LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2021] NZLCRO 053

Ref: LCRO 175/2020

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a decision of the [Area] Standards Committee [X]
BETWEEN	**PM on behalf of [MNO LIMITED]**
	Applicant
AND	**FS and BL**
	Respondents

DECISION

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

Introduction

[1] Mr PM has applied to review a decision by the [Area] Standards Committee [X] to take no further action in respect of his complaint concerning the conduct of the respondents, Ms FS and Mr BL.

[2] The Committee based its decision upon s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act). This provision allows a Committee to take no further action on a complaint, if it considers that doing so would be either unnecessary or inappropriate.

Background

[3] At the relevant time, Mr PM was a director of [MNO Limited] ([MNO]).

[4] [MNO] operated out of and leased premises situated in [Suburb A], [City]. Its landlord was [XY] Limited ([XY]).[1]

[5] The final expiry date under the lease was 15 December 2019. Rent and other costs owing under the lease at that date was $4,657.13.

[6] Under the lease, Mr PM was the guarantor of [MNO]'s rental and other payment obligations.[2]

[7] [XY] instructed its lawyers, [CAT Law] [CAT], to take steps to recover the unpaid rent and other costs. Ms FS and Mr BL had responsibility for managing those instructions.

[8] On 21 February 2020 Ms FS wrote to [MNO] on behalf of [XY] and made demand for payment of a total sum of $4,807.17 (the demand letter).[3] That sum was made up of payment defaults under the lease.

[9] Payment was required to be made by 5pm on Friday 28 February 2020.

[10] Ms FS also noted that [XY] was entitled to recover costs incurred in enforcing the lease, and said that those costs were then $800 plus GST and disbursements. She said that those costs would increase if matters were not resolved.

[11] Mr PM responded by email, also on 21 February 2020, confirming the outstanding rent and indicating that payment would be made when [MNO]'s debtors had paid what they owed the company. He challenged the demand letter as being premature and not in accordance with an agreement that he had made with [XY] about payment.

[12] Mr PM also referred to money he said [MNO] was owed by [XY], in connection with the security of the premises (the security issue).

[13] Mr PM and Ms FS corresponded further about the payment defaults and [XY]'s costs claim.

[14] On 27 February 2020 Mr PM informed Ms FS that the sum of $2,974.72 plus GST ($3,420.93) had been paid to [XY]. He had deducted an amount that he said [XY] owed [MNO] in relation to the security issue, and declined to pay [XY]'s costs on the basis that they were not recoverable under the lease (the reconciliation letter).

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[1] [MNO] was formerly known as [ABC] Limited. The original lease was between [GTN] Limited and [ABC] Limited. [GTN] Limited assigned its interests under the lease to [XY].
[2] Throughout this decision I will refer to Mr PM and [MNO] interchangeably.
[3] This sum was made up of outstanding rent in the sum of $4,657.13 plus interest payable under the lease calculated as $150.04.

[15] In the reconciliation letter Mr PM described the payment he had made as a "final payment".

[16] On 28 February Mr BL prepared a Notice of Statutory Demand pursuant to s 289 of the Companies Act 1993, and served that on [MNO] at approximately 11.30am that day (the Notice). The sum demanded was $4,056.54.[4]

[17] Later that day Mr PM emailed Mr BL objecting to the Notice on grounds that he had already paid what he believed was owing to [XY], and that the Notice had been served before the expiration of the deadline that Ms FS had imposed for settlement (5pm that day). He repeated that he did not consider that he had an obligation to pay [XY]'s legal fees.

[18] Mr PM emphasised that he had directly raised the security issue with [XY], claiming that it was in breach of its obligations under the lease to provide and maintain secure premises for [MNO] and its staff. Mr PM's position was that this entitled him to set-off an amount against the rent and other amounts [MNO] owed [XY], and that this meant that there was a dispute about what was owed to [XY].

[19] Also raised by Mr PM was his belief that, because there was a dispute between [MNO] and [XY], mediation and arbitration provisions in the lease applied and that this was a further reason for saying that the Notice was inappropriate.

[20] The parties then endeavoured to negotiate a settlement that included payment of what was owing by [MNO] to [XY] and withdrawal of the Notice, but the Level 4 lockdown of New Zealand on 25 March 2020 due to the COVID-19 pandemic intervened, and delayed matters.

[21] On 3 April 2020 Mr PM paid a further $1,408.75 directly to [XY], which cleared [MNO]'s rental debt. However, he asked [XY] for an invoice for the $800 said to be owing for its legal costs. Mr PM copied that email to others, including Ms FS.

[22] Ms FS responded on behalf of [XY] and reasserted its claim for payment of the legal costs included in the Notice ($2,647.79). Mr PM objected to paying anything more than $800 plus GST. He said that he intended to pursue [XY] in the Disputes Tribunal in connection with the security issue.

[23] Ms FS offered to reduce [XY]'s legal costs for which [MNO] was responsible for under the terms of the lease, to a GST inclusive total of $2,313.80.

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[4] This was made up of the balance of unpaid rent after Mr PM's part-payment ($1,386.24), [XY]'s legal costs ($2,322.00) and GST.

[24] The parties reached agreement about the amount Mr PM would pay in full and final settlement of the rent and costs claim by [XY], however that agreement has never been finalised.

The complaint

[25] Mr PM lodged a complaint on behalf of [MNO], with the New Zealand Law Society Complaints Service (Complaints Service) on 29 April 2020. The substance of his complaint was that:

(a) Mr BL served the Notice before the deadline set out in the demand letter.

(b) Mr PM's reconciliation letter sought confirmation that [XY] accepted the amount that was paid.

(c) The balance allegedly owing by [MNO] to [XY], was relatively small and did not justify taking steps such as serving the Notice.

(d) Serving the notice was unfair and burdensome.

(e) There was an existing dispute between [MNO] and [XY], in relation to the security issue.

(f) The lawyers' fees were in dispute.

[26] By way of outcome, Mr PM sought:

> [A] credit by [CAT] against fees submitted to a minimum of $2313.80 – this includes a credit for [CAT's] fees charged for issuing [the Notice] (in error)/writing of Letter of Acknowledgement and costs for my time engaged to resolve this matter.

Response by the lawyers

[27] Through counsel, Mr BW QC, the lawyers responded as follows:[5]

(a) Mr PM's complaint appears to relate to his liability to pay legal fees incurred by [XY] in enforcing the lease.

(b) All steps were taken by the lawyers on [XY]'s instructions.

(c) [XY]'s legal fees increased as Mr PM continued to engage with the lawyers and delay making the required payment.

[5] Letter from Mr BW to the Complaints Service (25 May 2020).

(d) Despite the increasing legal fees, the lawyers agreed to an amount payable by Mr PM in order to bring matters to a conclusion.

(e) Despite Mr PM claiming that there was a dispute with [XY] in relation to the security issue, the lease between the parties did not allow for there to be a set-off against rent owing.

(f) The amount paid by Mr PM in his reconciliation letter was not acceptable to [XY]. It therefore instructed [CAT] to prepare and serve the Notice.

(g) The amount demanded in the Notice was the balance of the rent arrears after Mr PM's part-payment ($1,386.24), together with legal costs ($2,670.30).

(h) On 3 April 2020 Mr PM paid a further sum of $1,408.75, but required [CAT] to provide an invoice of its costs before he would consider paying those.

(i) The lawyers "went to the furthest extent to accommodate Mr PM and reach compromises with him [including significantly] discounting the costs incurred by [XY]."

[28] Mr BW provided a bundle of the relevant documents and email correspondence that passed between Mr PM and the lawyers.

Comment by Mr PM

[29] In a letter to the Complaints Service dated 28 July 2020, Mr PM provided a response to Mr BW's submissions, and articulated his complaint in the following terms:

(a) The payment made in the reconciliation letter "included a request to confirm the amount paid/received as being correct".

(b) No response was received one way or the other.

(c) [CAT]'s legal fees could not be paid because no invoice had been provided.

(d) The Notice was served prematurely because the deadline provided for in the demand letter had not expired.

[30] Mr PM also said the following:

> [The amount paid in the reconciliation letter] came about due to the fact I had also already advised [[XY]] seven days prior of 28 Feb settlement of an outstanding

> issue of costs arising from [MNO] against their company – I did not have any knowledge that such costs are "not legally able to be deducted against final lease payments" – I have since been corrected in this matter and have paid all outstanding rental in full as promised.

[31] Mr PM repeated his assertion that the amount involved ($1,386.24) "would struggle to meet any reasonable threshold of acceptance in a District Court".

Standards Committee decision

[32] The Standards Committee delivered its decision on 10 August 2020. It identified the issue to be determined as being whether:[6]

> Ms FS and Mr BL have used the statutory demand process properly and have complied with their professional obligations.

[33] The Committee referred to r 2.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) and noted that this provided that "a lawyer must use legal processes only for proper purposes".

[34] The Committee gave as an example of a breach of r 2.3, a lawyer "[issuing] a statutory demand under the Companies Act 1993 knowing that (or failing to make enquiries whether) the debt is bone fide disputed."[7]

[35] The Committee then held that it was "satisfied that [the lawyers] issued the statutory demand for proper purposes", noting that Mr PM had made it clear in his reconciliation letter "that payment of the outstanding amount would not be made". The Committee's view was that the lawyers "were entitled to issue the statutory demand".[8]

[36] Finally, the Committee observed that Mr PM was not the lawyers' client, and that they were acting on behalf of, and protecting and promoting the interests of, [XY].

Application for review

[37] Mr PM filed an application for review on 7 September 2020. The outcome sought is:

> Withdrawal of the [Notice] … due to it being issued incorrectly and without reasonable cause or instruction [and a] Refund (or credit) ANY/ALL FEES and costs claimed by [CAT] in relation to issue of [the demands letter] and subsequent issue of [the Notice].

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[6] Standards Committee decision at [12].
[7] At [14].
[8] At [15].

[38] The essence of Mr PM's complaint and review application was set out in the accompanying memorandum as follows:

> The [notice] was issued prior to the due date for lease payments having expired. Noted the complaint should also have noted a dissatisfaction with [the lawyers'] conduct in observing Good Faith provisions in the deed of lease. They did not make any attempt to seek clarity of the situation regarding final payment shortfall, nor did they enquire with [MNO] as to whether there was any legitimate dispute regarding settlement amounts paid to [[XY]] – prior to their accepting and acting on their client advice to issue [the Notice].

[39] Mr PM made further submissions in a letter to the Case Manager dated 6 September 2020, and in emails to the Case Manager dated 18 November 2020 and 8 February 2021. I deal further below with points made by Mr PM in those submissions.

Response

[40] Mr BW responded to the review application on behalf of the lawyers.

[41] Mr BW's primary submission was that the review application should be struck out pursuant to s 205 of the Act. I deal with that application, later in my decision.

[42] As to the substance of the review application, Mr BW largely repeated the submissions that he had made on behalf of the lawyers to the Complaints Service.

[43] Mr BW emphasised that the Notice was served after Mr PM had "made it clear that [the] payment [required under the letter of demand] would not be made."[9]

[44] Further, Mr BW emphasised that "there was no bona fide dispute as to whether the debt was due and owing" because "set-offs were precluded under the lease."[10]

Nature and scope of review

[45] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[11]

> … 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" …

[9] Mr BW's letter (9 October 2020) at [42].
[10] At [79].
[11] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

> … 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.

[46] More recently, the High Court has described a review by this Office in the following way:[12]

> 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.

[47] 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.

Hearing in person

[48] Mr PM's application for review was progressed before me at a hearing in Auckland on 13 April 2021.

[49] Mr PM appeared in person. Mr BW and Ms SK appeared on behalf of Ms FS and Mr BL. The two lawyers did not appear.

[50] Prior to the hearing commencing, Mr BW provided a memorandum of submissions and attached bundle of relevant documents.

[51] Submissions were made respectively supporting and opposing the review application. Mr PM and Mr BW both answered questions from me.

[52] I confirm that I have read Mr PM's complaint, the response to that and the Committee's decision. I have also read the review application and the lawyers'

[12] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

responses to that, and I have heard from Mr PM in person and Mr BW on behalf of the lawyers.

[53] There are no additional issues or questions in my mind that necessitate any further evidence, information or submissions from either of the parties.

Discussion

Preliminary: strike-out application

[54] On behalf of the lawyers, at an early stage of the proceedings Mr BW applied to strike-out the review application. He did so on the principal basis that Mr PM's review application disclosed no reasonable cause of action.

[55] A Review Officer has the power, in appropriate cases, to summarily strike-out a review application.[13] The grounds include:

(a) that it discloses no reasonable cause of action; or

(b) that it is likely to cause prejudice or delay; or

(c) that it is frivolous or vexatious; or

(d) that it is otherwise an abuse of process.

[56] Mr BW's reasonably short point was that neither Mr PM's complaint nor his review application raised matters "which could be said to constitute a breach of a professional standard".[14]

[57] Mr BW identified what he considered to be the basis of Mr PM's complaint and review application – liability to pay [XY]'s legal costs, and the fairness of the Notice.

[58] I dealt very briefly with Mr BW's strike out application in a Minute issued to the parties through an email from the Case Manager, on 9 February 2021. I said:

> 3. I am not persuaded that the review application is so bereft of merit as to trigger the strikeout jurisdiction.
>
> 4. It seems to me that a discrete issue is whether r 2.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 is engaged when a Notice of Statutory Demand is issued before the expiration of the time allowed by a creditor for a debtor to satisfy a debt.

[13] Section 205 of the Act.
[14] Letter from Mr [BW] (9 October 2020) at [14].

> As well, an issue arises as to whether it could truly be said that the debt was not disputed by [MNO]/Mr PM.
>
> 5. I appreciate that Mr BW's … submissions addressed the latter issue in a substantial way … And I am not to be seen as rejecting his argument that [MNO]/Mr PM's position was one of obduracy rather than bone fide dispute.

[59] It is well understood that a decision-maker's power to strike-out should be exercised sparingly, and only in clear cases.[15]

[60] My concerns at the time included Mr PM's numerous references in his complaint and review application to having sought confirmation from the lawyers as to whether the amount tendered in his reconciliation letter, was acceptable.

[61] At first blush Mr PM's reconciliation letter did not appear to me to include a specific request for confirmation as to whether the amount tendered was acceptable. However, I considered that it was an issue about which I needed to hear further.

[62] Further, although Mr PM appeared to accept that he was unable to apply a set-off to the rental arrears, it was not entirely clear to me that he fully understood this.

[63] The approach that I took in declining to strike-out the review application was informed by the fact that a Review Officer has no jurisdiction to decide, let alone consider, what might be contestable legal and factual arguments about substantive non-disciplinary questions.

[64] I considered that for those reasons a hearing in person was appropriate, in order to more fully canvas the issues I identified.

Issue for determination by me

[65] There is one issue for me to consider: do any professional conduct issues arise for either lawyer in relation to the Notice served by email on [MNO] at approximately 11.30am on 28 February 2020?

[66] At this point I observe that the Notice was prepared and served by Mr BL.

[67] Ms FS's involvement in this matter appears to have been limited to writing the initial letter of demand to [MNO] on 21 February 2020 (no issue is taken with that letter – and nor could there be), and with negotiating with Mr PM briefly before and more extensively after the Notice had been served.

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[15] *Couch v Attorney-General* [2008] NZSC 45.

[68] Whilst Mr PM considers that Ms FS was needlessly aggressive in her negotiations on behalf of [XY], he does not appear to raise that as a separate conduct issue.

[69] To put that particular matter to rest however, I confirm that I have carefully read all of Ms FS's correspondence to Mr PM – from the initial letter of demand down to the final negotiations and settlement, ending with her email to him dated 14 April 2020. I can detect no departure by Ms FS from the required standards of courtesy and respect.

[70] Indeed, Ms FS's correspondence reveals patience, deference and a willingness to compromise. The fact that she set out certain non-negotiable positions could not, of itself, be translated into unwarranted aggression calling for a disciplinary response. At its heart negotiation is positional bargaining which will include parties drawing their lines in the sand.

[71] Ms FS conducted herself with commendable professionalism.

The Notice

[72] There are two parts to Mr PM's complaint about the issue and service of the Notice.

[73] First, that there was an existing dispute between [MNO] and [XY] and secondly, the Notice was served before the time had expired by which [XY] had required [MNO] (or Mr PM as guarantor) to pay the full amount of the rent arrears.

[74] I will deal with each of those issues in turn.

Dispute

[75] When first advanced by him, Mr PM's objection to the Notice was that because [MNO] and [XY] were in dispute about the security issue – something known to the lawyers – it was improper to engage the Notice procedure under the Companies Act 1993.

[76] I accept that the lawyers were aware that Mr PM had foreshadowed – both in his reconciliation letter and earlier – that [MNO] and [XY] were in dispute about the security issue.

[77] Knowledge of this dispute by the lawyers was a central plank to Mr PM's complaint that Mr BL acted improperly in serving the Notice.

[78] Mr PM is correct about the circumstances in which a lawyer may serve a Notice of Statutory Demand.

[79] Rule 2.3 of the Rules provides:

> **Proper purpose**
>
> A lawyer must use legal processes only for proper purposes. A lawyer must not use, or knowingly assist in using, the law legal processes for the purpose of causing unnecessary embarrassment, distress, or inconvenience to another person's reputation, interests, or occupation.

[80] The well-known footnote to r 2.3 gives as an example of the improper use of legal processes, serving a Notice of Statutory Demand in circumstances where the lawyer is or ought to be aware that the debt which is the subject of the Notice, is disputed.

[81] The rationale for this is tolerably clear.

[82] A Notice of Statutory Demand begins what can be – for the alleged debtor company concerned – an expensive if not a harsh process. The fast-track process triggered by the service of a Notice should not, therefore, be engaged in cases where there is genuine disagreement about the debt in question. It is oppressive and unreasonable to do so. Other fairer and more conventional procedures exist to resolve bone fide disputes.

[83] So the issue at least initially raised by Mr PM's complaint boils down to whether Mr BL improperly served the Notice on [MNO] in circumstances where he knew that there was a bona fide dispute between [MNO] and [XY] which impacted upon the rental debt.

[84] As indicated, when initially framed and argued by Mr PM, his position was that the security issue was such a dispute: [MNO] had suffered losses (he alleged) because of [XY]'s failure to provide secure premises as the lease demanded. Mr PM believed that those losses could be set-off against [MNO]'s rental arrears.

[85] However, and as Mr PM now understands, the terms of [MNO]'s lease with [XY] did not allow there to be any set-off or deduction from rental and other payments.

[86] The lease between the parties was one that is standardised and in common use: the Auckland District Law Society Inc, sixth edition 2012, Deed of Lease.[16]

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[16] The execution of the Deed of Lease was preceded by the parties entering into an Agreement to Lease. It is common in commercial leases for parties to do so. In simple terms, an Agreement to Lease anticipates that the parties will execute a more formal Deed of Lease. Clause 4.1 of the Agreement to Lease provides that "the tenant shall enter into a formal lease with the landlord … using the sixth edition of the Auckland District Law Society Inc Deed of Lease form." Clause 4.3 provides that if a Deed of Lease is not executed, its terms will nevertheless apply to the Agreement

[87] The Second Schedule of the Deed of Lease executed by the parties, sets out in explicit detail both the tenant's and the landlord's obligations under the lease.

[88] Clause 1.1 of the Deed of Lease relevantly provides:

> The Tenant shall pay the annual rent by equal monthly payments in advance … on the rent payment dates. … All rent shall be paid without any deductions or set-off…

[89] Mr PM endeavoured to argue that because he had, he believed, triggered a dispute with [XY] about the security issue, then the good faith mediation and arbitration (dispute resolution) provisions of the lease applied, and that this prevented Mr BL from serving the Notice.[17]

[90] Clauses 43.1 – 43.4 in the Deed of Lease set out the applicable dispute resolution provisions. Significantly, clause 43.4 provides:

> The procedures prescribed in [the dispute resolution provisions] shall not prevent the landlord from taking proceedings for the recovery of any rent or other monies payable under this lease which remain unpaid….

[91] In my view the combination of clauses 1.1 and 43.4 of the Deed of Lease between the parties, makes it plain that Mr PM could not apply a set-off in relation to the security issue, to the rent that [MNO] owed to [XY].

[92] The rationale for the obligation to pay rent without deduction would appear to be to prevent a tenant from manufacturing a dispute with their landlord as a device to avoid paying rent, or to pay a reduced amount. I hasten to add that I do not for a moment suggest that this was the case with the security issue.

[93] The types of rental dispute that might prevent a landlord from serving a Notice on a corporate tenant, would be a dispute about exactly how much is owing, or a dispute about the correct party to a lease.

[94] As indicated, Mr PM now accepts that position. He said the following in his review application:

> I was subsequently advised (after the issue of the [Notice]) that amount withheld should not have been excluded from consideration in any final lease payment…

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to Lease. It follows that when parties have executed a Deed of Lease and there is a discrepancy between it and the terms of the earlier Agreement to Lease, the Deed of Lease will apply and prevail.

[17] Mr PM was relying upon the dispute resolution provisions of the Agreement to Lease. Because the parties had executed a Deed of Lease, the dispute resolution provisions in that document prevailed and applied.

> [I]n effect there was no dispute – just a misunderstanding of the amount due from [MNO] to [XY] Management.

[95] As well, at the hearing Mr PM confirmed that he understood that a set-off was not available.

[96] Despite that subsequent understanding and for completeness, I briefly deal with an issue raised by Mr PM that was somewhat aligned with his argument that Mr BL knew, at the time he served the Notice, that there was a dispute.

[97] As I understand it, Mr PM argues that Mr BL may not have appreciated that a set-off was not possible, and was thus aware (albeit mistakenly) that there was a dispute between [MNO] and [XY] which prevented resort to the Notice procedure.

[98] There is no merit whatsoever in this argument. Although I have not heard evidence on the subject, I would be reasonably confident that Mr BL was aware – as I imagine most lawyers are – that commercial leases of the type between [MNO] and [XY], do not permit a tenant to claim a set-off against rent.

[99] Moreover, even if Mr BL was unaware of this, as a matter of law there was no dispute between [MNO] and [XY] in relation to the rent that was owed.

Timing

[100] In his email to the Case Manager dated 8 February 2021, Mr PM framed his timing argument as follows:

> I was estopped from completing my lawful right to complete payment/settlement of my lease obligations within a time frame provided by [Ms FS] in [the demand letter].

[101] Couched as a disciplinary issue, I interpret Mr PM's complaint to be that Mr BL breached r 2.3 by improperly using a legal process (service of the Notice) so as to cause Mr PM unnecessary embarrassment, distress or inconvenience.

[102] The "improper use" was to serve a Notice prior to the expiration of an earlier imposed deadline for satisfaction of a debt.

[103] Mr PM put it this way in his complaint:

> The [Notice] should not have been issued and created a burden of unnecessary costs imposed without regard to fairly allowing the business of [[MNO]] to settle the balance under paid in genuine error.

[104] Mr PM relies upon his reconciliation letter as being clear evidence of him seeking confirmation of the amount that [XY] required to settle. In his complaint and review application, Mr PM has variously referred to his reconciliation letter as including:

(a) "a request for [the lawyers] to confirm the payment was correct/and represents full and final payment to retiring all outstanding lease obligations";

(b) "my payment/settlement included a reconciliation and request for clarification and agreement of the amount paid";

(c) "neither [XY] … or [the lawyers] provided any reasonable courtesy in reply or acknowledgement of receipt of payment made by [MNO] in that they did not seek to advise the payment made was short of what they required";

(d) "The [notice] was issued prior to the due date for lease payments having expired. … [The lawyers] did not make any attempt to seek clarity of the situation regarding final payment shortfall, nor did they inquire with [MNO] as to [whether] there was any legitimate dispute regarding settlement amounts paid … prior to [serving the Notice]";

(e) "[MNO] presented [XY] … with clear reconciliation to payments made and written request for the receiving party to reconcile and/or agree to the payments";

(f) "There was absolutely no correspondence entered into at any time between [the reconciliation letter and the Notice being served]".

[105] Mr PM made submissions to similar effect at the hearing. Indeed, he went further and suggested that there was a commercial convention whereby a request for confirmation, such as he argues he included in his reconciliation letter, should always be answered.

[106] Mr PM argued that a failure to do so followed by unilaterally invoking legal processes, was bad faith and in the case of lawyers, unprofessional and unethical.

[107] It bears setting out the relevant parts of Mr PM's reconciliation letter:

> Please take note:
>
> **The balance of rental owed for [MNO] Lease … is now paid.**
>
> TOTAL Paid $2974.72 plus GST ($3420.93 incl GST)

> Reconciliation as follows:
>
> **Ref invoice 020-24** $4049.68 (plus GST) – Dated 12 November 2019
>
> **Less $1225.00** as explained to [[XY]] for mandatory on-site security attendance (Plus GST)
>
> **Plus Interest on outstanding (full) balance at 12%** $150.04.
>
> **…**
>
> It is noted that [CAT's] costs are not claimable under the terms of lease unless approved by a court.
>
> I trust this final payment will retire the matter of outstanding rents and lease obligations from [MNO] … to [[XY]].

[108] It is important to emphasise that it is his reconciliation letter upon which Mr PM bases his submission that the lawyers failed, in bad faith, to respond to a request for confirmation as to what (if anything) remained payable, and that Mr BL instead, and before the expiration of a deadline imposed by Ms FS, resorted to the Notice procedure.

[109] When pressed by me to identify where in his reconciliation letter he made such a request, Mr PM said that the sentence "I trust this final payment will retire the matter … " was a conventional expression which means "please confirm whether this final payment will retire the matter … " Mr PM also said that the words "I trust", convey that he is asking a question.

[110] I cannot agree with Mr PM's argument that his reconciliation letter amounted to a request for confirmation as to amounts outstanding.

[111] Read as a whole, it is clear to me that Mr PM's reconciliation letter included (if not comprised) a rejection by him of the amount sought by [XY] in Ms FS's demand letter of 21 February 2020. It is difficult to come to any other conclusion when the opening sentence in Mr PM's reconciliation letter reads "the balance of rental owed … is now paid."

[112] It must be remembered that at the time he sent the reconciliation letter and made the payment, Mr PM genuinely believed that he was entitled to set-off an amount in relation to the security issue, against the rental owed. Indeed, Mr PM has persisted in his belief that [XY] were in breach of their security obligations under the lease, by separately pursuing that matter to the Disputes Tribunal.

[113] I do not accept that there is a "commercial convention" of the type explained by Mr PM, whereby all correspondence must be answered before there can be resort to legal processes. Each case will be different, and in some cases I accept that responses

may be called for but that is not the same as saying that there is a "commercial convention" as argued by Mr PM.

[114] I consider that the only reasonable construction that can be put on Mr PM's reconciliation letter, is that he was refusing to pay anything more than the amount tendered in conjunction with that letter.

[115] In my view, once Mr PM had made it clear, as I am satisfied his reconciliation letter did, that he was not going to pay anything more than the amount tendered, Mr BL was entitled to conclude that there was no point in waiting until Ms FS's deadline had expired before serving the Notice.

[116] In that regard I note that Mr PM's response to receiving the Notice, set out in his email of 28 February 2020 to Mr BL, included him saying:

(a) that he had, the day before, "paid all amounts due to [XY]";

(b) that he had "clearly settled what [he believed was] owing to [XY] (less costs)";

(c) that there was "a current dispute with [XY] (the security issue]"; and

(d) that he "[believed that he had] genuinely settled this matter of overdue invoice … in the requested timeframe" and that "[costs were] being withheld … due to current costs in dispute."

[117] Mr PM's response to the Notice did not include any suggestion that his reconciliation letter amounted to a request for confirmation of what was owing.

[118] I do not need to address the more general question of whether a disciplinary issue might arise when a lawyer invokes a legal process against a party before the expiration of a deadline imposed on that party to remedy some legal breach or default.

[119] I emphasise that that is not what occurred here. Mr PM made it plain that he did not intend to remedy the breach identified in Ms FS's letter of demand, and instead he paid a lesser amount which he described as being "all amounts due to [XY]".

Other matters

[120] For completeness, I briefly deal with two other matters that were raised by Mr PM though, as I perceive it, largely abandoned by him.

[121] Those two matters related to the amount being sought, and Mr PM's liability to pay [XY]'s legal costs.

[122] I deal first with the issue of the amount that [XY] were seeking to recover, once payment had been made by Mr PM in his reconciliation letter. The amount set out in the Notice, was $4,056.54. This included the balance of the unpaid rents, and [XY]'s costs.

[123] Mr PM at least initially argued that this was an inconsequential or insignificant amount that did not justify either legal processes such as issuing a Notice, or proceedings being filed.

[124] The amount sought by [XY] was reduced further when Mr PM made a payment of some $1,400 on 3 April 2020 (which extinguished the rental debt), although unpaid costs sat at around $2,500.

[125] There is no money amount below which a party cannot initiate legal processes or proceedings seeking recovery. Obviously, questions of costs in pursuing a relatively small amount of money, will inform any decision as to whether or not to take that step. Arguably perhaps also, a court might be asked to consider whether pursuing a very small amount could be an abuse of process.

[126] It would be wrong of me, sitting as a Review Officer, to comment on whether the amounts at stake in this matter were worthy of pursuing through the courts. It cannot be overlooked that [XY] had suffered a loss as a result of [MNO] failing to meet its obligations under the lease, thereby requiring [XY] to seek legal advice and pursue the matter formally.

[127] As it happens, litigation ultimately did not become necessary because the parties reached agreement as to a settlement amount. Mr BW said that the agreed amount has not been paid by Mr PM, and it remains to be seen whether steps will be taken to enforce that agreement.

[128] The second point at least initially raised by Mr PM but, as I perceive it largely abandoned by him, was the question of [XY]'s costs – [CAT]'s legal fees.

[129] At the hearing Mr PM accepted that the legal fees in question were, viewed objectively, fair and reasonable for the work done by the lawyers in enforcing the provisions of the lease on behalf of [XY].

[130] That simply leaves the question of whether [MNO] was contractually obliged to pay those costs under the lease. It appears to be the case that clause 6.1 of the lease creates that obligation. It provides that "the tenant shall pay the landlord's … legal costs

(as between lawyer and client) of and incidental to the enforcement of the landlord's rights and remedies and powers under this lease."

Conclusion

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

Costs

[132] On behalf of the lawyers Mr BW applied for an award of costs against [MNO], in the event that its review application was unsuccessful.

[133] Mr BW argued that the review application was without merit and submitted that it should be met with a costs award, pointing out that the jurisdiction to award costs was contained in s 210 of the Act.

[134] As to quantum, Mr BW suggested the conventional approach of 70% of the actual costs incurred. That amount, as I understand it, is some $9,000 plus GST, of which the sum of approximately $5,000 plus GST was consumed by the review application and hearing.

[135] Mr PM opposed an award of costs being made. He submitted that lodging a review application was [MNO]'s right, to which particular attention was drawn by the Committee at the foot of its decision.

[136] Mr PM also noted that despite the lawyers' applying to strike out his review application on the grounds set out in s 205 of the Act, as the Review Officer managing the case I had declined to do so, and had informed the parties that the matter would proceed as a both-party hearing.

[137] Mr BW referred to the Legal Complaints Review Officer's "Guidelines for Parties to Review" (the Guidelines). Where relevant, the Guidelines provide:

> 54. The LCRO also has a general power to make such further costs orders in respect of the conduct of the review. These may include orders that the professional body pay costs incurred by the review to a practitioner, or that the practitioner pay the costs incurred by the review to the professional body.

[138] The Guidelines also refer to the separate Costs Guidelines. These provide the following:

> **Costs between the parties**
>
> 11 Section 210(1) of the Lawyers and Conveyancers Act gives a general power to the LCRO to make such order as to the payment of costs and

> expenses as the LCRO thinks fit. This may extend to an award of costs as between complainant and practitioner in respect of the review, however, such power will be exercised sparingly.
>
> 12 Where the application for review was reasonable (whether or not the decision of the Standards Committee is modified or reversed) and the parties have acted appropriately, parties will generally be expected to bear the costs they incurred in being party to the review.
>
> 13 A costs order may be made against a party to review (whether a practitioner or a lay person) in favour of the other party where there has been some improper conduct in the course of the review. Such conduct may exist where a party has acted vexatiously, frivolously, improperly, or unreasonably in bringing, continuing, or defending the review. Improper conduct may also exist where a party has ignored or disobeyed an order or direction of the LCRO or breached an undertaking given to the LCRO or another party.
>
> 14 Such an order will take into account the actual costs incurred by the other party in the conduct of the review including any counsel retained and any out of pocket expenses.

[139] Of course, both sets of guidelines are just that: general observations designed to provide a framework within which to exercise the statutory power to award costs.

[140] Although Mr PM's review application has been unsuccessful, I am not persuaded that an award of costs against [MNO] is justified.

[141] As a preliminary matter however, I do not accept that because a Committee's decision contains information for parties about a right of review, this insulates an applicant against an award of costs in an appropriate case.

[142] Pursuant to s 139(2)(b) and (c) of the Act, Standards Committees are required, as part of the notice of any decision made under s 138 of the Act, to "describe the right of review conferred by s 193 [of the Act]" and "state the period within which an application for a review of the decision may be lodged."[18]

[143] This is not an encouragement to lodge a review application; it is a statement of rights and the description of a process.

[144] This review application proceeded to a hearing where the parties appeared in person, because I declined to strike-out Mr PM's review application on the grounds that there were issues requiring closer analysis by me.

[145] Whilst I accept that Mr PM significantly changed his position about the existence of a dispute between [MNO] and [XY] justifying a reduction in the rent owed, it was still

[18] The same requirement applies to determinations made by Standards Committees, under s 152 of the Act (see s 158(2)(c) and (d) of the Act).

not entirely clear to me that Mr PM fully understood that because he also made frequent reference to that dispute in the context of the Notice.

[146] Further, there was also an issue in my mind as to Mr PM's frequent references to his reconciliation letter being part, rather than the conclusion, of a negotiation process.

[147] Although I have reasonably readily dismissed all of Mr PM's arguments, I take the view that they were matters which nevertheless required a degree of explanation by the parties and attention by a Review Officer.

[148] In my view, that takes Mr PM's review application out of the category contemplated by the Costs Guidelines at [13] as involving "some improper conduct in the course of the review" including that Mr PM "has acted vexatiously, frivolously, improperly, or unreasonably in bringing [and] continuing … the review."

[149] In declining to award costs, I also take into account the fact that, at least at the complaint stage, Mr PM received advice from a lawyer which could well have buoyed his views about Ms FS's and Mr BL's conduct. I am not privy to what was said, in detail, by Mr PM to that lawyer – and vice versa. However, I do regard the comments made in an email by that lawyer as being (at the very least) unwise.

Anonymised publication

[150] Pursuant to s 206(4) of the Act, this decision is to be made available to the public with the names and identifying details of the parties removed.

Decision

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

DATED this 22nd day of April 2021

R Hesketh
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 PM as the Applicant
Ms FS and Mr BL as the Respondents
Mr BW QC as counsel for the Respondents
Mr RJ as a Related Person
[Area] Standards Committee [X]
New Zealand Law Society