

In the Matter of Part 7 of the Lawyers and Conveyancers Act 2006

And

In the Matter of complaint 15171 by Mr Malcolm Rabson against Mr Howard Thompson

Notice of Decision by Wellington Standards Committee 1

Background

1. Mr Malcolm Rabson was adjudicated bankrupt in March 2013. All claims and causes of action in Mr Rabson's bankrupt estate were assigned to the liquidators of two companies associated with Mr Rabson. On 9 December 2015 the liquidators were successful in High Court proceedings (the proceedings) against Mr Rabson and Mr Richard Creser in their capacities as trustees of the Malcolm Rabson Family Trust (the Trust) for the sum of \$782,531. Justice Collins found the Trust owed Mr Rabson that sum and the liquidators were entitled to claim the sum from Mr Rabson. Mr Rabson and Mr Creser were ordered to pay the liquidators' costs in respect of the proceedings.
2. On 28 January 2016 Mr Rabson filed an appeal against the High Court decision. Mr Creser was also named as an appellant in the appeal and sought to have the High Court's costs order against him overturned. Security for the costs of the appeal was set at \$6,600.
3. Mr Creser made an application to dispense with security for costs against him. The application was considered by Deputy Registrar McGrath and was declined. Mr Creser applied for a review of the Deputy Registrar's decision, which was set to be heard by Justice Wild in the Court of Appeal. Before the review was heard, Wild J issued a minute indicating that he was of the view that Collins J may have mistakenly ordered Mr Creser to pay costs in the proceedings, and calling for comments from Mr Howard Thompson as counsel for the liquidators.
4. On 18 May 2016 Mr Thompson filed a memorandum in response to Wild J's minute 2016 (the memorandum). In the memorandum, Mr Thompson submitted that Collins J had not erred in ordering costs against Mr Creser as, essentially, Mr Creser was a party to and/or had an on-going interest in the proceedings. Mr Thompson's submissions included that:
 - (a) whilst Mr Creser had advised Mr Thompson about three months before the trial that he had resigned as a trustee, he had not asked to be removed as a party to the proceedings;
 - (b) Mr Creser had fully supported Mr Rabson in the proceedings, including giving evidence and attending much of the trial, and had behaved as though he had an on-going interest in the proceedings; and
 - (c) there was no reason Mr Creser should not be made liable for costs up to the point that he resigned as a trustee. There was also a case for saying costs should simply follow in the ordinary way because Mr Creser had remained a party to the proceedings.

5. Wild J upheld the Deputy Registrar's decision declining to dispense with security for costs. In his judgment on the matter dated 23 June 2016, Wild J referred to the memorandum when reaching the conclusion that his initial impression that Collins J may have made an error in awarding costs against Mr Creser may have been wrong. He also concluded that it would not be right to require the liquidators to defend the High Court judgment without the usual protection as to costs provided by security.
6. On 30 June 2016 Mr Creser made an application to have Wild J's judgment of 23 June 2016 recalled (the application for recall), predominantly on the ground that Mr Thompson had misled the Court as to his status in the proceedings. In support, Mr Creser referred to email correspondence between himself, Mr Thompson and the High Court from 3 months before the High Court trial, in which Mr Creser confirmed to Mr Thompson that he had retired as a trustee and had no interest in the proceedings.
7. Around this same time, Mr Rabson made a complaint to the Lawyers Complaints Service that Mr Thompson had breached his duty not to mislead or deceive the Court by knowingly filing a memorandum which had misrepresented Mr Creser's status in the proceedings. The complaint was considered by Central Standards Committee 2 (CSC2) and dismissed on the basis that the alleged misrepresentation was currently before the Court, and Mr Rabson therefore had access to an adequate alternative remedy or right of appeal. In its decision dated 7 July 2016, CSC2 noted:

"If in the course of his decision on Mr Creser's recall application, Justice Wild makes a finding adverse to Mr Thompson, that is a matter about which Mr Rabson can bring a fresh complaint to the Lawyers Complaints Service. If, on the other hand, Justice Wild does not make a finding adverse to Mr Thompson, that will determine the matter."
8. The application for recall was dismissed by Wild J on 28 July 2016. In his decision on the matter, Wild J did not comment on Mr Thompson's alleged misrepresentation, but dismissed the application on the basis that Mr Creser had not established that the situation was one where justice required that the judgment be recalled.

Complaint

9. Mr Rabson brought a fresh complaint about Mr Thompson on the basis that Wild J had failed to address the allegation that Mr Thompson had misled the Court in his judgment on the application for recall. Mr Rabson said that Wild J "...evaded the evidence by ruling that Mr Creser had not in the judge's opinion met the legal threshold for recall"¹. He submitted that CSC2's finding that he had access to an alternative remedy had therefore "proved untrue".
10. In support, Mr Rabson provided an affidavit from Mr Creser dated 6 September 2016 (the affidavit). Mr Creser confirms that he informed Mr Thompson by email before the trial that he had resigned as a trustee and had no interest in the proceedings, and denies that he fully supported Mr Rabson in the proceedings and was present for much of the trial.

The issues

11. The Standards Committee's consideration of the complaint was focused on what it considered to be the key issues, namely:
 - (a) Had Mr Rabson had access to an adequate remedy or right of appeal in respect of the matters raised in his complaint?

¹ Email from Mr Rabson to the Complaints Service dated 31 August 2016.

- (b) Had Mr Thomas breached any of his professional obligations in relation to the matters raised by Mr Rabson?

Examining the issues

Issue (a) *Had Mr Rabson had access to an adequate remedy or right of appeal in respect of the matters raised in his complaint?*

12. As set out in more detail below, the Standards Committee was satisfied that the issues and evidence that Mr Rabson raises in his complaint have been squarely before the Court of Appeal. Furthermore, the complaint raises matters that are not within the jurisdiction of the Standards Committee to consider. Mr Rabson has also had access to appeal to the Supreme Court. If Mr Thompson's conduct was inappropriate, the Court of Appeal and the Supreme Court had an opportunity to comment on it. They did not. The Standards Committee was satisfied it can be implied that by dismissing the applications on this matter, both Wild J and Justice Ellen France had concluded that Mr Thompson had not misled the Court.
13. In the Standards Committee's view, Mr Rabson is essentially seeking to challenge Wild J's decision to dismiss the application for recall. Mr Rabson's complaint is that Mr Thompson has misled the Court and breached the duty of honesty he owes to the Court. These are the same allegations made in the application for recall and are made on the same grounds. It is not possible to make a realistic distinction between Mr Rabson's complaint on the one hand and the application for recall on the other. That Mr Rabson is essentially seeking to challenge Wild J's decision is evident in his comment that the Judge "*evaded the evidence by ruling that Mr Creser had not in the judge's opinion met the legal threshold for recall*".
14. The appropriate avenue to challenge a decision of the Court is on appeal. The Legal Complaints Review Officer (LCRO) has stated:
- "It is improper to use the complaints process as means to undermine or attack a decision of another court or tribunal. The proper route for challenge of a decision of another tribunal is appeal."*²
15. The Standards Committee was satisfied that Mr Rabson has had access to an adequate right of appeal in respect of the matters raised in his complaint. Mr Thompson's conduct has been before the Court and no concerns have been raised. It would not be appropriate for the Standards Committee to allow the complaints procedure to be used to essentially revisit a decision of the Court.
16. The principal evidence that Mr Rabson relies on to support his allegation that Mr Thompson has misled the Court is the email correspondence between Mr Creser and Mr Thompson, in which Mr Creser confirmed that he was no longer a trustee of the Trust and had no interest in the proceedings. This email correspondence was provided to the Court of Appeal by Mr Creser in support of his application for recall. The affidavit from Mr Creser provided with this complaint does not add anything material to the evidence that was placed before the Court of Appeal with regard to this issue.
17. The second evidential issue raised in Mr Creser's affidavit concerns Mr Thompson's submission that Mr Creser "*fully supported Mr Rabson in the proceeding, gave evidence in support of the position*

²LCRO 02/2009 at [11].

taken in [the trustees'] statement of defence and was present for much of the trial". Mr Creser says this is untrue. He says he did not attend the trial until the very end of the second day and then only as a material witness whose testimony lasted 20 minutes or less, and that on the third and final day he only observed the last 2 hours of the trial from the public gallery.

18. This issue was also raised in Mr Creser's application for recall, which stated:

"The court record confirms Mr Creser's involvement in the High Court proceeding was limited to being called as a witness in the proceedings (in his capacity as a former trustee).

Mr Thompson must have mistakenly identified someone else supporting Mr Rabson as Mr Creser. The Court transcript of evidence unequivocally confirms Mr Creser was in fact excluded from the Court until he gave evidence at the end of the third day for a period of only 19 minutes."

19. The Standards Committee failed to see how Mr Creser's affidavit raises any material matter about his involvement with the proceedings that was not before the Court. The only significant difference between the application for recall and the affidavit is that Mr Creser now confirms he was in the public gallery on day three of the trial. The Standards Committee was satisfied that this does not amount to new evidence that would warrant the Standards Committee taking any further action on this matter.
20. Mr Creser raised two further matters in his affidavit. Firstly, Mr Creser considers it telling that Wild J concluded his judgment by making a direction adding him as a second appellant in the appeal proceedings. He says this contradicts Mr Thompson's claim that he remained a party to the High Court proceedings. Secondly, Mr Creser takes issue with the fact that Wild J took into account the fact that he is a creditor of the Trust when reaching the view that it may have been appropriate to award costs against him. He says *"If this is the benchmark for paying trial costs, I can only state there were many other creditors of the trust. None were ordered to pay costs except me."*
21. With regard to the first of these matters, Wild J's direction that Mr Creser be added as a second appellant was made to enable Mr Creser to appeal in his personal capacity as he did not have capacity to appeal as a trustee. It was a procedural direction concerning the proceedings before the Court of Appeal and does not amount to evidence of any wrongdoing on the part of Mr Thompson.
22. With regard the second matter raised, the Standards Committee considered Mr Creser appears to be fundamentally arguing that Wild J has taken into account an irrelevant consideration or made an error as to the grounds for ordering a party to pay costs. If a party considers a decision of the Court is based on an error or irrelevant consideration the appropriate forum for the correction of the error or for a review of the factors taken into account is on appeal. It is inappropriate and beyond the jurisdiction of the Standards Committee to review a Judge's decision making on a matter of law at issue in proceedings before them.
23. For the reasons set out above, the Standards Committee was satisfied that Mr Rabson has had access to an adequate remedy or right of appeal in respect of the matters he has complained about. It was also satisfied that the matters raised have been judicially determined and it was not necessary or appropriate for the Standards Committee to take any further action in relation to the complaint.

Issue (b) Had Mr Thomas breached any of his professional obligations in relation to the matters raised by Mr Rabson?

24. For completeness, the Standards Committee turned to consider the substance of Mr Rabson's complaint and whether Mr Thompson had breached any of his professional obligations in relation to the matters complained about.
25. Mr Thompson's overriding duty is as an officer of the court. Central to this is his duty of fidelity to the court. Mr Thompson owes an absolute duty of honesty to the court and must not mislead or deceive the court.³
26. Having considered the material provided, the Standards Committee was satisfied that Mr Thompson has not misled or deceived the Court as to Mr Creser's status in the proceedings or otherwise breached his professional obligations in relation to any of the matters Mr Rabson has complained about.
27. In reaching that decision, the Standards Committee focused on what it considered to be the key issues arising from the statements which Mr Rabson alleged were misrepresentations, namely:
 - i. was it misleading to submit that Mr Creser had not asked to be removed as a party to the proceedings;
 - ii. was it misleading to submit that Mr Creser remained a party to the proceedings; and
 - iii. had Mr Thompson misled the Court about Mr Creser's presence at the trial and involvement in the proceedings?

Was it misleading to submit that Mr Creser had not asked to be removed as a party to the proceedings?

28. The email correspondence between Mr Creser, the High Court and Mr Thompson that is relevant to this issue is set out in full below.

On 19 August 2015, Mr Creser emailed the High Court case officer and Mr Thompson as follows:

"Hello Denia Nunn,
I can confirm that I've resigned as trustee of the Malcolm Rabson Family Trust as of 6 August 2015.
This email is my formal notice (Filed and Served) on Court and counsel.
Kind regards,
John Creser"

On 27 August 2015, Mr Thompson emailed Mr Creser:

*"Dear Mr Creser
I note that although you are still a party to the proceeding, the Court appears to have stopped including you on circular email messages. I see that you have resigned as a trustee of the Malcolm Robson Family Trust. Do you still have any further claims against trust assets, whether for indemnity or otherwise, or any other ongoing interest in the subject matter of this proceeding? If not, I would be prepared to recommend to my clients*

³ Rule 13.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

that they discontinue the proceeding against you, with no issue as to costs. Would you agree to that? If so, we would also need either consent from Mr Rabson and Mr Chapman to discontinue against you, alternatively, leave from the Court, which I doubt would be a problem.

Do you know if you have been replaced as a trustee by anyone else? If you are aware of the identity of your replacement, are you able to pass on their name and contact details to me?

I look forward to hearing from you.

*Yours sincerely
Howard Thompson
Partner
McMahon Butterworth Thompson*

On 27 August 2015, Mr Creser responded to Mr Thompson:

*"Dear Mr Thompson,
I am no longer a trustee of the MRFT, therefore I have no interest in these proceedings.
Regards
John Creser"*

29. The Standards Committee was satisfied that neither Mr Creser's email to the High Court of 19 August 2015 nor his response to Mr Thompson of 27 August 2015 amounted to a request to be removed as a party to the proceedings. In fact, Mr Creser had not addressed whether he would agree to the proceedings against him being discontinued as Mr Thompson had asked. It was not dishonest or misleading for Mr Thompson to advise the Court that Mr Creser had not asked to be removed as a party to the proceedings. He had not.
30. The Standards Committee also considered whether Mr Thompson had misled the Court by not informing it that Mr Creser had emailed him on 27 August 2015 stating that he had no interest in the proceedings.
31. The Standards Committee considered that on a natural reading, Mr Creser's email appears to be a statement of his view that as he was no longer a trustee of the Trust, he had no interest in the proceedings.
32. Mr Thompson advised the Court that Mr Creser had resigned as a trustee some three months before the High Court trial. If the fact of Mr Creser having resigned as a trustee was sufficient to remove him as a party to the proceedings, or meant he had no further interest in the proceedings, it was open to the Court to reach that view on the facts. The Standards Committee was satisfied that Mr Thompson has not concealed any matter relevant to the consideration of this issue from the Court.
33. The Standards Committee was also satisfied that Mr Thompson was not obliged to advise the Court that Mr Creser had stated that he had no interest in the proceedings in circumstances where Mr Creser had not addressed whether he had any further claim over Trust assets as Mr Thompson had asked, and had later gone on to give evidence at, and attend at least part of, the High Court trial.

Was it misleading to submit that Mr Creser remained a party to the proceedings?

34. The Standards Committee confirmed that a defendant trustee does not cease to be a party to court proceedings merely because they resign as a trustee. Further steps are required, such as a discontinuance filed by the plaintiff and/or a court order to that effect. Mr Creser did not respond to Mr Thompson's query as to whether he would agree to proceedings against him being discontinued and therefore no discontinuance was filed. Mr Thompson had no obligation to take

further steps to have the proceedings against Mr Creser discontinued and Mr Creser does not appear to have taken any steps to have himself removed as a party.

35. The Standards Committee was satisfied that Mr Creser had not been removed as a party to the proceedings after he had retired as a trustee and therefore Mr Thompson had not misled the Court on this issue.

Had Mr Thompson misled the Court about Mr Creser's presence at the trial and involvement in the proceedings?

36. The Standards Committee was also satisfied that Mr Thompson had not misled the Court about Mr Creser's presence at the trial or his involvement in the proceedings.
37. The Standards Committee accepted that Mr Thompson had formed the impression that Mr Creser was present for much of the trial and fully supported Mr Rabson in the proceedings as submitted in the memorandum.
38. In LCRO 262/2011 the LCRO considered the position of practitioners as officers of the court in relation to their duty of fidelity of the court saying⁴:

"In order to make a disciplinary finding under this Rule [13.1 of the Rules], there needs to be more than an honest error or oversight. A finding that a lawyer has 'misled' or 'deceived' the Court requires an element of knowledge or intention on the part of the lawyer to mislead or deceive the Court, or some evidence of a reckless disregard as to the accuracy of information conveyed to the Court. This may come in the form of a wilful blindness to matters that challenge the accuracy of the information, but materially there needs to be an element of moral lapse in the lawyer's actions."

39. The Standards Committee did not consider it was in a position to make a finding as to when Mr Creser was present and when he was absent from the trial, nor did it consider it was necessary for it to do so. Having regard to the above, the Standards Committee was satisfied that there was no credible evidence that Mr Thompson had intended to mislead or deceive the Court about Mr Creser's level of involvement with the proceedings, or that he had been reckless as to the accuracy of the information conveyed to the Court in that regard.
40. For the reasons set out above, and having regard for the memorandum as a whole, the Standards Committee was satisfied that Mr Thompson had not misled or deceived the Court as to Mr Creser's status in the proceedings, and it was not necessary or appropriate to take any further action on the complaint.

Decision

41. The Standards Committee, having considered the matters raised by the complaint and exercised its discretion, formally decided to take no further action pursuant to section 138(2) of the Lawyers and Conveyancers Act 2006, as after having regard to all the circumstances of the case, no further action was either necessary or appropriate.

⁴ At para [20].

Confidentiality

Decisions of the Standards Committee must remain confidential between the parties unless the Standards Committee directs otherwise. The Standards Committee has made no such direction in relation to these matters.

Right to apply for review to the Legal Complaints Review Officer (LCRO)

If you have received this Notice you may have a right to apply for a review of this decision by the LCRO. On review the LCRO may:

- (i) direct the Standards Committee to reconsider the whole or any part of the complaint; or
- (ii) confirm, modify or reverse the decision of the Standards Committee: and
- (iii) exercise any of the powers that could have been exercised by the Standards Committee in relation to this complaint.

Any application for a review of this decision by the LCRO must be made within 30 working days after a copy or notice of this decision is served on, given to, or otherwise brought to the attention of, the applicant for review. In the absence of proof to the contrary this is presumed to have occurred on the fifth working day after the date of this decision. An application for review must be on the prescribed form and accompanied by the prescribed fee of \$50.00. Contact details for the LCRO are:

Private Bag 92535
Wellesley Street
Auckland 1141

For further information about the LCRO and the review process call 0800 3676838 (extn2) or go to <http://www.justice.govt.nz/tribunals/legal-complaints-review-officer/contact-us>



Ross Crotty

Convenor, Wellington Standards Committee 1

Date: 23 December 2016
To: Mr Rabson
Mr Thompson c/o Mr Hugh King
New Zealand Law Society