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

LCRO 61 / 09

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	A determination of the Wellington Standards Committee 2
BETWEEN	**AYLESBURY** of Stratford Applicant
AND	**M MILTON, A MILTON AND Z MILTON** of Nelson Respondents

DECISION

Introduction

[1] Mr Aylesbury complained to the New Zealand Law Society about the conduct of M Milton, A Milton and Z Milton. All of the respondents are of the firm Milton Law (and I will refer to them collectively as Milton Law). The respondents acted for Mr Aylesbury's former wife. The conduct complained about was the service of a bankruptcy notice. That notice was served on the basis that Mr Aylesbury had not satisfied a judgement against him made in favour of his former wife in the Family Court. He complained that in arranging for that bankruptcy notice to be issued and served the respondents acted in breach of their professional obligations and were using the procedure to cause him embarrassment and distress and therefore not for its proper purpose.

[2] The matter was considered by the Wellington Standards Committee 2 which resolved to take no action on the complaint. It considered that the existence of an unsatisfied judgement was proper grounds for the issue of a bankruptcy notice and that

the complainant had other remedies available to him. Mr Aylesbury seeks a review of that decision. Mr Aylesbury (through his counsel) sought a review on the grounds that:

- The Standards Committee should not have taken into account certain information which was confidential (also described as highly irrelevant, inaccurate and prejudicial) and ought not have been put before them. Furthermore, Mr Aylesbury had complained that the release of that information was of itself unprofessional and the Committee did not deal with that part of the complaint;

- the Committee failed to decide whether it was possible to enforce a judgment that was under appeal; and

- the Standards Committee had erred in not finding that the respondents had been in breach of their professional obligations in obtaining and serving the bankruptcy notice. In this the Committee wrongly took into account the fact that the judgment was enforceable by the issue of a bankruptcy notice.

In the submissions of Mr Aylesbury some observations were made as regards the procedure of this office. I do not consider that they need to be separately addressed.

[3] The parties have consented to this matter being considered without a formal hearing and therefore in accordance with s 206(2) of the Lawyers and Conveyancers Act this matter is being determined on the material made available to this office by the parties and the Standards Committee.

Background

[4] Mr Aylesbury was engaged in litigation regarding relationship property with his former wife. The Family Court issued judgements on the matter on 19 November 2007 and 19 March 2008. The effect of those judgements was formalised in an order of the Court which was sealed on 30 June 2008. The effect of the order was to require Mr Aylesbury to make a substantial payment to his former wife "forthwith". In the response to the complaint made to the Standards Committee the respondents traversed what they considered to be the considerable difficulties in obtaining judgement (or co-

operation in other respects) against Mr Aylesbury. For example, the respondents state that in seeking payment "Mrs Aylesbury was faced with the usual unyielding attitude from her former husband".

[5] It is not necessary to traverse in detail the events around July and August 2008 which led to the issuing and service of the bankruptcy notice. However the material provided by the parties make it clear that demand was made of Mr Aylesbury for payment of the unsatisfied judgement and through Milton Law Ms Aylesbury was pressing for payment. It was also the case that payment was required urgently to complete a property purchase. Because of the delays in obtaining payment that purchase ultimately fell through. Mr Aylesbury's advisors stated in a letter of 9 July 2008 that it was intended that the funds to meet the order of the Court would be available on 31 July 2008 and requested that no enforcement action be taken before 4 August 2008. Correspondence passed between the parties in which the respondents sought details of the arrangements for payment and reasons for delay. The applicant (through his lawyers) was not particularly forthcoming in this regard.

[6] In the event payment was not made on 31 July. On 1 August 2008 the respondents stated that a bankruptcy notice had been prepared and that it would be filed and served unless a definite proposal for settlement was made that day. Some further correspondence occurred on 4 August in which the applicant's lawyers stated that settlement of the sale of certain property had been delayed by virtue of an interest being mistakenly registered against the title. Further correspondence ensued between 13 and 15 August. On 16 August Mr Aylesbury was served with the bankruptcy notice. On 22 August payment was finally made.

[7] I observe that in their response to the Law Society of 24 February 2009 the respondents do not suggest that they had any concerns about the solvency of Mr Aylesbury. Rather, the tenor of that letter is that Mr Aylesbury had acted objectionably and obstructively throughout and it was necessary for them to take forceful steps to obtain payment. The respondents first referred to the financial stability of Mr Aylesbury on 19 March 2009 in a final response to the Standards Committee.

[8] There is also some contention relating to a letter that Mr Aylesbury provided to the Standards Committee dated 7 August 2008 from XXX (a Taranaki law firm) to MMM (Mr Aylesbury's lawyers). That letter indicated that a release of the impediment

on the title of the land being sold (to make the payment to Ms Aylesbury) would be forthcoming. Hand-written on the foot of that letter is “cc Milton Law”. That letter was provided to the Committee on 10 March 2009 under cover of a letter of reply from Mr Aylesbury. I note that it was not provided with other correspondence at the time the original complaint was made (on 8 January 2009). Mr Aylesbury suggested that that letter had been received by Milton Law and ought to have been provided to the Standards Committee by them. This assertion was reiterated by Mr Aylesbury’s submission to this office (at para 16). The relevance of the letter appears to be that if it was received it tends to show that it was unnecessary (and therefore improper) to obtain and serve the bankruptcy notice. The respondents deny ever having received that letter.

[9] It is appropriate that I make a finding as to whether it was received or not as the respondents raised it as an issue. I am proceeding on the basis that Milton Law did not receive the letter of 7 August 2008. I do so on the basis that there is no independent evidence of it being sent (such as a covering letter or fax confirmation slip). Neither Mr Aylesbury nor his lawyer Mr M has stated that they personally sent the copy of the letter to Mr Milton. Had the letter been sent by XXX to Milton Law I would have expected the words “cc Milton Law” to have been typed on the foot of the letter rather than hand-written. Had the letter been forwarded by Mr Aylesbury’s lawyers I would have expected to see reference to it in other correspondence, or some covering note to exist. Given the absence of clear evidence as to the despatch of that letter to Milton Law and the clear statement by the respondents that they had not seen it prior to the complaint being laid, I find on the balance of probabilities that the letter was not received by Milton Law.

First Ground: Confidential Information

[10] Mr Aylesbury complained that the Standards Committee should not have taken into account certain information which was described as confidential, highly irrelevant, inaccurate and prejudicial. It was argued that that information ought not to have been put before the Committee. It was also stated that Mr Aylesbury had complained that the release of that information was of itself unprofessional. He considered that the Committee did not deal with that part of the complaint.

[11] This ground is raised in relation to two distinct kinds of information. First, information relating to the relationship property proceedings (which information was focussed on in the submission of Mr Aylesbury to this office) and second, information in relation to the purchase by Mr Aylesbury of a property in the Bay of Islands.

[12] In responding to the complaint on 24 February 2009 it was stated by the respondents that Ms Aylesbury had consented to the disclosure of any information that was confidential to her. In any event it is clear that the general duty of confidence imposed on a lawyer does not apply where the disclosure is made to the professional body which is making a determination as regards the conduct of the lawyer in question: *Parry v Law Society* [1969] 1 Ch 1. In any event, the respondents did not owe Mr Aylesbury any duty of confidence – that duty was owed to Ms Aylesbury and was waived. It is also relevant that r 8.4(g) of the Rules of Conduct and Client Care for lawyers contemplate that a lawyer may disclose otherwise confidential information when answering a complaint against him or her. Similarly r 8.4(g) permits disclosure with the consent of the client. There was no duty of confidence owed by Milton Law to Mr Aylesbury and as such the disclosure of information to the Standards Committee in relation to the Bay of Islands property was not in breach of any professional obligation. I note that Mr Aylesbury has had the opportunity to respond to the alleged inaccuracies in respect of the purchase of the Bay of Islands property and the relationship property matters and did so in a letter to the Standards Committee of 10 March 2009.

[13] In the submissions of Mr Aylesbury it was suggested that the Standards Committee should have dealt with "the unauthorised disclosure of part of the Family Court judgment". It was suggested that a response from Mr Aylesbury's counsel in those proceedings (a Mr S) should have been sought. It was also suggested that the material "incomplete, factually in dispute and highly prejudicial" should not have been viewed by the Committee or by me in considering this decision. Exactly what information fell into this category was not clearly stated.

[14] It was also suggested for Mr Aylesbury that having seen the information I may be unable to reach an objective decision. This suggestion was earlier raised in a telephone conference of 10 June 2009 in this matter and I declined to recuse myself. The Standards Committee and this office have wide powers of inquiry. It is up to such investigative bodies to give proper weight to information it considers and there is no evidence that anything other than this has occurred. The argument for Mr Aylesbury

that a body with adjudicative powers should be precluded from considering a matter if inaccurate and prejudicial information is put before it would, if accepted, create an impossible double bind. In such a case no Tribunal could consider information which one party considers is irrelevant or unduly prejudicial. That cannot be correct.

[15] While not clearly argued it appears that Mr Aylesbury was suggesting that the Family Court proceedings ought not have been disclosed and to do so was in breach of law. In making the response that they did the respondents did not breach s 35A of the Property (Relationships) Act 1976 or ss 11B to 11D of the Family Courts Act 1980 which relate to the publication of a report of proceedings in the Family Court. While the existence of relationship property proceedings was referred to, no detail of the substance of the proceedings was provided. In any event it is unlikely that those legislative provisions were intended to cover the disclosure of such matters to the professional body in answer to a complaint. Such a narrow disclosure is unlikely to be considered a "publication" within the meaning of the Act.

[16] As regards the wider suggestion that the information relating to the property and/or the relationship property proceedings was prejudicial and ought not have been before the Committee, it is clear that it formed the background to the complaint and was properly considered by the Committee. When a complaint is made against a lawyer it is proper that each party be entitled to put what information they consider relevant before the body considering the complaint. It then falls to that body to make what findings of fact are necessary and give what weight is appropriate to the information before them. In this case the Standards Committee appeared to do just that. There is no evidence that undue weight was given to the evidence objected to as prejudicial. I note in particular that that evidence objected to was not referred to in the part of the Standards Committee decision headed "reasons".

Second Ground: Enforcement of Judgement Under Appeal

[17] Mr Aylesbury considered that the Standards Committee should have determined whether or not it was open to Ms Aylesbury (through her lawyers) to issue a bankruptcy notice given that the judgment upon which the notice rested had been appealed by Ms Aylesbury. I do not consider that the Committee was required to determine this issue to properly reach a decision. The parties differed as to whether in law it was possible for a party who was appealing a judgment to also seek to enforce it.

There is no clear procedural rule prohibiting this. It may be that existence of such an appeal might be a relevant ground upon which a stay of execution would be granted. It is sufficient to say that there was nothing improper per se in the respondents both appealing the judgment and seeking to enforce it given the fact that this is not prohibited by the applicable procedural rules. Whether the method of enforcement was proper is a question which will be separately decided. The Standards Committee did not err in not deciding this point.

Third Ground: issue and service of the Bankruptcy Notice

[18] At the root of this review is the original complaint that the respondents breached their professional obligations in obtaining and serving the bankruptcy notice. The applicant considered that the Standards Committee erred in not finding this action to have been a professional breach. He also stated that the Committee took into account (and arguably relied upon) the irrelevant fact that the procedural rules of court permitted this course of action.

[19] Mr Aylesbury relied on r 2.3 of the Rules of Conduct and Client Care, which provide that:

> 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.

[20] In Mr Aylesbury's submissions it was argued that the fact that the law and procedural rules enabled the issue of the bankruptcy notice is not relevant. Rather it was suggested that the respondents used (or assisted in the use of) the bankruptcy procedure to cause embarrassment and distress to Mr Aylesbury. Mr Aylesbury is correct in so far as the fact that the actions were not in breach of the strict letter of the law or procedural rules is no answer to an allegation that a legal process has been used for in improper purpose. The whole thrust of r 2.3 and the doctrine of abuse of process is that it is improper to misuse the procedure of the court in a way which, although not inconsistent with a literal application of the rules would be manifestly unfair or otherwise bring the administration of justice into disrepute: *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 per Lord Diplock at p 536.

[21] The Standards Committee gave as a reason for taking no further action that "the complainant had other remedies available to him". It was argued in Mr Aylesbury's submission that this was irrelevant. There is merit in this argument. The fact that Mr Aylesbury could have set aside the bankruptcy notice on application, or have sought the exercise of the Court's discretion not to make an order of adjudication, or to have sought an order of costs in the court is not directly relevant to the core question. That question is whether the obtaining and service of the bankruptcy notice was motivated by an improper purpose alleged by Mr Aylesbury to be causing "maximum distress and embarrassment".

[22] The applicable law and procedural rules permitted the respondents to obtain and serve the bankruptcy notice in this case. The issue therefore is whether in doing so the respondents were using or assisting in the use of that procedure for an improper purpose. In making this application Mr Aylesbury relied upon *Lawson v Perkins* [2009] NZFLR 330. That case has some similarities with the present case in that there was an order in respect of relationship property proceedings that a payment be made and that the party in whose favour that order had been made was having difficulty obtaining that payment. In that case the Court accepted that the creditor had significant assets. He had also offered to pay the amount claimed into court (though in the event only a portion of the sum was directed to be so paid). The debtor sought an order that he not be adjudicated bankrupt on the basis that he was able to pay his debts. In this he was asking the Court to exercise its discretion under s 37 of the Insolvency Act 2006. The Court accepted that he was solvent and dismissed the creditor's application. On this basis it is argued by the applicant that Milton Law ought to have been aware that no court, properly advised, would have adjudicated Mr Aylesbury bankrupt.

[23] I note however that in that decision Justice Asher reiterated the discretionary nature of the Court's jurisdiction and stated at para [21]:

> It therefore does not automatically follow that because a debtor is able to pay his or her debts that adjudication should be refused. Rather, the presence of the overall discretion indicates that there may be circumstances where a debtor who is able to pay his or her debts should nevertheless be adjudicated bankrupt.

[24] It was also observed that the discretion of the Court not to make an order because the creditor could pay his or her debts required that the debtor be able to pay

them “immediately or within a reasonable time”. Examples of when an order might be made in respect of a solvent debtor given by His Honour included where the debtor had deliberately sought to make execution impossible or extremely difficult, where the debtor had failed to provide details of assets he claimed, or where there where numerous debtors. This is clearly a non-exhaustive list. In *Lawson v Perkins* His Honour found that it was appropriate for him to exercise his discretion not to make an order. In so doing he observed that it would be possible to use other execution procedures such as Charging Orders. It was observed that the purpose of the bankruptcy jurisdiction was to ensure the orderly administration of the affairs of an insolvent person and it was not to be used as a means of enforcing orders of the Court. While it was clear in that case that an order would not be made, I did not take from the decision that it was considered a breach of professional obligation for the application to have been made.

[25] I also distinguish the service of a bankruptcy notice from the service of a statutory demand on a company under s 289 of the Companies Act 1993. It is well established that it is improper to serve a statutory demand on a company for a collateral purpose: *Apple Fields Ltd v Trustees Executors and Agency Co of New Zealand Ltd* (1999) 8 NZCLC 262,008. A statutory demand may be issued on a debt alone without the need to obtain judgment first and without the need for it to issue from a Court. It is therefore proper that more stringent professional constraints exist on the use of that procedure.

[26] It should also be noted that on one approach Mr Aylesbury was insolvent in so far as he was unable to meet his debts as they fell due. This is an appropriate approach in such a case: *London and Counties Assets Co Ltd v Brighton Grand Concert Hall and Picture Palace Ltd* [1915] 2 KB 493 at p 501, *Re Stirling, ex parte Webb Ross & Co* [1990] 1 NZLR 569, 573). He had been in default on his obligation to pay Ms Aylesbury for some time. The Court of Appeal stated in *Holdgate v Blocassa Ltd & Anor* [2007] NZCA 132 (per Arnold J at para [19] that in respect of the bankruptcy jurisdiction:

> The debtor must be able to pay his or her debts as they are incurred, either immediately or within a reasonable time. If unable to do this, the debtor may be declared bankrupt even though he or she has more assets by value than liabilities. Put another way, a debtor will not necessarily avoid bankruptcy by showing a positive balance sheet.

In that case the debtor was adjudicated bankrupt even though he had properties the value of which appeared sufficient, if realised, to discharge the indebtedness.

[27] In the present case the respondents point to a number of factors which they say justified them in taking the action they did. I note at the outset that insofar as they argue that the conduct of Mr Aylesbury in refusing to pay the amount due to Ms Aylesbury was reprehensible and he was unwilling to pay that is not a relevant factor. However, the other matters raised include:

- Mr Aylesbury appeared to be entering into another high value property transaction (the Bay of Islands property),
- Information was not forthcoming as to the details of the sale transaction from which funds were to be provided,
- Ms Aylesbury had been denied almost all of her entitlement since the time of separation, and
- The judgement upon which the bankruptcy notice was founded was made on 17 June 2008 and required that payment be made “forthwith”.

[28] The concerns regarding the purchase of the Bay of Islands property was put to Mr Aylesbury’s advisors on 10 July 2008 by Milton Law. It was not responded to. Mr Aylesbury argued in his reply to the Standards Committee of 10 March 2009 that the information about the Bay of Islands Property was not relevant because he was not incurring any immediate significant liability in purchasing the Bay of Islands property and did not affect his ability to pay Ms Aylesbury. While this may be so, these facts do not appear to have been previously communicated to Milton Law.

[29] Bayly’s advisors stated that Mr Aylesbury would be in a position to pay the amount outstanding “on 31 July 2008 or within a short time after that to allow for the mechanics of settlement” (on 11 July 2008). Milton Law sought details of how this was to occur including the sale price of the land (on 25 July 2009). No such details were disclosed. In this regard it could not be said that Mr Aylesbury or his advisors were being open and frank with Ms Aylesbury and her advisors even though he was seeking a significant indulgence.

[30] It is also relevant that Milton Law raised the issue of impending bankruptcy proceedings on a number of occasions. While Mr Aylesbury's advisors indicated that such proceedings were unnecessary or futile (for example on 4 August) they did not suggest at any time that such a step would be an abuse or otherwise improper. I consider the fact that Mr Aylesbury was given some weeks notice of the intention to commence bankruptcy proceedings evidence that there was no improper motive on the part of Milton Law.

[31] It is also relevant that at the time of payment all that had occurred was the service of a bankruptcy notice and no application to bankrupt Mr Aylesbury had been made. The issuing and service of the notice of bankruptcy themselves were obvious preliminaries to such an application being made. However, of themselves, it is hard to see that they were reasonably a cause of distress and embarrassment over and above the orders of the Court. Had settlement not occurred when it did Mr Aylesbury may have been candid about his asset position, he may have made an interim payment or arrangement with Ms Aylesbury, or he may have provided full details of the transaction from which funds were to be paid. Any of these courses of action may have persuaded Milton Law that it would not be proper to apply for bankruptcy even though an act of bankruptcy (failure to comply with the notice in the prescribed period) had occurred. Alternatively, had no steps been taken to make the position clear to Milton Law it may have been reasonable for them to apply to the Court for an order of adjudication.

[32]] A proceeding should not be commenced in the Court unless there is an intention of seeking the remedy or order pleaded. It is not proper to use the process of the Court simply to gain a collateral advantage or to bring pressure to bear on the other party in respect of some unrelated matter. While it may be that in the present case it is more likely than not that the Court would not have made an order adjudicating Mr Aylesbury bankrupt, the question is whether or not the bankruptcy notice was obtained and served for an improper purpose.

[33] In determining this matter I must apply the civil standard of proof. In doing so I must do so flexibly taking into account that the more serious the wrongdoing alleged the less inherently likely the wrongdoing is to have occurred: *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

[34] I consider that the allegations against the respondents have not been established. I consider that in all of the circumstances of this case it is probable that the actions of the respondents were not motivated by an improper purpose and in particular that they did not set out to cause embarrassment, distress, or inconvenience to Mr Aylesbury. While it may have been very unlikely that a Court appraised of all of the facts would have adjudicated Mr Aylesbury bankrupt this is only clearly apparent on information made available after the issue of the bankruptcy notice.

Decision

[35] The application for review is declined pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act. The decision of the Wellington Standards Committee 2 is confirmed.

DATED this 31st day of July 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:

Mr Aylesbury as applicant (through Mr M)
Mr M Milton, Ms Z Milton and Mr A Milton as respondents
Milton Law as a related party
The Wellington Standards Committee 2
The New Zealand Law Society