LCRO 41/09

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	A determination of the Southland Standards Committee
BETWEEN	**COMPLAINANT COMPANY Q** of Auckland Applicant
AND	**LAWYER I** of Invercargill Respondent

DECISION

Background

[1] Complainant Q, through its principal Mr Q complained to the New Zealand Law Society regarding the conduct of Lawyer I of I legal firm. The matter was referred to the Southland Standards Committee for consideration.

[2] On 16 March 2009 the Southland Standards Committee resolved to take no action on the complaint. That decision was notified to Complainant Q and Lawyer I by a letter from the New Zealand Law Society Complaints Service dated 16 March 2009.

[3] Complainant Q sought a review of the decision of the Standards Committee by an application received in this office on 24 March 2009. The parties have consented to this matter being heard by way of a telephone conference which was conducted on 26 May 2009. At that conference Lawyer I consented to Mr Q (for Complainant company Q) submitting further documentation. That documentation was received on 29 May 2009 and was forwarded to Lawyer I for his information. The matter is being determined on the material made available to this office by the parties and the Standards Committee and on the basis of the arguments made at the telephone hearing.

[4] The complaint (to which I will refer interchangeably with Mr Q its principal) relates to the conduct of Lawyer I in acting for company A in seeking to recover an outstanding debt from Complainant Q. Mr Q complained that the conduct of Lawyer I was inappropriate in two respects. First he stated that Lawyer I had acted for Complainant Q some time previously and should not now be permitted to act against the company. Secondly, he stated that Lawyer I ought not have issued a statutory demand for payment of the sums claimed in light of the fact that the debt was disputed (or at least that he ought not have done so without warning).

[5] Lawyer I accepts that he acted for Complainat Q "from at least November 2005 to May 2006". It appears that this was in respect of resource consent matters. It also appears he undertook a small amount of conveyancing work for the company. At the hearing he did not seek to minimise the extent of those retainers. He also observed that when Complainant Q objected to him acting in the debt recovery matter for company A (which appears to have occurred by a letter from Complainant Q's solicitors of 20 December 2007) he desisted from acting. He also states that he was satisfied from the material provided by Company A that there was no evidence that Complainant Q disputed the debt at the time that the statutory demand was issued. Lawyer I also observed that Complainant Q had consented to Lawyer I acting for another shareholder of Complainant Q in respect of negotiations with the company and Mr Q.

Applicable professional standards

[6] This review concerns conduct which occurred prior to 1 August 2008. New legislation came into force in respect of the regulation of the legal profession on that date. Consequently the standards applicable differ between conduct which occurred before 1 August 2008, and conduct which occurred after that date.

[7] The pre 1 August 2008 standards are found in ss 106 and 112 of the Law Practitioners Act 1982. The threshold for disciplinary intervention under the Law Practitioners Act 1982 was relatively high and may include findings of misconduct or conduct unbecoming. Misconduct was generally considered to be conduct:

> of sufficient gravity to be termed 'reprehensible' (or 'inexcusable', 'disgraceful' or 'deplorable' or 'dishonourable') or if the default can be said to arise from negligence such negligence must be either reprehensible or be of such a degree or so frequent as to reflect on his fitness to practise.

(*Atkinson v Auckland District Law Society* NZLPDT, 15 August 1990; *Complaints Committee No 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105). Conduct unbecoming could relate to conduct both in the capacity as a lawyer, and also as a private citizen. The test will be whether the conduct is acceptable according to the standards of "competent, ethical, and responsible practitioners" (*B v Medical Council* [2005] 3 NZLR 810 per Elias J at p 811).

[8] One of the questions which is relevant to whether those standards were breached is whether there has been a breach of the applicable rules of conduct. Prior to 1 August 2008 those rules were the Rules of Professional Conduct for Barristers and Solicitors. Of particular relevance is R 1.05 which provided:

> A practitioner must not act for a client against a former client of the practitioner when, through prior knowledge of the former client or of his or her affairs which may be relevant to the matter, to so act would be or would have the potential to be to the detriment of the former client or could reasonably be expected to be objectionable to the former client.

Also relevant is r 7.07 which provided:

> A practitioner must make all reasonable efforts to ensure that legal processes are used for their proper purposes only and that their use is not likely to cause unnecessary embarrassment, distress, or inconvenience to another person's reputation, interests or occupation.

It should also be noted that the commentary to r 7.07 makes specific reference to the fact that a lawyer should not issue a statutory demand knowing that the debt is bona fide disputed.

Acting against Complainant Q

[9] There is no blanket prohibition on acting against a former client. The duty of loyalty owed to a client lasts as long as the retainer itself. However, the duty to keep information confidential and not to use it against a former client lasts forever. It is on this basis that there is a limited obligation not to act against a former client. That obligation is stated in r 1.05. Rule 1.05 which has two strands to it.

[10] The first part of r 1.05 rests on whether the lawyer holds any information "relevant" to the new matter which could therefore lead to detriment to the client. Understandably Mr Q was of the view that Lawyer I held such information. Lawyer I took the opposite view. The question of what kind of information might be relevant was

considered by the Court of Appeal in *Russell McVeagh McKenzie Bartleet & Co v Tower Corporation* [1998] 3 NZLR 641. In that case the Court rejected an argument at general information about the manner in which business was conducted was relevant to the new matter.

[11] Mr Q was not able to point to any specific relevant information in the hands of Lawyer I, but argued that he knew the nature and disposition of himself as the principal of Complainant Q and this conferred an illegitimate advantage. Such an argument was argued successfully in *Black v Taylor* [1993] 3 NZLR 403. However, in that case the respective parties were embroiled in an acrimonious family dispute over a will and the lawyer concerned had acted for other family members in diverse matters over a long period. In that case the court considered that the information regarding the general disposition of the former client was relevant.

[12] I consider that in the present case the *Russell McVeagh* approach is to be preferred. The matter in respect of which Lawyer I was retained by Company A was the recovery of a commercial debt. The information held by Lawyer I could not be seen to be able to be used to the detriment of Complainant Q in such a proceeding. The matter was quite unlike that in *Black v Taylor* which concerned fraught family conflicts where knowledge of the personal dispositions of the litigants may have been of particular advantage.

[13] The second strand to r 1.05 is that even where the information cannot be used to the detriment of the former client the lawyer still should not act if to do so "could reasonably be expected to be objectionable to the former client". It is perhaps understandable that clients are unhappy that their former advisors are now acting for their adversary. However, this must be balanced against the need not to unduly constrain whom a lawyer may act for in the future, and the ability of clients to retain the lawyer of their choice. This seems to have been recognised by Mr Q when he consented to Lawyer I acting for another shareholder in negotiations with the company.

[14] In light of the time that elapsed since the earlier retainer and the narrow nature of the new retainer (debt recovery) I consider that for Lawyer I to accept the retainer from Company A could not reasonably be expected to be objectionable to Complainant Q. I conclude that there has been no breach of r 1.05 in this matter and no unprofessional conduct by Lawyer I in this regard.

Issuing of Statutory Demand

[15] Mr Q complains that even if it was appropriate for Lawyer I to act for Company A he ought not to have issued the statutory demand because the debt was disputed. At the hearing it was also put to Lawyer I whether the statutory demand was improperly issued against Complainant Q by failing to first forewarn the company that legal action was imminent. Lawyer I maintained that it was clear that the debt was disputed prior to the issue of the statutory demand. He argued that the conduct of Lawyer I amounted to the use of a legal process for an improper purpose and therefore was a breach of r 7.04 of the Rules of Professional Conduct.

[16] Lawyer I stated that he took careful instructions from Company A and was satisfied on that basis that the debt had not been disputed. In the absence of some evidence of error or improper motive a lawyer is entitled to accept his or her clients word in such matters: *Wootton v Dickinson* (3 November 2000, High Court, Auckland, Master Faire, CP151/98). I note further that Mr Q has not provided any clear evidence that the debt was disputed. A lawyer cannot be expected to enquire of a debtor whether the debt is disputed. Such an enquiry would invariably lead to a predictable and unreliable answer that the debt was disputed.

[17] In this regard some recital of the background to the making of the statutory demand may be necessary. Mr Q had emailed Company A on 2 August requesting electronic copies of certain drawings and stating that the account would be settled “at that stage”. Company A replied to that email on 3 August pressing for payment and noting that if payment was not received the matter would be referred for debt collection. The nearest that can be said to a dispute being raised by Mr Q is an email of 6 August 2007 from Mr Q to Company A in which he complains about aspects of the service provided by that firm and about the timing of invoices. He does not in that email dispute the amounts due or state that he did not intend to pay. On the same date Company A replied by reiterating their position. A further email was sent by Company A to Mr Q on 23 August observing “you have not disputed these accounts but have failed to make the payments as promised”. I note that at the hearing Mr Q took some time to outline the nature of the complaint between Complainant Q and Company A. The nature of the complaint is not important to the resolution of this complaint, though I note for completeness that the outstanding account appears to have been finally resolved by recourse to another forum and the statutory demand was not pursued.

[18] In all of the circumstances I am satisfied that no breach of r 7.04 occurred. Lawyer I used efforts which were reasonable in the circumstances to ascertain whether the debt was disputed. On the evidence available to me (and available to Lawyer I at that time) his conclusion that the debt was not disputed was a reasonable one to reach.

[19] Mr Q for the complainant company also suggested that the statutory demand arrived unexpectedly. He suggested that some contact prior to the issue of a statutory demand should be required. Certainly where proceedings are issued it is expected practice to issue a letter of demand setting out the claim and giving the other party the opportunity of remedying the breach claimed prior to filing in court. It appears that the first communication from Lawyer I received by Complainant Q in this matter was the statutory demand itself.

[20] I observe however, that on 24 September 2007 Company A had written to Mr Q of the complainant company in the following terms:

> Before you incur further expense from the debt recovery proceedings and interest charges as provided for under our terms of engagement I thought I would give you one final opportunity to make contact with us to make payment. If I haven't heard from you by the end of tomorrow I will approve what's on my desk from xx and will see the matter run its course with the judiciary.

That is unequivocal. It should have come as no surprise that a statutory demand was issued a month later on dd mm 2007.

[21] The failure to write to Mr Q or Complainant Q to forewarn of the intention to serve a statutory demand was not a breach of professional standards. The position is significantly different from the service of legal proceedings. In that case the proceedings are filed in court and require a timely response must be similarly filed. For this reason they should not be filed without first some indication of that intention. A statutory demand is no more than a demand in a statutorily prescribed form which can form the basis of subsequent proceedings (to wind up the company or to set aside the demand). As such I see no bar to a lawyer arranging service of a statutory demand on a third party without indicating that intention first, at lease where the creditor has informed them that debt recovery proceedings are imminent as in the present case.

[22] I conclude that Lawyer I did not act unprofessionally in arranging for service of the statutory demand on Complainant Q without first informing Complainant Q of the intention to do so.

Result

[23] The application for review is declined pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act. The decision of the Southland Standards Committee is confirmed.

DATED this 2nd day of June 2009

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Duncan Webb

Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act this decision is to be provided to:

Complainant Q as applicant
Lawyer I as respondent
I legal firm as an entity entitled to apply for review under s 193 of the Act
The Southland Standards Committee
The New Zealand Law Society