complaint to the Standards Committee in November 2011 (concerning the Practitioner having bankrupted him) he wrote, "*I am pretty darned sure that I did not receive a warning that I might be involved in bankruptcy proceedings*." I do not find this to be the case since bankruptcy had been clearly signalled on a number of occasions, and his correspondence makes clear that he was well aware of the proposed proceeding.

[36] Third, the Practitioner provided ample time and opportunities to the Applicant regarding the outstanding debt. The Applicant informed me that he was always in a position to pay his debts. At the review hearing he confirmed that could have paid the debt but this would have required him to rearrange his finances. I have no reason to doubt him on this point but it did raise the question of why he did not take up the opportunity offered to him in the Practitioner's June letter to forward his 'best offer' for making full payment. At that time he wrote, "*for what it's worth, I believe that I have paid what is rightfully owing to your company*".

[37] No offer was made by the Applicant then, or later, to discuss terms for payment, and in my view the nature of the reply was a clear signal to the Practitioner of how the Applicant perceived the situation. In my view the Practitioner had made it abundantly clear what steps would follow if the Applicant failed to cooperate in making payments, and had invited the Applicant to make contact regarding settling the debt, but he did not do so.

[38] The Applicant explained at the review that it was always open to the Practitioner to contact him to set up a meeting to discuss the matter. In holding this view it seemed to me that the Applicant somewhat misjudged the situation. Taking into account the (above) steps already taken by the Practitioner or his firm to encourage the Applicant's payment of the debt, and the warnings of bankruptcy, I found it difficult to comprehend the Applicant's

attitude since it was his responsibility to satisfy the Practitioner of his intentions regarding making full payment. He was clearly on notice of the consequences of not doing so.

[39] The prior history of regular periodic payments having been tolerated by the firm indicated to me that the Practitioner would not have been unwilling to enter into an arrangement if the Applicant had taken steps to demonstrate his willingness to clear the full debt. There is no evidence that he contacted the Practitioner concerning making payments.

[40] At the review hearing the Applicant contended that he did not comprehend what bankruptcy entailed, and that he did not take seriously the Practitioner's threat of bankruptcy. These are not failures that can be attributed to the Practitioner.

[41] I have considered the circumstances surrounding the complaint and the Applicant's information and submissions, in order to determine whether any disciplinary issues arise for the Practitioner, in terms of Rule 2.3 of the Conduct and Client Care Rules, and also in terms of section 12 of the Lawyers and Conveyancers Act 2006. I can find no breach of Rule 2.3 since there is nothing to indicate that the Practitioner's purpose in pursuing bankruptcy proceeding was for a purpose other than to recover of fees owed to the firm.

[42] Section 12 (a) of the Act defines unsatisfactory conduct in terms of competency which does not apply in this case. Section 12(b) defines unsatisfactory conduct in terms of conduct that would be regarded by lawyers of good standing as unacceptable, and includes 'conduct unbecoming' and 'unprofessional conduct'. For reasons outlined, in my view there has been no unsatisfactory conduct on the part of the Practitioner.

[43] It is not difficult to be sympathetic to the Applicant's argument that the bankruptcy was disproportionate to the size of the original debt. However, I do not accept that the complaints and allegations against the Practitioner should be considered in terms of the quantum of the outstanding debt. Rather the Practitioner's conduct should be considered in terms of the overall circumstances, as I have done. The evidence clearly showed that over a period time the Practitioner had repeatedly signalled the possibility, and then the likelihood, of the bankruptcy, and given the Applicant's continued reluctance to cooperate in paying the debt, I can see no proper basis for any disciplinary finding against the Practitioner in exercising his legal remedies. Given this conclusion the Standards Committee was right to take no further action against the Practitioner.

[44] It appears that only since being bankrupted has the Applicant comprehended the full impact of this event on his life. His grievance is not surprising but I do not see that this situation has resulted from any wrongdoing by the Practitioner.

[45] Before completing this decision I received a further email from the Applicant regarding our discussion (at the review hearing) about his responses to the Practitioner's warnings about bankruptcy, including that he did not contest the bankruptcy proceeding, my having noted his statements that he had always been in a position to pay his debts, and that solvency is a defence to a bankruptcy application. The Applicant highlighted in particular that he had neither the skill nor resources to have contested the High Court proceeding. This may be so. But having also noted a suggestion (by the High Court Deputy Registrar) that he seek assistance from the Community Law Office in relation to his dispute about the costs, it was open to the Applicant to have obtained some assistance or advice about that and other possible defences. There is no evidence that he sought any such assistance.

Decision

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

DATED this 16th day of August 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:

Mr OP as the Applicant
Mr PQ as the Respondent
The Nelson Standards Committee
The New Zealand Law Society