LCRO 89/2017

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	**FZ** Applicant
AND	**LS** Respondent

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

DECISION

Introduction

[1] Mr FZ has applied for a review of a decision by the [Area] Standards Committee to take no further action in respect of his complaint concerning the conduct of Mr LS.

[2] Mr FZ is an American who has practised as a psychologist there and in Australia and New Zealand.

[3] His complaint arose from his engagement of [Company A] for taxation advice, and the view he subsequently formed that there were shortcomings in the advice received that proved costly for him.

Background

[4] This review and the complaint from which it derives have generated a significant quantity of written material, but what matters for the present purpose can be briefly identified.

[5] Unhappy with the quality of [Company A]'s tax advice, which in his view had unnecessarily led to him incurring a significant taxation obligation, Mr FZ sent them what he headed up as a "Formal Demand Letter" along with copies of previously exchanged email correspondence. The letter itself was undated.

[6] The letter said:

> Please be advised that as per our correspondence via email you have a liability in the amount of $71,652 based on your failure to advise me, FZ, of the pending tax residency date despite specific request by me on several occasions prior to the date tax residency occurred. Due to your negligent failure to inform (or respond) a tax burden in the above amount was created which but for your inaction would not have occurred. The evidence has been sent to you and you have not provided any reason why this liability does not exist. Therefore we (sic) hereby demand immediate payment of the amount mentioned. Failure to remit will result in a legal complaint being filed against your company and all persons responsible for this amount plus legal costs. We (sic) will be going forward with a formal complaint against you with the NZICA[1] regardless.

[7] An associated 10 August 2016 email said:

> … You can offer me settlement or we are going to court and I will be demanding every penny. I have nothing to lose except the time and effort but I would not say the same for you. I will be filing a formal complaint with the NZICA based on your response to this my final attempt to resolve this matter amicably.

[8] LS, who practises as a barrister, sent FZ a reply on behalf of [Company A] on 5 September 2016. In that reply he said of the demand for $71,652:

> [Company A] takes demands of the kind made very seriously, as does New Zealand law; the firm will respond appropriately.

[9] He then detailed [Company A]'s position before concluding:

> 8. You made threats in an attempt to have [Company A] meet the tax liability of $71,652 you incurred. You did not seek advice from [Company A] regarding leaving New Zealand so you ceased to be liable for New Zealand tax, and chose to trigger tax residence in New Zealand. Despite knowing the consequences since 2013. These matters must have been apparent to you when you made the threats contained in your “Formal Demand Letter”.

[1] New Zealand Institute of Chartered Accountants, now Chartered Accountants Australia and New Zealand.

> 9. It is a matter for you to decide what steps you wish to take. However, it will be evident to you that [Company A] has no liability for the tax consequences you were informed of in and after 2013; and that they fully met their professional obligations to you. The responsibility to pay New Zealand tax is yours.

[10] Mr FZ emailed Mr LS the following day thanking him for a very thoughtful letter and for his endeavour to clarify the situation. However he went on to say that Mr LS' response reflected his client having provided him with incomplete information.

[11] He said that he was:

> … In the process of laying (his position) out in copious detail to present to the government in my formal complaints. That will take time and effort on my part. Should I require the assistance of legal counsel the cost will be added to my claim.

At the email's close he added:

> At this stage the sensible thing would (sic) for your client to do would be to engage in a discussion of accepting responsibility, improving the atmosphere between us and working out a settlement. However, if your client has a policy of denial and fighting hard that will certainly increase your fees but that will result in my filing for any and all damages to which I am entitled under New Zealand law.
>
> I look forward to a reasonable response from you.

[12] Mr LS replied that day. He invited Mr FZ to provide further information if he considered that he had asked for advice and received wrong advice. In particular he asked Mr FZ to:

(a) identify the relevant emails;

(b) say what advice he sought (with reference to the wording of the email/s);

(c) say what advice he received (with reference to the wording of the email/s); and

(d) identify why he said the advice was wrong.

[13] In his response that evening, Mr FZ copied to Mr LS what he contended was a "critical" email and the email response by [Company A]. As he saw matters, the email, and the reply from [Company A] served to make his case.

[14] Mr LS replied on 8 September 2016. In doing so he analysed the position as his client saw it to be, which was that Mr FZ was the author of his own predicament as

he had, with full knowledge of the taxation consequences, remained too long in New Zealand.

[15] Mr LS concluded with these words:

> You have accompanied your claim for payment and offers to settle for part payment, with threats of filing legal proceedings, making a professional disciplinary complaint, and made references to newspapers. You have said you have nothing to lose but the time and effort.
>
> You should be aware that trying to make a person pay money to you without a proper foundation using threats of adverse publicity, expense and embarrassment is taken very seriously by the law in New Zealand.
>
> [Company A] will respond appropriately, and will not engage in further correspondence now it is clear what your position is.

[16] To this Mr FZ responded:

> I take your letter to mean you and your client have no intention to settle this matter leaving only one route for redress and that is the courts. This will be a question the judge will ask us both and I have clearly made an attempt to work this out which you have rejected and made a threat that doing so is against the law. I look forward to you posing your arguments in court if this is how you will pursue your defense (sic). Good luck.

[17] Mr FZ sent further emails to Mr LS which he acknowledged without further comment.

The complaint

[18] Mr FZ lodged a complaint with the New Zealand Law Society Complaints Service on 12 September 2016. The substance of the complaint was that:

> In an exchange with Mr LS, who represents his client [Company A], he asserted he would take legal action against me for blackmail because I had complained against his client for negligence and suggested settlement in lieu of litigation. This appears highly irregular and outside the scope of the duties and obligations of a barrister. Mr LS has refused to correspond further forcing me to file suit against his client.

[19] Attached to the complaint were copies of email correspondence with both Mr LS and [Company A].

The Standards Committee's decision

[20] The Standards Committee delivered its decision on 10 April 2017.

[21] The Committee determined that no further action on the complaint was necessary or appropriate.

[22] In reaching that decision, which focused on r 2.7 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules) 2008 (the Rules) referring to improper threats, the Committee determined that:

(a) Mr LS had not threatened Mr FZ.

(b) he had simply advised that his client did not accept Mr FZ's claims and alerted him to the potential consequences of making meritless claims;

(c) even if Mr LS had made a threat, it had not been for an improper purpose, which is what r 2.7 prohibits;

(d) it was entirely in order for Mr LS to relay to Mr FZ his client's rejection of Mr FZ's claims, and to draw to his attention the potential consequences of making meritless demands; and

(e) that Mr LS had provided Mr FZ with a full response to his demands setting out why the claims were rejected by his client, which was inconsistent with any indication of an improper threat.

Application for review

[23] Mr FZ filed an application for review on 5 May 2017. The outcome sought is that the Committee's decision be reversed in favour of a finding of unsatisfactory conduct by Mr LS.

[24] In summary, Mr FZ submits that:

(a) viewed objectively, Mr LS's reference to the demands in question being "taken very seriously by the law in New Zealand" and his intimation that his client "will respond appropriately" implied that Mr FZ had "committed blackmail by virtue of both his continuing demand for compensation and his correspondence prior to the letter of demand";

(b) rather than having the purpose of "alerting Mr FZ to the potential consequences of meritless" claims, Mr LS' purpose was clearly to dissuade Mr FZ from pursuit of his claim, one he considered to be valid;

(c) Mr LS' communications implied that [Company A] would take further action in respect of the alleged blackmail in the event that Mr FZ persisted in his claim and by definition that purpose rendered Mr LS' statements a threat — a statement of intended hostile action in retribution for something done;

(d) blackmail was a serious allegation and it could not be satisfactory conduct for a lawyer dealing with a "lay claimant (and a foreigner in this case), with the knowledge and power imbalance that implies, misleadingly to imply criminal liability in order to discourage the pursuit of a civil claim";

(e) this was especially so when there was no basis upon which Mr LS could legitimately imply that Mr FZ had committed, or was at risk of committing, blackmail;

(f) the Chartered Accountants Australia and New Zealand complaints process exhorted potential claimants to raise their complaint with the member before submitting a formal complaint;

(g) the fact that his intention to submit a complaint was not contingent on [Company A]'s subsequent conduct, which rendered it (Mr FZ's intimation) incapable of constituting blackmail;

(h) his correspondence had not, as Mr LS claimed, implied potential adverse publicity to encourage settlement of his (Mr FZ's) claim;

(i) while it was open to Mr LS to argue that Mr FZ's claim would be unlikely to succeed, it was improper to contend that it was entirely meritless so as to constitute grounds for an allegation that he had committed blackmail by seeking compensation;

(j) the threats were unnecessary for the protection or promotion of [Company A]'s interests and their omission would not have detracted from Mr LS' argument; and

(k) If allowed to stand, the decision set "a dangerous precedent which permits a lawyer expressly or impliedly to represent that a lay claimant has committed, or may commit, blackmail based solely on the lawyer's

own perception of a lack of merit in the proposed claim and for the purpose of dissuading the claimant from pursuing that claim".

Mr LS' response

[25] Mr LS was invited to comment on the review application. He had responded in detail to the original complaint, and when he responded to the review on 15 June 2017 he submitted that his original response had fully addressed the merits.

[26] Indicating his continued reliance on his original response, Mr LS submitted that the review was without merit and that Mr FZ had acted vexatiously, frivolously, improperly and unreasonably in bringing the application.

[27] On this account and in reliance on section 210(1) of the Lawyers and Conveyancers Act 2006 (the Act) he sought to be heard on costs when the review process was complete: Mr LS' contention being that Mr FZ had consciously persisted in the "misrepresentation" that he had set out to blackmail him.

[28] Mr FZ countered with a reply received on 4 July 2017. This response made reference to prior costs decisions. Mr FZ submitted that it was well established that awards of costs against applicants for review were for exceptional cases only, and that they would generally be made only when there was improper conduct by an applicant during the review process.

[29] Both Mr LS' response and Mr FZ's rejoinder alluded to the outcome of the latter's complaint about [Company A] itself, but that has no present relevance.

[30] Given his continued reliance on it, I now turn to Mr LS' 28 October 2016 response to the original complaint. In that response:

(a) Mr LS referred to his 5 September 2016 email to Mr FZ as one that set out very fully why, in his view, [Company A] had no liability to Mr FZ.

(b) [Company A]'s position was that any unwanted tax liability that Mr FZ had attracted arose from the personal decisions he had made despite the clear advice he had received from [Company A].

(c) He acknowledged that after stating why Mr FZ had no claim he had written:

> You should be aware that trying to make a person pay money to you without a proper foundation using threats of an adverse publicity, expense and embarrassment is taken very seriously by the law in New Zealand.

(d) He submitted that his response was accurate and appropriate. The law relating to enhanced and indemnity costs, defamation and blackmail were some of the protections provided against such conduct.

(e) [Company A] was a professional practice entitled to protect its reputation. Mr FZ's threats and statement that "I have nothing to lose except the time and effort but I would not say the same for you" indicated that Mr FZ was conducting himself with a false sense of impunity.

(f) His, Mr LS', duty was to draw Mr FZ's attention to the significance of his conduct, so as to ensure that his client could best enforce its rights against Mr FZ.

(g) Mr FZ appeared to take the view that by raising grounds of complaint he became entitled to a payment and settlement when in fact serious adverse consequences could flow from bringing a meritless claim, that being [Company A]'s view of it.

[31] As Mr LS read Mr FZ's review grounds, his complaints were that:

(a) Mr LS had said he would take action against him for blackmail; and

(b) Mr LS' refusal to correspond further forced him to issue proceedings against [Company A].

[32] Paraphrased, Mr LS' response was that:

(a) he had done no such thing;

(b) he had simply put Mr FZ on notice that risks were involved for him if he put his threats into effect; and

(c) his refusal to entertain further correspondence was, in all the circumstances, entirely appropriate.

[33] Mr FZ's rejoinder was one that he summed up by saying that:

> Mr LS has been dishonest with the committee in trying to portray my behaviour as extortion while denying the accusation of blackmail and without foundation, as shown by his failure to provide any support in fact or law. Mr LS speaks from both sides of his mouth denying and affirming the fallacious claim against me. He clearly has undermined the process of seeking redress and thus demonstrates disdain for the legal process and the rights of New Zealanders. He should be sanctioned appropriately for this serious breach of his obligation as a lawyer to uphold the law.

Review on the papers

[34] The parties have agreed to the review being dealt with on the papers. This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[35] It must be noted at the outset that Mr LS is personally known to a number of the current Review Officers.

[36] To ensure that this review inquiry was not contaminated by suggestion that the party conducting the inquiry had an association with Mr LS, I directed that the substantive inquiry was to be conducted by former District Court judge, Roderick Joyce QC. Mr Joyce is a delegate working in the Legal Complaints Review Office. Mr Joyce's delegation is authorised pursuant to the Act. [2] Mr Joyce does not know, and has had no personal contact with, Mr LS.

[37] The final determination of the outcome of this review, as set out in this decision, is made following a discussion of the review with Mr Joyce which included a consideration of his report.

Nature and Scope of Review

[38] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[3]

> … 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

[2] Lawyers and Conveyancers Act 2006, sch 3, cl 6.
[3] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

> 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.

[39] More recently, the High Court has described a review by this Office in the following way:[4]

> 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 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.

[40] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

(a) consider all of the available material afresh, including the Committee's decision; and

(b) provide an independent opinion based on those materials.

Analysis

Lawyer's duty: Rule 6

[41] Rule 6 obliges a lawyer to protect and promote within proper bounds the interests of the client to the exclusion of the interests of any third party including one in dispute with the client.

"Threat" and "Threaten"

[42] "Threat" is defined in *Butterworth's New Zealand Law Dictionary* as:[5]

---

[4] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].
[5] Peter Spiller *Butterworths New Zealand Law Dictionary* (7th ed, LexisNexis, Wellington, 2011) at 307.

> Any menace of such a nature and extent as to unsettle the mind of the person on whom it operates, and to take away from his or her acts that free involuntary action which alone constitutes consent.

[43] The Oxford English Dictionary defines "threaten" as:

> To press, urge, try to force or induce; especially by use of menaces.

Lawyers duty: Rule 2.7

[44] Rule 2.7 of the Rules says that:

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

[45] It has accurately been said of r 2.7 that:[6]

(a) it does not purport to prohibit conduct unless and until the "improper purpose" test is met. Thus the lawyer's motives must be discerned;

(b) lawyers' work frequently occurs in a contentious and adversarial environment involving actual or potential confrontation. In one form or another, threats are frequently encountered;

(c) rule 2.7 does not define "improper purpose" but some assistance may be gained from r 2.3 which is concerned with the use of legal processes only for proper purposes; and

(d) that rule indicates that the use of the law or legal processes for an improper purpose will include causing unnecessary embarrassment, distress, or inconvenience to another person's reputation, interest or occupation.

[46] The focus of Mr FZ's case on review is upon these words of Mr LS in his 8 September 2016 email to Mr FZ:

> You have accompanied your claim for payment and offers to settle for part payment, with the threats of filing legal proceedings, making a professional disciplinary complaint, and made reference to newspapers.

---

[6] Paul Collins "Commentary on Rules 2.7 and 2.10" (paper presented to Standards Committee Conference, 10 August 2017).

> You should be aware that trying to make a person pay money to you without a proper foundation using threats of an adverse publicity, expense and embarrassment is taken very seriously by the law in New Zealand.
>
> [Company A] will respond *appropriately* (emphasis added), and will not engage in further correspondence now it is clear what your position is.

[47] Mr FZ's call for the reversal of the determination of the Committee appears to rest upon an inference he draws from those words that Mr LS is saying that Mr FZ has committed blackmail, and will be at risk accordingly should he further pursue his claim.

[48] Mr FZ seeks to engage r 2.7 which, as I repeat, says:

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

[49] A reasonable inference is a conclusion drawn from otherwise established facts that is fair, reasonable and logical. An implication is descriptive of a suggestion that is indirectly conveyed.

[50] The words complained of do not permit the drawing of the inferential conclusion for which Mr FZ presses. They do not express or amount to a threat. There is no menace in them, express or implied. They convey no more than a matter of fact, forewarning of an "appropriate" response should Mr FZ persist.

[51] Recognised dictionaries commonly define "appropriate" as meaning "suitable or proper in the circumstances". Since endeavours to blackmail cannot be considered suitable or proper in any circumstances and Mr LS speaks only of an "appropriate" response, there is no logical room for any contention that Mr LS was indulging in blackmail.

[52] Nor is there any logical basis for reading into Mr LS' words a threat to report, and thus to accuse, Mr FZ of blackmail. Such a threat could not, in the present circumstances, be counted suitable or proper. Mr LS was careful to qualify what he said, and thus keep it firmly within the bounds of propriety.

[53] Mr FZ is free to reach his own view as to the import of the words, but this review cannot be determined by reference to the subjective views of Mr FZ.

[54] In the end, the ground upon which Mr FZ primarily founds his review is fatally flawed. It is founded upon a fallacy. I therefore turn to the second ground.

Refusal to continue the correspondence

[55] All Mr LS did was to advise Mr FZ that his client was not prepared to correspond further. For him to do so was, no more or no less, than to convey his client's unwillingness, in the obvious light of its view that Mr FZ had no claim, to deal with him further. Mr LS was duty bound to implement his client's instructions. He cannot be criticised for doing that; for simply doing his job.

[56] The lawyer's position in relation to a client and third parties is captured by r 6 of the Rules:

> In acting for a client, a lawyer must, within the bounds of the law and these rules, protect and promote the interests of the client to the exclusion of the interests of third parties.

[57] In responding as he did, it is apparent that Mr LS was doing no more than that: protecting and promoting the interests of his client, [Company A].

[58] I see no grounds which could persuade me to depart from the Committee's decision.

Costs

[59] Mr LS had requested that he be provided with opportunity to make a submission on costs.

[60] I do not propose to seek submissions on costs.

[61] Mr FZ is correct when he notes that it is uncommon for the Review Office to make an award of costs against applicants for review, particularly lay applicants.

[62] Consistent with the consumer protection objectives of the Lawyers and Conveyancers Act 2006, costs will only be awarded against lay applicants in circumstances where the Review Officer considers that the application is so frivolous, vexatious, or fundamentally lacking in merit, that a cost response is merited.

[63] Whilst I consider that Mr FZ's application lacked merit, I did not form a view that his application fell within the category which could appropriately be described as frivolous or vexatious.

[64] I appreciate that there is time and cost involved for a practitioner in responding to a complaint, but it is part and parcel of a lawyer's professional obligations to

constructively respond to complaints when made, and to engage with the complaint process, as Mr LS clearly has, in a helpful and constructive manner.

Decision

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

DATED this 7th day of November 2017

_____

R Maidment
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 FZ as the Applicant
Mr LS as the Respondent
Mr C and Mr N as the Applicant's representatives
[Area] Standards Committee
The New Zealand Law Society