LCRO 65/2011

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

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

Introduction

[1] Mr JV seeks a review of a determination by Auckland Standards Committee to take no further action in respect of a complaint by Mr JV against Mr QG that he failed to properly supervise his employee Mr QF.

Background

[2] In 2009 Mr QF was employed by the firm of AER of which Mr QG was the principal.

[3] Mr QF accepted instructions from Mr JV to act in connection with an application pursuant to the Costs in Criminal Cases Act 1967.

[4] Mr QF did not progress matters and that has been the subject of a separate complaint and review.

[5] On 16 March 2010, Mr JV wrote to Mr QG. He advised Mr QG that he had written to Mr QF on four occasions (4 August, 4 September, 17 November 2009 and 24 February 2010) and had telephoned on three occasions (2 October, 16 November and 15 December 2009) to ascertain what progress Mr QF was making in connection with his instructions. He advised Mr QG that he had received no response from Mr QF to these communications and sought assistance from Mr QG in eliciting a response from Mr QF.

[6] Mr QG responded to Mr JV on 22 March 2010 in the following way:-

> I acknowledge receipt of your letter of the 16th March 2010 which I have discussed with Mr [QF]. He will be writing to you in the very near future. In the meantime please complete and return the enclosed application for legal aid.

[7] Mr JV did not receive any communication from Mr QF. He wrote to Mr QG on 27 April 2010 to advise that he had not received any communication from Mr QF. He did not receive any response from Mr QG.

[8] He wrote on two further occasions on 4 May and 25 May 2010 to Mr QG to advise again that he had received no response from Mr QF. No response was forthcoming from Mr QG.

[9] Finally, Mr JV wrote to Mr QG on 19 June 2010 as follows:-

> Further to numerous letters penned by myself to your office and to Mr [QF] in which I have requested correspondence to advise of your intentions to proceed with the above matter, there has been no response.
>
> I can only conclude from your lack of response that you have no interest in proceeding.
>
> That being so, I request that you kindly return my documentation to me.

[10] Again, Mr QG did not respond to or acknowledge that letter.

The complaint and the Standards Committee determination

[11] On 5 July 2010, Mr JV lodged a complaint with the New Zealand Law Society Complaints Service. He complained that Mr QG had failed to meet his obligations to properly supervise Mr QF. He also complained that Mr QG had failed to honour an undertaking.

[12] Mr QG responded to the Complaints Service in the following way:-

> I acknowledge receipt of your letter of the 18th July,2010. I do not know the complainant nor have I met him.

> I acknowledge that I received a letter from Mr. [JV] dated the 16th March 2010 and that I did reply to it on the 22nd March 2010 having first discussed it with Mr [QF] who assured that [*sic*] he had the matter in hand. I do not engage in matters involving Court proceedings and therefore I was unable to discuss the matter with any degree of understanding. I am aware that the communication was made more difficult by the fact that the complainant was moved from the prison at Huntly where he was available to be called upon by Mr. [QF] to a prison in Wanganui where he had become no longer easily accessible as it is a long journey to Wanganui.
>
> I subsequently handed other correspondence to Mr. [QF] and being aware of the extreme communication difficulty I left all matters to him.

[13] In response to a Notice of Hearing from the Standards Committee, Mr QG made further comments by way of a letter dated 7 October 2010, which is again reproduced in full:-

> I acknowledge receipt of your letter of the 23rd September 2010. I reply as follows:-
>
> 1. Mr. [JV] was unknown to me until he wrote to me earlier this year.
>
> 2. I did discuss the letter with Mr. [QF] on more than one occasion.
>
> 3. I am not aware whether my firm has been instructed by Mr. [JV]. I am aware that Mr. [QF] did have a discussion with Mr. [JV] in prison about the possibility of Mr. [QF] assisting Mr [JV].
>
> 4. I do not know the nature of the assistance that was sought by Mr. [JV] except that it was in the field of criminal law, a field in which I have little experience or knowledge.
>
> 5. Each partner in my firm has his or her own field of expertise and in which we engage. We do discuss certain matters amongst ourselves but we do not seek to interfere or intervene in each others separate areas of practice. I believe that this is the case in most in most legal partnerships.
>
> 6. I am not aware of any current file or matter of Mr. [JV] in which my firm is engaged that requires any supervision.
>
> 7. That I consider my partners most competent in their own fields of law in which they engage and in which I do not possess the knowledge or competence to intervene or supervise. We are all available to each other to discuss any matters should the occasion arise.
>
> 8. I am not aware of any obligation to supervise my partners nor am I responsible for their failings other than in any civil liability that may arise.

[14] Following consideration of the matter, the Standards Committee determined to take no further action in respect of the complaint. It recorded its discussion of the matter in this way:-

> [10] The Committee considered Mr [QG's] submissions and took into account its earlier findings concerning Mr [QF]. The Committee noted that there appeared to be an adequate management and supervision structure in place. The Committee noted that Mr [QF] is a capable practitioner.

> [11] The Committee considered that there was sufficient information to suggest that Mr [QG] had competently supervised and managed Mr [QF]. In addition, the Committee formed the view that its findings of unsatisfactory conduct on the part of Mr [QF] should not, in all of the circumstances, also be attributed to Mr [QG]. The Committee concluded that Mr [QG] had not breached Rule 11.3 Lawyers: Conduct and Client Care Rules.

[15] Mr JV has applied for a review of that determination. He repeats the information provided by him in respect of his complaints and asserts that the Standards Committee is incorrect in its findings. He seeks a full review of all aspects of the complaint and the Standards Committee determination.

Review

[16] On 28 May 2011, Mr JV provided detailed comments and submissions as follows:-

- He disagrees with Mr QG's response to the Law Society that Mr JV had a chance conversation with Mr QF at Springhill Prison. Mr JV says that he specifically contacted Mr QF with a request that he act for Mr JV based on his perception that Mr QF had expertise in the type of application that Mr JV wished to bring.

- Mr JV notes that Mr QG's statement that no file for Mr JV was opened in the office is inconsistent with Mr QF's responses to the Law Society in connection with Mr JV's complaint about him. Mr JV refers to the documentation that Mr QF asserts he prepared for Mr JV which was in a substantially advanced form.

- Mr JV notes the further letters sent by him to Mr QG on 16 March 2010, 27 April 2010 and 25 May 2010 to which he received no response.

- He classifies the response to his first letter by Mr QG as an "ambiguous undertaking" that Mr QF would respond "in the very near future".

- He submits that he has not introduced new material to his complaint as suggested by Mr QG.

[17] Both parties consented to this matter proceeding by way of a hearing on the papers and I note that it was impracticable to consider a hearing in person given the fact that Mr JV was in prison. By letter dated 18 May 2012, I specifically requested Mr QG to respond to Mr JV's submissions and comments.

[18] Mr QG responded on 6 June 2012. He noted again that he had never met Mr JV nor was aware of the reason for his imprisonment. He considered however, that Mr JV was being vindictive in pursuing the review and also observed that he was aware that Mr JV had laid many other complaints about other solicitors. This comment and the subsequent comment that "it seems that this is his means of filling in his otherwise boring existence in prison" constituted a somewhat gratuitous response to the issues raised and added nothing to the material for this review.

[19] Mr QG asserted that he did not believe he had given any undertaking to Mr JV "but in any event this and any other new submissions made are irrelevant as this is a review of the Standards Committee's decision and being a review new matters cannot be introduced now".

Did Mr QG properly supervise Mr QF?

[20] Rule 11.3 of the Conduct and Client Care Rules[1] provides as follows:

> A lawyer in practice on his or her own account must ensure that the conduct of the practice (including separate places of business) and the conduct of employees is at all times competently supervised and managed by a lawyer who is qualified to practice on his or her own account

[21] Mr QG has confirmed that at the time of the conduct complained of, Mr QF was an employed solicitor. His statement in his letter of 7 October 2010 to the Complaints Service at paragraph 7 that "I consider my partners most competent in their fields of law in which they engage and in which I do not possess the knowledge or competence to intervene or supervise" is therefore somewhat puzzling.

[22] Similarly, in paragraph 8 Mr QG states "I am not aware of any obligation to supervise my partners nor am I responsible for their failings other than in any civil liability that may arise".

[23] Mr QF was not Mr QG's partner. He was his employee and as such Mr QG had a duty to supervise Mr QF's conduct in accordance with rule 11.3.

[24] The statement by Mr QG as referred to in [21] above is somewhat concerning, in that Mr QG acknowledges that he did not possess the knowledge or competence to intervene or supervise Mr QF. Mr QG had a duty to ensure that the conduct of his

[1] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

employees was competently supervised. It seems to me that Mr QG has by his own words acknowledged that he was in breach of rule 11.3.

[25] Various other comments made by Mr QG add to the impression that Mr QG undertook very little in the way of supervision, contrary to the comments made by him to the Standards Committee. For example, in his letter of 27 July 2010 to the Standards Committee, he indicates that he accepted Mr QF's assurances that Mr QF had the matter in hand. He stated that he did not "engage in matters involving court proceedings and therefore [he] was unable to discuss the matter with any degree of understanding". Later in that same letter he states that "I subsequently handed other correspondence to Mr [QF] and being aware of the extreme communication difficulty I left all matters to him".

[26] Further comments in Mr QG's letter dated 3 February 2011 to the Standards Committee supports that view.

- "Mr [QF] has done no work for Mr [JV] that could be supervised".
- "No file was opened in my office and there was nothing to be supervised. I did discuss Mr [JV's] letters with Mr [QF] on several occasions".
- "In my opinion Mr [QF] is a very competent lawyer. He has his own large client base and is constantly approached by new clients".
- "In conclusion, I repeat that I have complete confidence in the work done by Mr [QF] and I do not consider it necessary for further supervision than that presently exercised".

[27] He does however state in that same letter that "Mr [QF] and I discuss his files daily and discussions also take place with Ms Datt who is also an associate of my firm".

[28] I acknowledge the difficulty in supervising a solicitor whose field of work is one that the principal is unskilled in. The question arises as to whether the firm should be undertaking that work at all, but I do not intend to comment on that.

[29] In this case, the "supervision" required was minimal and administrative in nature. Mr JV wrote to Mr QG advising that he was not receiving any response from Mr QF to his requests for advice as to progress. Mr QG responded to Mr JV that Mr QF would be responding "in the very near future". All that was required of Mr QG was to ensure that Mr QF <u>did</u> respond.

[30] Mr JV wrote to Mr QG 4 times again to advise that he had not received any response from Mr QF. Mr QG did not respond to these letters. Instead his only action was to hand them to Mr QF for response.

[31] In his letter of 3 February 2011, Mr QG advised that he met with Mr QF and discussed his files daily. However, he seems to have adopted the view, that because there was no file, there was nothing to supervise. It seems to me that he should have been asking why there was no file, and given that the client was seeking advice as to progress, why there had been no progress.

[32] Mr QG's initial response to Mr JV was to send another legal aid application form. Mr JV advises that he had already provided a legal aid application form and again it seems that a very minimal conversation with Mr QF would have elicited the fact that a legal aid form had been completed which should then have prompted a question as to why it had not been forwarded to the Legal Services Agency.

[33] I find it difficult to ascertain what information the Standards Committee based its comments on when it stated in its determination that "there appeared to be an adequate management and supervision structure in place." The only basis for these comments would seem to be the statements made by Mr QG himself.

[34] An objective consideration of the events does not support this conclusion. Mr QG assured Mr JV that Mr QF would be replying. Mr QF did not, and nor did he respond to further enquiries. To ensure that a response was sent by Mr QF would require supervision of a very basic nature. It does not amount to supervision as to the course of action to be taken in respect of a particular matter, or which required any specific knowledge on a particular area of law.

Was there an undertaking?

[35] Mr JV alleges that Mr QG had provided an undertaking. It is somewhat unclear to me what that undertaking was, but I have assumed that Mr JV considers Mr QG's assurance that Mr QF would respond constituted an undertaking. This is not an undertaking in the formal sense as understood by lawyers and to which specific obligations attach. It is somewhat confusing to refer to this as an undertaking and to refer to the content of the letter as an undertaking adds nothing to the complaint.

The correspondence

[36] In all, Mr JV wrote five letters (or six as there are two letters dated 25 May 2010) to Mr QG. Mr QG replied to one and thereafter merely handed that correspondence to Mr QF to address. Rule 7.2 of the Conduct and Client Care Rules provides that "a lawyer must promptly answer requests for information or other enquiries from the client". It was not enough for Mr QG to just hand the letters to Mr QF to respond to without ensuring that the letters were indeed answered.

[37] In addition to rule 7.2, the general rules of conduct as to appropriate standards of professionalism demand that correspondence be replied to.

[38] The complaint to the Standards Committee by Mr JV did not raise the lack of response to the correspondence as a specific area of complaint and nor did the Standards Committee itself pursue this aspect. It is not however something which should be overlooked and I take this into account when coming to my conclusions with regard to this review.

Conclusion

[39] In conclusion I do not agree with the findings of the Standards Committee. In my view, there was a lack of very basic supervision provided by Mr QG in that he merely deferred to Mr QF and left to him to respond to or not. He took no responsibility to check that Mr QF had replied to Mr JV as he had advised would happen, and adopted a somewhat disingenuous approach that if there was no file then there was nothing to supervise. He should however have been enquiring as to what instructions Mr QF had received, why there was no file, and what steps he had taken to further those instructions.

[40] Even when Mr JV terminated his instructions and requested the return of his materials, Mr QG took no steps to ensure that that occurred.

[41] The complaints lodged by Mr JV could very easily have been avoided if Mr QG had taken the trouble to make enquiries of Mr QF about this matter and ensured that Mr JV's correspondence was responded to. Instead, and somewhat unnecessarily, the complaint continued, to be followed by this review. Mr QG has noted that any complaint such as this is stressful and unpleasant and as the matter started over two years ago he now considers this length of time unreasonable. It was in Mr QG's own hands to prevent this matter developing to the stage of a complaint at all.

[42] As a result of my conclusion, I intend to reverse the determination of the Standards Committee and to replace it with a finding of unsatisfactory conduct.

What are the appropriate orders to make?

[43] In his review application, Mr JV focuses on what he perceives to be an undertaking and applies the principles and consequences of a breach of undertaking to these facts. As I have found that Mr QG did not provide an undertaking in the sense that it is recognised by lawyers, those outcomes are inappropriate.

[44] Other than this, Mr JV seeks that the LCRO "exercises the powers that could have been exercised by the Standards Committee in relation to this complaint and to acknowledge the inherent responsibility assured by Mr [QG's] response and assurance Mr [QF] would be responding to Mr [JV]".

[45] Orders than can be made by the LCRO are contained within section 156 of the Lawyers and Conveyancers Act 2006. Of these, I consider the appropriate order to make is one of a censure or reprimand pursuant to section 156(1)(e).

[46] In *B v Auckland Standards Committee*[2] the Court noted at [36] that "it is clear that a censure will convey a greater degree of condemnation than a reprimand. The terms are not synonymous. The power to reprimand was not available to the District Disciplinary Tribunal under the Law Practitioners Act and plainly is intended to give Committees greater flexibility in dealing with relatively minor matters."

[47] At [38] the Court noted that "to censure a Practitioner is to harshly criticise his or her conduct. It is the means by which the Committee can most strongly express its condemnation of what a Practitioner has done, backed up, if it sees fit, with a fine and remedial order."

[48] By contrast, the Court referred to the definitions of the word "reprimand" in Black's Law Dictionary[3] as being "in professional responsibility, a form of disciplinary action - imposed after trial or formal charges - that declares the lawyers conduct improper but does not limit his or her right to practice law; a mild form of lawyer discipline that does not restrict the lawyers ability to practice law." The Court also

[2] CIV-2010-404-8451.

[3] 9th Edition at 253.

referred to the definition in the New Zealand Oxford Dictionary which defines the word as “an official or sharp rebuke (for a fault, etc)”.

[49] In the circumstances I consider that the appropriate order to make is that of a reprimand. There will also be an order for costs.

Decision

Pursuant to Section 211 (1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Standards Committee is reversed.

Mr QG’s conduct constitutes unsatisfactory conduct by reason of a breach of the Conduct and Client Care Rules and section 12(c) of the Lawyers and Conveyancers Act 2006.

Pursuant to section 156 (1)(b) of the Lawyers and Conveyancers Act 2006, Mr QG is reprimanded.

Costs

Pursuant to the Costs Orders Guidelines published by this Office, where a finding of unsatisfactory conduct is made against a Practitioner, a costs order will usually be made against the Practitioner in favour of the Society.

In accordance with these Guidelines Mr QG is therefore ordered to make payment of the sum of $300.00 by way of costs, such sum to be paid to the New Zealand Law Society within four weeks of the date of this decision. A full costs award has not been imposed in this instance as the issues involved are limited.

DATED this 13th day of September 2012

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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:

JV as the Applicant
QG the Respondent
Auckland Standards Committee
The New Zealand Law Society