

LCRO 278/2016

CONCERNING

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of [Area] Standards Committee [X]

BETWEEN

[Company 1]

Applicant

AND

ZC
Respondent

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

DECISION

Introduction

[1] [Company 1] (in liquidation) has applied for a review of the determination by [Area] Standards Committee [X] (the Committee) to take no further action in respect of its complaint that Mr ZC had refused to comply with a request by the liquidators pursuant to s 261 of the Companies Act 1993 to deliver all books, records, documents and files of the company to them.

Background

[2] On 12 August 2016, Mr RG was appointed joint liquidator of [Company 1]. On 22 August 2016, Mr RG sent a request to Mr ZC to “deliver ... all books, records or documents and files of the company that are in your possession or under your control”.

[3] The letter continued:

This request is made on the following two grounds:

- (a) By the liquidators, pursuant to s 261(1) of the Companies Act 1993 (Act).

- (b) By the Company, under the common law and pursuant to the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. For the avoidance of any doubt, please also treat this letter as formal notice of the termination of any retainer between you and the Company.

[4] The letter concluded with the following warning:

Under s 261(6A) of the Act, a person who fails to comply with a notice under s 261 commits an offence and is liable on conviction to a penalty as detailed in s 373(3) of the Act.

[5] Mr ZC responded by email on 1 September 2016:

I do not hold any funds on behalf of the company nor do I operate a trust account and have not entered into any transactions on behalf of [Company 1] or acted on any transactions involving the property of [Company 1].

...

Obviously legal advice provided is covered by legal privilege so cannot release my file notes and emails brought into existence for that purpose but otherwise attach a copy of a qs report which was sent to me for [Company 1].

[6] Subsequently Mr ZC sent, what is referred to as his “notes”, to the law firm [Law Firm 1] which acted for the directors of the company.

[7] On 4 November 2016, Mr RG advised Mr ZC:

The Company has now commenced proceedings against Mr and Mrs QN. The solicitor acting for the defendants is Mr NW.

Your actions in sending the file you maintained on instructions from the Company, after you knew of the liquidation, and after I and my lawyers specifically asked you for the file, to Mr NW (whom you knew to be acting for Mr and Mrs QN, against the Company) is a significant breach of confidence and privilege. Your actions have literally resulted in the defendants being given the plaintiffs’ lawyer’s file.

I will be making a formal complaint to the law society about this. ...

[8] The complaint was filed on 18 November 2016.

The complaint

[9] The complaint form was completed by Mr RG “on behalf of [Company 1] (in liquidation)”. The Lawyers Complaints Service correctly recorded the complainant as being [Company 1] (in liquidation).

[10] Mr RG did not specifically state that the complaint was for the failure by Mr ZC to comply with the s 261 demand, but that appeared to be the nature of the complaint.

[11] In his complaint Mr RG said:

The company has now commenced proceedings against its director[s] (among others). Mr ZC's actions have therefore resulted in the plaintiff's legal files being provided to the defendant without the plaintiff's consent.

[12] Mr RG left blank the section of the complaint form which provides for the complainant to indicate the desired outcome.

The Standards Committee determination

[13] The Committee issued its determination on 15 December 2016. It said:¹

The conduct that Mr RG complains about is conduct arising in the context of an alleged breach of the Companies Act 1993. In the case of an alleged breach of the Companies Act 1993 the remedy available is to initiate proceedings under that Act, if Mr RG believes that such proceedings would have merit. The Standards Committee, through the complaints process, has no similar function or jurisdiction to make a determination in respect of an alleged breach of the Companies Act 1993.

[14] The Committee determined to take no further action in respect of the complaint, but it left open the option for Mr RG to make a fresh complaint about Mr ZC if proceedings under the Companies Act were successful.

The application for review

[15] [Company 1] applied for a review of the determination. Mr RG advised that the complaint was not that Mr ZC had breached the Companies Act but "that Mr ZC sent his client files for the company to another party (the defendants in proceedings in which the company is the plaintiff) without authorisation".

[16] The outcome of the review sought by Mr RG was a "review of the decision".

Mr ZC's response

[17] Mr ZC instructed [Company 2] to act for him in connection with this review. In their response to the application for review Ms OT/Mr HS initially observed that the complaint did not refer to a specific Rule which Mr ZC was alleged to have breached.² Their submissions were therefore general in nature:

- The company had adequate remedies outside of the complaints process.

¹ Standards Committee determination, 15 December 2016 at [3].

² Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

- Mr ZC considered his clients to be the directors and shareholders of the company in their personal capacities.

[18] They submit that the liquidator could have:

- (a) ... filed an application with the High Court under section 266 Companies Act 1993 against Mr ZC requiring him to comply with the section 261 notice.
- (b) ... issued a section 261 Companies Act 1993 notice to the shareholders' lawyers, [Law Firm 1] requiring them to provide the documents Mr ZC provided them.

[19] They continue:

While Mr ZC filed documents and appeared in Court for [Company 1], he received instructions from, provided advice to, and considered his clients to be the shareholders in their personal capacities.

[20] [Company 2] advise that Mr ZC's Letter of Engagement was given to the shareholders in person and he had rendered his invoice to them personally. They cite the High Court judgment *Foley's Transport Ltd v Weddel New Zealand Ltd* as authority to support their submission that "solicitors are entitled to withhold documents and information from liquidators if it relates to advice given to directors in their personal capacity".³

[21] They also submit that it is arguable that Mr ZC's notes were his own property and not the property of [Company 1]. In this regard it is relevant that all Mr ZC has been accused of providing to [Law Firm 1] are his notes. A lawyer's notes do not constitute "books, records or documents" of the company, which is what the s 261 notice requested.

[22] Finally, [Company 2] observed that the liquidator had formally terminated Mr ZC's instructions to act for the company and he therefore had no ongoing solicitor-client duties to the company.

[23] The only response received from Mr RG was a copy of a Court Minute dated 12 August 2016 in proceedings issued by the Commissioner of Inland Revenue against the company. This Minute recorded that Mr ZC appeared for the company.

[24] In reply, [Company 2] advised:

Mr ZC accepts that he filed documents and appeared in court for [Company 1]. However, his contract of retainer was always with [Company 1's] directors and shareholders in their personal capacities – not [Company 1].

³ *Foley's Transport Ltd v Weddel New Zealand Ltd (in Rec and in Liq)* (1996) 7 NZCLC 261,126 (HC).

Procedure on Review

[25] A hearing with both parties was scheduled for 7 June 2019 and the file assigned to Mr Vaughan, a duly appointed delegate to the Legal Complaints Review Office.⁴ Mr RG was directed to file final submissions by 5 pm 24 May 2019 and [Company 2] then had until 5 pm 4 June 2019 to respond.

[26] Nothing was received from Mr RG, but final submissions were received from [Company 2] on 4 June.

[27] At that point, Mr Vaughan determined that he did not require to hear from the parties in person and the scheduled hearing was cancelled. Mr RG was requested to advise whether or not he required the review to be completed or whether it was withdrawn. His response of 6 June 2019 was:

I am not authorised to answer the question.

The complainant was [Company 1] (in liq) as the previous client of Mr ZC.

I was that company's authorised representative while I was the company's liquidator. However the liquidation has now been completed (and the company removed from the register). That had the effect of terminating my appointment as liquidator and so removing my status as authorised representative.

Review

[28] Neither the Complaints Service or this Office can be called upon to make a ruling on the reasons provided by Mr ZC for not complying with Mr RG's s 261 request.

[29] Section 266(2)(b) of the Companies Act provides that the Court may order a person who has failed to comply with a request pursuant to s 261 to comply, and/or attend Court to be examined about matters relating to the company, and to produce "the books, records or documents relating to the business, accounts, or affairs of the company in that person's possession or under that person's control".

[30] Mr RG's remedy was to apply to the Court to enforce the request and/or to have the penalty provided by s 261A imposed on Mr ZC.

[31] On review, Mr RG advised that his complaint was not that Mr ZC failed to comply with the request but that he provided his "notes" to [Law Firm 1], which resulted in company information being provided to the lawyers representing the directors/shareholders in an action by the company to recover shareholder advances.

⁴ Lawyers and Conveyancers Act 2006, sch 3, cl 6.

[32] In the first instance, it is arguable that Mr ZC's notes were not subject to the request by Mr RG. They do not constitute "books, records, documents or files" belonging to the company. The Judge's comment in *Foley* that "it is appropriate to take a narrow view of the terms of the request" would support that interpretation. However, again, that is not a matter which this Office should be called upon to rule on.

[33] Mr ZC advises that his clients were the directors/shareholders in person. His Letter of Engagement was addressed to them in person and his account was also rendered to them in person. That issue was discussed by the Court in *Foley* where it said:

...it would not be unusual to have a file opened in a company name or for the company to pay for the advice which the directors or an employee was seeking to obtain in respect of its own individual and personal responsibility and liability.

Conclusion

[34] The combination of the matters discussed above drives me to the conclusion that the determination of the Committee to take no further action in respect of Mr RG's complaints is the correct decision.

Decision

[35] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Committee to take no further action in respect of [Company 1's] complaint is confirmed.

DATED this 17th day of June 2019

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:

[Company 1] as the Applicant
Mr ZC as the Respondent
Mr HS as the Respondent's Representative
[Area] Standards Committee [X]
New Zealand Law Society
Secretary for Justice