



Walking the line

Photo by Kristin Smith

Lawyers are tightrope walkers. Every day we balance, often precariously but usually with great skill, the needs of clients, the rights of the other side, our duties to the law and the court and, invariably, the demands of our employer – all while walking a sometimes ill-defined ethical line.

But sometimes, as we teeter courageously between triumph and tragedy, we suddenly realise that we're not even sure where the rope is anymore. Where is the line, for example, between aggressive advocacy and intimidation?

It's not always easy for those of us called to walk that line to know when we've crossed it – or lost it.

This was the issue in the spotlight in the recent Legal Services Tribunal case of *LSC v Sing*.¹ It is a long-held principle that a lawyer must not threaten criminal proceedings to remedy a civil breach. It may be allowable, however, for a lawyer to indicate that a suspected criminal act (such as theft or non-payment for goods) may be referred to the appropriate au-



When does aggressive advocacy become unprofessional conduct? Neil Watt looks at the recent *LSC v Sing* case.

thorities for their investigation.² The line between these two courses of action is not always clear, as in the case of Sing.

Mr Sing, a lawyer, and his wife owned a commercial property which they leased to a company in February 2006. Problems began almost immediately. First the bond cheque, then the rental cheques bounced with monotonous regularity. By April 2006 in complete frustration Mr Sing wrote to the tenant the following letter:

“We act for Susan Sing in respect of your tenancy of the above property. Please find enclosed copy of correspondence to the Officer in Charge of Southport Police Station. This com-

plaint will be activated should full payment not be made on the due dates for the balance of your lease or should there be any damage to the premises beyond fair wear and tear . . .”³

Attached, as indicated, was a letter requesting the police to investigate whether a crime had been committed in the issuing of the dishonoured cheques by the tenant.

Did Mr Sing cross the line? Clearly the tenant thought so and made a complaint to the Legal Services Commission that led to the matter being heard by the Legal Services Tribunal. The Chief Justice, presiding in this matter, drew the following distinction:

“The threat by the letter of 4 April 2006 should be carefully defined. It was to ask the police to investigate the dishonouring of the cheques, an investigation which, if followed through, may or may not have led to a prosecution. It was not actually a threat to launch criminal proceedings were civil satisfaction not made.”⁴

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A critical factor in his Honour's decision was the fact that there was "no basis for concluding that, by what he said, the respondent was invoking his professional status to intimidate the recipient of the letter".⁵

Bullying must not be confused with advocacy and clearly crosses the line. Here is the crux of the matter – did Mr Sing use his position as a solicitor to intimidate the tenant with a threat of criminal proceedings? Clearly not; Mr Sing merely advised the tenant of a course his wife could already have taken.⁶ He did not threaten a criminal prosecution and, indeed, could not have done so as he is not the prosecuting authority.

Mr Sing applied pressure as advocates do, but did so in a measured way. His Honour held that, while Mr Sing walked the line, he did not cross it and the application was therefore dismissed.

While the matter ended happily for Mr Sing, there is nonetheless a warning in this case. As was said at the outset, sometimes the line is difficult to see and practitioners should walk it with extreme caution. The Chief Justice concluded:

"There is a continuum applicable to practitioners, with legitimate pressure at the one end, and improper intimidation at the other. It may, in any particular case, be difficult to delineate the precise point at which any application of pressure becomes improper. That is why practi-

tioners must be extremely careful before resorting to any even arguably threatening conduct. They are well advised to err on the side of caution, as in all aspects of their professional approach. With the increasingly intense demands of clients, and the high level of competition which these days characterises the practice of the law, practitioners will inevitably be asked to stretch the limits of their consciences: they must be steadfast not to yield to that temptation."⁷

Remedied

The Chief Justice noted in his decision that there was no rule in Queensland on this issue.⁸ With the introduction on July 1 of the Legal Profession (Solicitors) Rule 2007 this has now been remedied. Rules 28.2 and 28.3 read:

A solicitor must not, in connection with the practice of law, in any communication with another person . . . :

- 28.2 make any statement that is calculated to mislead or intimidate the other person, and which grossly exceeds the legitimate assertion of the rights or entitlement of the solicitor's client; or
- 28.3 threaten the institution of criminal or disciplinary proceedings against the other person in default of the person's satisfying a concurrent civil liability to the solicitor's client.

While the result for Mr Sing would likely have been the same had the new Rule 28 been in place at the time, the obvious message from this case is that practitioners should clearly know where the line is before they decide to walk it.

And speaking of the Rule . . .

An annotated copy of the Solicitors Rule can be downloaded from the QLS website under 'What's New?' It is the Society's aim to keep the new rule under constant review to ensure its currency and relevance to the profession and to update and add to the Guidelines and Commentary.

Reviewing the rule will now be a standing agenda item for the Ethics Committee and members are encouraged to provide feedback and advice on the rule at any time by forwarding their comments to myself at email n.watt@qls.com.au. ■

Notes

- 1 [2007] LPT 004.
- 2 G. Dal Pont, *Lawyers Professional Responsibility*, (3rd edition), 21.180.
- 3 Above n1, para 4.
- 4 Above n1, para 8.
- 5 Above n1, para 9.
- 6 Above n1, para 21.
- 7 Above n1, para 30.
- 8 Above n1, para 10.

QLS ethics officer Neil Watt welcomes your input on ethics issues; email n.watt@qls.com.au

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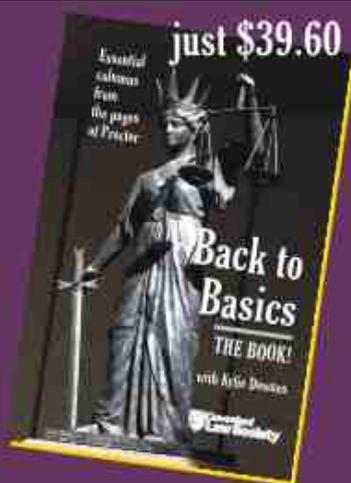
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