LCRO 108 /2010

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Auckland Standards Committee No.2
BETWEEN	**MR MAIDENHEAD** of Auckland Applicant
AND	**MR MARGATE** of Auckland Respondent

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

DECISION

Introduction

[1] This is an application by Mr Maidenhead (the Applicant) for review of a decision of the Auckland Standards Committee No.2 in respect of a complaint by the Applicant against Mr Margate (the Practitioner).

[2] The Committee did not consider that there were any matters raised in the Applicant's complaint that would warrant any further action and resolved accordingly pursuant to the provisions of Section 138(2) of the Lawyers and Conveyancers Act 2006 (the Act).

[3] In the letter accompanying the application for review, the Applicant advised that he considered that the Committee may have been confused in its dealing with the complaint and outlined the three issues of the complaint.

[4] These are as noted in the Applicant's letter dated 20 June 2010 accompanying the Application for review, namely

- the adverse outcome of the transaction between N Ltd (N) and IL Ltd (IL)
- the Practitioner's charges related to the PP Ltd (PP) transaction.
- the internal dispute resolution and escalation to managing partner.

[5] A hearing was held at Auckland on 13 October 2010 which was attended by the Applicant and the Practitioner.

The Background

[6] In February 2009 the Applicant met with the Practitioner to discuss the possibility of the Practitioner acting on the Applicant's behalf with regard to two property transactions. The first of these was the sale of a flat owned by N (a company in which the Applicant and his wife were the sole shareholders and directors) to another company owned by the Applicant and his wife, and the second transaction was the sale of a section owned by PP (a company in which the Applicant was the sole shareholder/director) to a third party. The two transactions were linked and the Practitioner was advised that a signed sale and purchase agreement for the PP sale was required by the Applicant's bank (BNZ) in order to allow the Applicant to complete the N transaction. The key objective emphasised by the Applicant was to complete the transactions by 31 March 2009. As events unfolded, the requirement by the bank that the two transactions proceed at the same time, was waived by the bank.

[7] There were two alternative means of achieving the PP transaction - either as a sale of the section or as a sale of shares. Initially, the Applicant determined that the PP transaction was to proceed by way of a sale of the section, but subsequently the purchasers determined that they would prefer to complete the transaction by way of a purchase of the shares in the company.

[8] As noted in paragraph [6] above, the two transactions ceased to be linked, as the purchasers in the PP transaction were unable to get their affairs into a position where the sale could proceed at the same time as the N transaction. Consequently it was the N transaction only which was to be completed by 31 March 2009.

The N transaction

[9] The failure to complete the settlement of this transaction by 31 March 2009 is at the core of the Applicant's complaint. Although the Applicant has stated in the complaint and correspondence with the LCRO that failing to settle by 31 March 2009 "had cost him many thousands of dollars", he was uncertain at the hearing quite how the loss had been caused other than to say that it was a tax issue. He also advised that he believed that his accountant had been able to structure things in such a way that the loss had not in fact occurred.

[10] Nevertheless, at the time, it was imperative for the Applicant that settlement occur by that date and that was communicated quite forcefully to the Practitioner.

[11] On 20 March 2009, a company IL was incorporated with the Applicant as the sole shareholder and director. Incorporation of the company was carried out by persons other than the Practitioner.

[12] This company was to be the Purchaser of the property from N, funded with a loan of $270,000 (the total price) from the BNZ.

[13] The Practitioner was not involved in any of the communications with the bank relating to the loan arrangements and these were all handled by the Applicant. No letter of offer or loan agreement had been received by the Practitioner or provided to him by the Applicant. Consequently, the Practitioner was unaware as to how the purchase was to be funded, or loans secured. Perhaps it could be stated that the Practitioner should have made enquiries in this regard, but the Applicant had dealt with the bank over a number of years, and clearly had a good working relationship with the bank. He also chose not to bring the Practitioner into the loop with regard to his dealings with the bank.

[14] On 24 March 2009, the Applicant rang the Practitioner, and found to his surprise, that the Practitioner was absent from the office, returning on 1 April. The Applicant was naturally concerned that settlement of the transaction would be interrupted. The Practitioner states that there were experienced staff in the office who would complete the transaction and in addition he was able to be contacted by email and telephone if needed.

[15] As it stands, had the loan documentation not required a guarantee from the Applicant's wife, then I have no doubt that the staff would have had the documents executed, the certificates lodged with the bank, funds uplifted and the transaction settled, by the proposed settlement date of 31 March.

[16] The loan instructions from BNZ arrived on 25 March at the offices of the law firm where the Practitioner was employed. Arrangements were made for the Applicant and his wife to attend at the firm's offices to see W, a solicitor of some five years experience, on 26 March for the purposes of executing the above documents.

[17] However, to W's credit, she immediately noted that the interests of the Applicant's wife, M, were compromised by the proposed documentation. M was not a director or shareholder of IL, yet the loan was to be guaranteed by her and secured by a mortgage over a property owned by her with her husband. W's initial advice was that M should be required to obtain advice from an independent lawyer.

[18] The Applicant acknowledges that this was sound advice given to his wife, but considers that the importance of completing the transaction by 31 March over-rode any duties that W owed to M.

[19] With respect to the Applicant, this cannot be. The law reports contain many instances where securities have been set aside for failure by a lawyer to ensure that a spouse obtains independent advice in circumstances exactly like this, and in many instances also, the lawyer has been heavily criticised by the Courts for not ensuring that independent advice was taken.

[20] It must be borne in mind that the Practitioner had been proceeding on the assumption that the only securities required would be from the Applicant, as he was the sole shareholder and director of IL.

[21] Discussions ensued and it was agreed that M was to become a director and equal shareholder in IL. On that basis, W's principals decided that it was acceptable for her to act on behalf of M with regard to the guarantee and mortgage.

[22] Consequently, it was necessary for the bank's loan documentation to be amended. At the same time, W took the opportunity to negotiate a limitation of the guarantors' liability under the guarantees, a limitation which was for the guarantors' benefit.

[23] The changes to the company were effected on Friday, 27 March 2009. Unfortunately, the revised documentation from BNZ did not arrive by the following Monday 30 March. Neither did they arrive at the law firm's offices on the following day, but instead, for some reason, were forwarded by email direct to the Applicant.

[24] M was unfortunately unable to make herself available on 31 March for the purpose of signing these documents. Consequently, W was unable to certify to the

bank that the loan documentation and guarantees had been executed by both parties, and in addition this meant that an Authority and Instruction for the transfer of the title to IL was also unable to be completed.

[25] The end result of this is that, without completion of these documents, the bank's position could not be secured.

[26] Late in the day of 31 March, it was suggested that the bank would advance the funds to IL on the basis of the Applicant's signature alone. Although the suggestion may have been made by the Applicant's personal banker, it is inconceivable that the bank's loan department would have advanced the funds on that basis.

[27] Consequently, the 31 March deadline was missed.

[28] It appears that settlement was not finally effected until 7 April, but presumably once the 31 March deadline had been missed, the heat went out of the requirement to settle.

[29] The Applicant's complaint is that the cause of the missed deadline was the fact that the Practitioner went on leave without making proper arrangements for handing over of his file.

[30] It is my assessment however that the same scenario would have unfolded, whether the Practitioner was there or not. He had not been included in the dealings with the bank and had not received any communication from the Applicant as to what the arrangements were. As noted above, the only criticism that could perhaps be levelled at the Practitioner, is that he should have been proactive in ascertaining prior to his departure exactly what the arrangements with the bank were, and what securities were expected.

[31] The Practitioner may also be criticised for not advising the Applicant in a telephone conversation on 23 March that he was going to be absent for the next 6 working days, a period which encompassed 31 March. However, this is a matter of client relations and relationships, not a matter where the disciplinary processes of the Act should be involved.

[32] If the conduct complained of is to be the subject of disciplinary proceedings, the conduct would have to fall within the definition of "unsatisfactory conduct" as defined in Section 12(a) of the Act. Unsatisfactory conduct is defined by that section as conduct of a lawyer that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

[33] The Practitioner's omission to advise the Applicant that he was going to be absent from the office did not in any way contribute to the missed deadline. If the documentation had been in the form anticipated, then I have no doubt that the arrangements made with the staff at the law firm would have ensured completion of the transaction by the required deadline. It is my view, that the major factors in the missed deadline were the unexpected requirement for a guarantee and supporting security from M, and the subsequent delay in the arrival of the amended bank documentation.

[34] Consequently, the decision of the Standards Committee in connection with this transaction is confirmed.

The PP charges.

[35] The Practitioner's estimate of costs for the transaction relating to PP was $850 if the transaction proceeded as a sale of the section or $1200 if it proceeded as a sale of shares. Both estimates were exclusive of GST and disbursements as set out in the firm's Terms of Engagement provided to the Applicant, although the Applicant indicated at the hearing that he thought the estimates were inclusive of GST.

[36] Either way, it would appear that both estimates included the initial advice provided by the Practitioner.

[37] The transaction initially proceeded on the instructions of the Applicant as a sale of the section and an Agreement for Sale and Purchase was provided to the Practitioner. There is a dispute as to whether it was provided on the 17th or 20th March, but nothing turns on that. I do note, however, that correspondence from the Practitioner in relation to this transaction to the purchaser's solicitor and the Applicant's bank is dated 19 March.

[38] Although it may not have been apparent to the Applicant, the Practitioner proceeded with the necessary steps to be in a position to settle in accordance with the Agreement. I have been provided with copies of the correspondence and a copy of the firm's settlement dated 20 March. There was also correspondence with the solicitors who were supposed to be acting for the purchaser as to whether or not they had instructions.

[39] On 1 April however, the Practitioner was instructed by the Applicant that the transaction was to proceed by way of a sale of shares. The Applicant arrived at the Practitioner's office with a Memorandum of Understanding together with the two

purchasers. The Memorandum of Understanding was duly signed and the Practitioner proceeded to prepare a short form share sale agreement. The proposed completion date was 7th April 2009.

[40] Nothing further was heard by the Practitioner relating to this transaction and it appears that the documentation and payments required to complete the transaction were settled directly between the parties.

[41] On 11 May 2009, the Practitioner forwarded an interim account to the Applicant for $1,632 plus GST and disbursements. The narration in this account shows that the work charged for in this account covered the initial attendances on the Applicant, the attendances relating to the proposed sale of the section, and the provision of the share sale agreement.

[42] The account is expressed to cover the period from February to April, presumably from the commencement of instructions to 30 April.

[43] Although this account is noted as being an interim account, I do observe that 11 May was well beyond the proposed completion date of 7 April, and it is not clear to me what further attendances the Practitioner contemplated at that time.

[44] Unfortunately, for reasons unexplained, this account was not received by the Applicant.

[45] As stated above, the Practitioner was not involved in the documentation and payments required to complete the transaction, although the Practitioner did note at the hearing that he had been contacted by the purchaser's solicitor with regard to the payment of loans owed by the company to the bank.

[46] On 25 May a further account was rendered by the Practitioner with regard to settlement of the share sale agreement. This account was for $400 plus GST and disbursements. This was the first account received by the Applicant, although of course it was the second account sent by the Practitioner.

[47] The Applicant was somewhat surprised at the quantum of this account, as it was less than either of the estimates. However, he assumed that this was maybe a gesture by the Practitioner for the Applicant's disappointment about the N transaction. The account was duly paid by him and we were advised at the hearing by the Applicant that he was in fact reimbursed by the purchaser for this.

[48] Subsequently the Practitioner received a statement from the law firm, showing that the initial account remained unpaid. He was surprised about this as he had not seen the first account.

[49] The Applicant's complaint is that he does not understand why the accounts were split into two, and also that the total amount exceeded the estimates. At the hearing, I did point out to the Applicant that both transactions originally contemplated as alternatives had in fact been largely carried out, and that the total of the two accounts was $2,032 plus GST and disbursements, whereas the combined estimates was $2,050 plus GST and disbursements.

[50] I have already touched upon the Applicant's expectations with regard to GST and disbursements, and accept that the Practitioner had provided the Applicant with the information in this regard in the firm's Terms of Engagement. The Practitioner can hardly be criticised for the fact that the Applicant chose not to read these.

[51] It does seem however, that the Practitioner has fallen short of his obligations in terms of Rule 9.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. This provides that "... a lawyer must upon request provide an estimate of fees and inform the client promptly if it becomes apparent that the fee is most likely to be exceeded".

[52] I would also observe, that when rendering the two accounts no reference appears to be made to the estimates, or any reason given as to why the estimates had been exceeded.

[53] The contravention of this rule was pointed out to the Practitioner, and he immediately and unreservedly apologised to the Applicant for that omission.

[54] At the conclusion of the hearing, I asked the Applicant whether, in the light of the apology from the Practitioner, and the fact that the two accounts were very close to the combined estimates, whether he maintained his complaint. The Applicant responded in the affirmative.

[55] One of the options available to the LCRO is to order an apology from the Practitioner pursuant to Section 156(1)(c) of the Act. There is no need for this as the Practitioner offered an apology readily and voluntarily at the hearing. This apology is recorded and the readiness with which it was provided is also noted.

[56] The two accounts both relate to attendances with regard to the PP transaction and I have already noted that the initial account is recorded as being an interim

account. It is my view that they should be treated as one account for the purposes of Regulation 29(b) of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees (Regulations 2008). .

[57] The two accounts total $2,032 plus GST and disbursements. The Standards Committee declined to consider the accounts because neither of them exceeded the limit set by Rule 29. I consider the Committee was incorrect in this view and should have considered these as part of the complaint.

[58] At the beginning of the hearing I flagged to the Practitioner that this was my preliminary view. The Practitioner submitted that as the Applicant had been reimbursed by the purchaser for the second account, it was therefore only the first account that could be the subject of any complaint.

[59] I do not accept this view. The Applicant was the party chargeable with the accounts in accordance with Section 132(2) of the Act, and consequently whether or not he was reimbursed is irrelevant to a consideration of this issue.

[60] I hesitate to make orders which would have the effect of prolonging this complaint, particularly as the total of the two accounts exceeds the limit by a minimal amount. However, given that the Committee declined jurisdiction, and therefore did not consider the accounts at all in its consideration of this matter, I have come to the conclusion that there is no option other than to direct the Committee to reconsider its response with regard to this particular aspect of the complaint.

[61] It is recorded that I have made no comment on the quantum of the accounts as that is a matter for the Standards Committee.

The Internal Dispute Resolution and escalation to the managing partner

[62] The Applicant's complaint in this regard, is that he was not given the opportunity to put his side of the story to the firm's managing partner, MN. As a result, he considers that the letter from MN dated 30 July 2009 contains inaccurate statements, and that the Practitioner had failed to acquaint MN with the Applicant's view of the events.

[63] The Practitioner states that he did in fact advise the Applicant that he could put his side of the story to MN by way of email or letter but that MN did not wish to receive verbal representations in that regard. The Applicant denies that he was advised of this. There can be no resolution of that difference in recollection of what was said at the meeting in question.

[64] However, what cannot be denied, is that the internal complaints process of the law firm, was clearly set out in its Terms of Engagement, several copies of which had been provided to the Applicant and which were sighted by me at the hearing. The Applicant acknowledges that he did not read the Terms of Engagement, but once again, neither the Practitioner nor the law firm can be criticised for this.

[65] Having said this, it does appear that the Applicant did communicate in writing with the firm about this matter by way of email on 28 July. It appears however, that this email did not contain all of the information which the Applicant wished to lay before MN.

[66] I must record my comment at the hearing that this is a complaint about the Practitioner and consequently it can only be his part in the "escalation" of this matter that can be considered.

[67] I find that the Practitioner has communicated the firm's internal complaint resolution process to the Applicant, if not verbally, then certainly in writing. He cannot be expected to be the Applicant's advocate in respect of the Applicant's complaint.

[68] I do not therefore consider that the Practitioner has failed to meet the obligations imposed on him in terms of the Act and the Client Care Rules.

Decision

[1] Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed in all respects, save for the matter referred to in item 2 of this decision.

[2] Pursuant to Section 209 of the Lawyers and Conveyancers Act 2006, I direct that the Standards Committee reconsider the quantum of the two accounts dated 11 and 25 May 2009 rendered by the Practitioner in respect of the PP transaction. The reason for making this direction is as stated in paragraph [57] of this decision, namely that I consider that the two accounts are in respect of the same matter and in aggregate exceed $2,000.

DATED this 28th day of October 2010

Owen Vaughan
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 Maidenhead as the Applicant
Mr Margate as the Respondent
XX as an interested party
The Auckland Standards Committee 2
The New Zealand Law Society