LCRO 8/2014

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [Area] Standards Committee
BETWEEN	**HTO** Applicant
AND	**AG** Respondent

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

DECISION

Introduction

[1] HTO has applied for a review of a decision by the [Area] Standards Committee which decided to take no further action in respect of a complaint that Mr AG had made a threat against HTO for an improper purpose.

Background

[2] HTO operated in New Zealand as an internet service provider (ISP).

[3] Mr AG acted for DYRJ. DYRJ had invested around $300,000 to purchase rights to a number of [Country's] television shows. Mr AG's instructions were to protect DYRJ's intellectual property rights.

[4] On 25 August 2011 Mr AG sent a three-page letter to HTO. Mr AG said he acted for DYRJ, identified several TV channels over which DYRJ claimed copyright, and set out its concerns about one of HTO's users operating a website which provided

free streaming without DYRJ's approval.

[5] Mr AG referred to DYRJ's expectation that its approval would be sought, and referred to sections of the Copyright Act 1994,[1] which impose "criminal liability for making or dealing with infringing objects" and prescribe "internet service provider liability for storing infringing material".[2] Mr AG described the former as a "serious criminal offence", and explained that the latter could carry potentially substantial financial consequences as a result of HTO being an internet service provider.

[6] Mr AG also referred to the possibility that an infringement offence had been committed, and set out the possible consequences associated with the commission of such an offence.

[7] Mr AG requested information and cooperation from HTO in terms that indicated DYRJ did not know the extent of HTO's involvement in the potential copyright issues. He asked HTO to immediately disable the website, immediately cease operating the website and confirm its intention to do so if it was indirectly involved as defined in the Copyright Act. Mr AG requested information from HTO if it was the case that a user of HTO's internet service was operating the website.

[8] Mr AG's letter concluded with the following paragraph, later described by HTO in its complaint as a threat made for an improper purpose:[3]

> Our client demands that you undertake the above actions by 30th August 2011 and send us confirmation to that effect with the signed agreement on or before that date. If we do not receive a notification on or before such date, our client instructed us to report this matter to the police commissioner who will immediately cooperate with us to bring this case to justice with maximum effect. Our client may also simultaneously, without any further notice, take an action against you for civil proceedings to obtain compensation for the damages our client suffered due to all your illegal actions in breach of the Act.

[9] Comments attributed to Mr AG made their way into the media and by August 2011 HTO had instructed HXC about a "DYRJ and Newspaper Defamation Issue".[4] Correspondence was exchanged between the lawyers, then on 23 December 2011 Ms J, HTO's office manager, wrote to Mr AG expressing HTO's belief that Mr AG had contravened r 2.7 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

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[1] Mr AG's letter refers to the Copyright Act 2004 but he acknowledges that was an error.
[2] Copyright Act 1994, ss 131 and 92C.
[3] Letter AG to HTO (25 August 2011).
[4] Invoice HXC to HTO (20 October 2011).

[10] Ms J said the primary purpose of Mr AG's threat was to assert increased pressure on HTO and its directors to comply with DYRJ's demands. Ms J expressed the view that Mr AG should simply have reported the copyright breach to police if he genuinely believed HTO had committed a criminal offence worthy of police attention. Ms J requested a formal written apology and payment of $3,920 as:[5]

> a small gesture of compensation for the stress and worry caused to HTO's directors and management and the costs and expenses incurred by HTO in taking its own legal advice in relation to your Fax and the threats therein.

[11] Mr AG wrote back on 10 February 2012 saying he was no longer acting for DYRJ in the matter. He said his primary intention in writing to HTO had been to inform it about the possible legal issues in relation to the use of particular media content, and to clarify DYRJ's position with regard to that. Mr AG sincerely apologised for any unfortunate misunderstanding if HTO had taken the fax as a threat, expressed the hope resolution of the matter could be achieved "amicably through clearer communication and cooperation", and invited further discussion.

[12] HTO replied requesting payment of $3,920 by 13 February 2012. Mr AG did not pay.

Complaint

[13] In July 2013, Ms J laid a complaint on behalf of HTO alleging Mr AG had contravened r 2.7 of the Rules by making a threat for an improper purpose. In her complaint Ms J said:

> The primary purpose of the fax is to allege a breach of the Copyright Act 1994 by [HTO] and to seek action or an undertaking from HTO that it will take action required by Mr AG's client.

[14] Ms J believes Mr AG's threat had a second "primary purpose", which was to increase pressure on HTO to induce compliance with DYRJ's demands, and later contended the threat was "strategically and improperly included to ensure compliance with the demands in the letter".[6]

[15] HTO seeks a formal written apology from Mr AG to be published in two newspapers nominated by HTO, and reimbursement of legal fees it incurred in relation to the complaint.

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[5] Letter J to AG (23 December 2011).
[6] Letter, HTO to New Zealand Law Society (6 September 2013).

Practitioner's Reply

[16] Mr AG says in his reply of 14 August 2013 that DYRJ's instructions were to stop "some businesses" from infringing its intellectual property rights. He referred to the apology he had delivered to HTO, and says of his letter dated 25 August 2011:

> After covering the relevant legal grounds, we have outlined our client's requests as part of a resolution process. We noted that our client's intention was to bring this matter to the police commissioner and/or make a civil claim should the requests be rejected by [HTO].
>
> … it was not our intention to make a threat … but only to notify [HTO] about the possible legal issues that may be raised and legal avenues to be followed if the situation was not resolved immediately. Our client's intention to follow the available legal avenues was expressed clearly to us as [DYRJ] has been endeavouring to stop breach of their copyright…
>
> … we believe that we did not threaten [HTO] and if any threat is assumed, we believe that it was not made for any improper purpose … our primary purpose in writing the comments was to protect [HTO's] commercial interest by engaging in the necessary negotiation most effectively, not to manipulate [HTO's] position.

[17] Mr AG notes the mention of defamation in relation to the legal fees HTO is claiming, and says he had nothing to do with comments attributed to him appearing in the media which form the basis of the defamation allegations.

Standards Committee decision

[18] The Committee considered the parties' correspondence and r 2.7 which says:

> A lawyer must not threaten, expressly or by implication, to make any accusation against a person or to disclose something about any person for any improper purpose.

[19] The Committee considered Mr AG's letter of 25 August 2011, was "concerned to note the tone …at the penultimate paragraph" and recorded that the Committee "takes [a] stern view on such issues".[7]

[20] The Committee considered Mr AG's letter of 10 February 2012 clarified the primary intention was not to make a threat, but to inform HTO about the possible legal issues and contained an apology for any "unfortunate misunderstanding".

[21] In the circumstances the Committee decided to take no further action on the complaint pursuant to s 138(2) of the Lawyers and Conveyancers Act (the Act). It declined to address HTO's concerns about allegedly defamatory comments attributed to Mr AG.

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[7] Standards Committee decision at [19].

Application for review

[22] HTO applied for a review of the Committee's decision saying, in essence, it had not dealt with the threat or the improper purposes for which Mr AG made it. The improper purpose was primarily to inappropriately exert increased pressure on HTO and its directors to comply with DYRJ's demands.[8] Ms J repeated the request that Mr AG be directed to provide an apology that will be published in two newspapers nominated by HTO, and seeks reimbursement of HTO's legal fees.

[23] Mr AG replied on 23 April 2014 but does not accept he did anything wrong.

Review Hearing

[24] The parties attended a hearing in Auckland on 3 October 2017. Mr M, Ms J's replacement, appeared for HTO. Mr AG attended on his own account.

Nature and scope of review

[25] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[9]

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
>
> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
>
> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[26] More recently, the High Court has described a review by this Office in the following way:[10]

> A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A

[8] Letter J to Legal Complaints Review Officer (15 May 2014).
[9] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].
[10] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

> review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

Discussion

[27] As there is no dispute about the contents of the letter Mr AG sent, the only considerations on review are whether there is evidence to prove conduct and purpose in contravention of the two elements to r 2.7 of the Rules, namely:

(a) Did Mr AG threaten to make an accusation against HTO? (the conduct)

(b) Was that conduct for any improper purpose?

Threaten

[28] The verb "threaten" is defined as:[11]

> To press, urge, force.

[29] Threaten covers a range of behaviours including attempting to "influence (a person) by menaces"; to "command sternly or strictly"; "to declare one's intention of injuring or punishing in order to influence"; and to "express an intention to do something, not necessarily evil".[12]

[30] To threaten is a form of abuse. To threaten can be a criminal offence. Blackmail, for example, is defined as threatening to make an accusation against a person with intent both to cause the person to act in accordance with the will of the person making the threat and to obtain a benefit or cause a loss to another person.[13]

[31] A lawyer must walk a careful line. Much of the work of many lawyers is to persuade others to act in a particular way, so the lawyer's client can obtain a benefit, or not sustain a loss which might otherwise be caused to another person.

[32] In going about their business, lawyers must comply with r 2.7. They must not threaten to make any accusation against a person for any improper purpose. They must not threaten to disclose something about any person for any improper purpose. They must not threaten expressly or impliedly. To threaten is inconsistent with the exercise of free choice.

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[11] *Oxford English Dictionary* (3rd ed, online ed, Oxford University Press, Oxford, 2009) [*Oxford English Dictionary*].
[12] *Oxford English Dictionary*.
[13] *Oxford English Dictionary*.

[33] Mr AG describes the purposes of his letter to HTO variously as notification, an attempt at resolution, to persuade it to do what DYRJ wanted, and to protect DYRJ, but not to manipulate HTO. He says the formal process through the Commissioner of Police and other government bodies is too slow. He did not consider applying to the High Court for an injunction to put a stop to whatever HTO may have been doing, but doubts his client had access to sufficient evidence to make out grounds. Mr AG says it is common practice when handling copyright matters to refer to the criminal and civil implications of the Copyright Act, and refers to copyright issues handled by patent attorneys (not all of whom are necessarily lawyers). He considered his approach optimised DYRJ's chances of stopping the unauthorised broadcasts.

[34] HTO has a different view of the substance of the copyright issues. Its commercial interests, and those of its users, are not entirely coincident with DYRJ's. It does not accept the allegations DYRJ levels against it. It says its managers and directors felt threatened by Mr AG's letter. However, that is not the test to be satisfied for the purposes of r 2.7. The first question is whether Mr AG "threatened".

[35] The Committee's view was that although Mr AG had written to HTO in August 2011 in a tone that warranted mention, the letter Mr AG sent nearly 6 months later containing an apology clarified that Mr AG did not intend to make a threat. Instead he sought to inform HTO about the possible legal issues.

[36] The alternate view of the apology letter is that it was a delayed reaction to the emergence of a genuine professional standards issue. The apology was slow in coming, and sought to account for conduct that was plainly aimed at prevailing on HTO to cooperate with DYRJ in circumstances where DYRJ had no control over events and difficulties in accessing information to support a complaint to police.

[37] Even though it is coupled with somewhat unconvincing references to how the police might be expected to react, it appears to me that Mr AG saying "our client instructed us to report this matter to the police commissioner" is threatening.

[38] Mr AG threatened to allege to police that HTO was guilty of a criminal offence. That is conduct of a type envisaged by r 2.7 of the Rules.

Improper Purpose

[39] On the basis that Mr AG threatened to make a criminal allegation against HTO, the next question is whether that conduct was for an improper purpose.

[40] The purpose of threatening was to add weight to Mr AG's attempts to persuade HTO to act in accordance with DYRJ's demands. Persuasion is not the problem. The problem is deploying the threat of making a complaint to police about alleged criminal conduct to add weight to otherwise legitimate attempts to persuade.

[41] In my view the threat of complaint to police was a step too far, and is conduct on the part of Mr AG that contravened r 2.7 of the Rules.

[42] I disagree with the Committee's view, which is inconsistent with the strict view it says it takes. The fact that Mr AG later apologised and explained does not necessarily mean his conduct was excusable. In my view the Committee should at least have addressed Mr AG's conduct in the context of whether it was a contravention of r 2.7.

[43] I do not consider Mr AG's letter of 10 February 2012 including his apology adequately recognises, or properly characterises, his conduct or the purpose for which he threatened HTO. Mr AG threatened to make an allegation to police in order to overbear HTO's free will. That is threatening for an improper purpose in contravention of r 2.7. That conduct falls within the definition of unsatisfactory conduct in s 12(c) of the Act. There is no good reason not to recognise the conduct by making a determination in those terms.

[44] A determination is made on review that there has been unsatisfactory conduct on the part of Mr AG pursuant to s 12(c) of the Act.

Consequential orders – s 156

[45] A range of consequential orders is available under s 156 including apology. As Mr AG has already apologised to HTO, there is no purpose to be served in ordering him to do so again. There is no reason to order publication of that apology.

[46] Section 156 enables a Legal Complaints Review Officer (LCRO) to order compensation, for example, for legal costs incurred as a result of the conduct. As it is not clear that the costs HTO claims relate solely to Mr AG's unsatisfactory conduct, no such order is made.

[47] Section 156 also provides for penalties to be imposed. The functions of penalty in the disciplinary context are referred to in *Wislang v Medical Council of New Zealand* as:

(a) Punishing the practitioner;

(b) A deterrent to other practitioners;

(c) To reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct.[14]

[48] The starting points for determining a penalty are the gravity of the misconduct and culpability of the practitioner, with the various mitigating and aggravating features being taken into account when fixing the penalty. Acknowledgement of error and acceptance of responsibility are matters for mitigation.

[49] A fine is a penalty. The maximum fine available under the Act is $15,000. Mr AG does not accept that he threatened HTO for an improper purpose. That is not correct. However, Mr AG's conduct is well short of the most serious of its kind. A fine of $1,000 is appropriate.

Costs on review – s 210

[50] Section 210 of the Act allows a LCRO discretion to order costs on review. The LCRO's Costs Orders Guidelines provide for costs to be ordered against a practitioner where the complaint was justified and an adverse finding is made. The guideline amount for a straight forward review where there is a hearing in person is $1,200.

[51] Mr AG is ordered to pay costs of $1,200 on review pursuant to s 210 of the Act.

Decision

[52] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is reversed.

[53] Pursuant to ss 211(1)(b) and 152(2)(b) of the Lawyers and Conveyancers Act 2006, a determination is made that Mr AG contravened r 2.7 of the Rules which is unsatisfactory conduct on the part of Mr AG within the meaning set out in s 12(c).

[54] Pursuant to ss 211(1)(b) and 156(1)(i) of the Lawyers and Conveyancers Act 2006, Mr AG is ordered to pay a fine of $1,000 to NZLS by [28 days].

[55] Pursuant to s 210 of the Lawyers and Conveyancers Act 2006, Mr AG is ordered to pay costs of $1,200 on review by [28 days].

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[14] *Wislang v Medical Council of New Zealand* [2002] NZAR 573 (CA) at [21].

[56] Pursuant to s 215 of the Lawyers and Conveyancers Act 2006, the costs order may be enforced in the District Court.

DATED this 16th day of October 2017

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D Thresher
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:

HTO as the Applicant
Mr AG as the Respondent
Ms J as the Related Person
[Area] Standards Committee
The New Zealand Law Society