LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2021] NZLCRO 007

Ref: LCRO 188/2018

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [Area] Standards Committee [X]
BETWEEN	**KB** Applicant
AND	**WQ and LT** Respondents

DECISION

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

Introduction

[1] Mr KB has applied for a review of a decision by the [Area] Standards Committee [X] to take no further action in respect of his complaint concerning the conduct of the respondents, Messrs WQ and LT.[1]

Background

[2] XYZ Limited (XYZL) were developing a block of residential housing at [address] (the "development").

[1] In the course of this decision, Mr WQ and Mr LT will on occasions be identified by reference to their firm, Q Law Limited. Parties who invested in the [City 1] development will be referred to as "the investors".

[3] The development offered investors an opportunity to purchase first right of refusal agreements ("FRR agreements") in respect to units that were to be constructed.

[4] The development was being marketed both within New Zealand and, it appears, extensively offshore.

[5] Mr WQ and Mr LT were partners in the firm Q Law Limited (QLL).

[6] In around April 2011, QLL was instructed to act for AHVL.

[7] QLL was instructed to review the FRR agreements, and to receive payments into the Q Law Trust account.

[8] Mr KB decided to invest in the development. Having entered into a FRR agreement, he then made, pursuant to the agreement, an initial payment to the agents who were marketing the property. This payment was deposited to the QLL Trust account.

[9] XYZL went into liquidation on February of 2013.

[10] In October 2013, the Serious Fraud Office advised that it was conducting an investigation into the [city 1] development.

[11] In October 2014, Mr KB filed a complaint with the Lawyers Complaints Service about Q Law. In this complaint, Mr KB alleged that;

(a) XYZL did not have resource consent for the development, nor was there evidence of XYZL having legal ownership of the property it was promoting for sale; and

(b) QLL must have been aware of this when the FRR agreements were completed; and

(c) QLL facilitated the money transfer to XYZL and thus became a willing participant in cross-border money laundering; and

(d) QLL acted on the subsequent sale of the land to another developer, and knowingly participated in a scheme to defraud investors.

[12] Mr KB's first complaint was considered by the [City] Standards Committee [X] (CSCX).

[13] CSCX delivered its decision on 20 March 2014. The Committee determined to take no further action on the complaint, as it considered that Mr KB had an adequate remedy or right of appeal that would be reasonable for him to exercise.

[14] In July 2017, Q Law merged its practice with [Law firm A]. Mr WQ continued as a director. Mr LT ceased being a director in December 2016. Mr WQ is now retired from practice.

The complaint, the response to the complaint, and the Standards Committee decision

[15] Mr KB lodged a further complaint with the New Zealand Law Society Complaints Service (NZLS) on 18 July 2018.

[16] In this complaint, Mr KB refers to having endeavoured to file a further complaint in late 2016 but reports that this complaint had been rejected by the Committee on grounds that the complaint simply reiterated the concerns that had been put to the Committee in the 2014 complaint. Mr KB's complaint of July 2018 is his third attempt to advance a professional conduct complaint against the directors of QLL.

[17] Mr KB's 18 July 2018 complaint submits that it provides new evidence of what Mr KB describes as a "big fraud operation", this in reliance on argument that he has conclusive proof that no resource consent had been granted to complete the subdivision for the [address] site during 2011 and 2012.

[18] Mr KB notes, that a site plan for [address] records that the site first received consent for a subdivision on 17 December 2015. The site plan, says Mr KB, establishes that other site plans that had been produced were "fake".

[19] Mr KB followed up his notice of complaint, of 28 July 2018, with a report in which he set out his complaint in detail.

[20] That report is comprehensive, running to some fifteen pages.

[21] Mr KB's submissions provide a detailed background of the circumstances which prompted him to invest in the [suburb] development. To the extent that his submission identifies conduct complaints directly engaging Mr WQ and Mr LT, Mr KB submits that the lawyers:

(a) had an obligation to ensure that their clients were conducting legal transactions; and

(b) were obliged to check and verify that their client was in a position to proceed with the development proposal which was being marketed on a clear representation that the developers had title to land, and resource consents in place, to allow construction to proceed.

[22] To the extent that Mr KB distinguishes his complaint from the earlier complaint filed, Mr KB submitted that he had new evidence available, this being documentation which established, conclusively in his view, that no resource consent had been granted for the [address] development during 2011/2012 – that consent only being secured in December 2015.

[23] Mr WQ (on behalf of himself and Mr LT) responded to Mr KB's complaint on 4 February 2014.

[24] In the introduction to this response, Mr WQ notes the following:

> We refer to the numerous letters you have sent to us relating to complaints that have been filed by a number of parties against QLL and the writer, and in particular to the email from [NZLS staff] dated 21 January setting out the full list of those complaints. We do not propose in this letter to deal specifically with each individual complaint. This response is made in respect of all the complaints listed on [NZLS staff]'s email.

[25] I take it from this, that a number of investors who had found themselves in a similar situation to Mr KB had filed complaints against Mr WQ and Mr LT with the New Zealand Law Society Complaints Service.

[26] Mr WQ submits that:

(a) his firm had acted for two companies, UVW Limited (UVWL) and XYZL (both in liquidation at the time of Mr WQ providing his response) that were involved in proposals to complete a residential housing development in [suburb] (the [city] development); and

(b) the extent of his firm's involvement had been to assist with the documenting of option arrangements and providing advice in relation to first right of refusal agreements; and

(c) in addition to reviewing option agreements and providing advice on the content and terms of those documents, QLL was engaged by UVWL and XYZL to receive and process option payments into its trust account, and to pay out those monies in accordance with its clients' instructions; and

(d) from mid to late 2012, QLL began receiving a number of inquiries from investors, querying as to whether funds received from UVWL and XYZL had been released to the developers; and

(e) in the face of those inquiries, QLL had made it clear that QLL had acted for XYZL (or UVWL) and not for the investors; and

(f) option payments made under the option agreements were made to UVWL and XYZL by way of payment to the firm's trust account; and

(g) payments received were recorded for the credit of UVWL and XYZL; and

(h) funds were paid to UVWL and XYZL as requested by the client; and

(i) QLL was not privy to, or had no knowledge of, any representations made by overseas agents to investors in relation to the option agreements; and

(j) QLL was not involved in, nor instructed in respect of, the preparation or review of any documentation relating to the title of the land on which the developments were being built; and

(k) UVWL and XYZL instructed separate solicitors in [City 2] in relation to land acquisition transactions, land financing, resource management applications and trust advice; and

(l) QLL was aware that at the time the [address] Village development was being marketed to overseas clients, UVWL was not yet the legal owner of the development land, but understood, that an agreement was in place for the sale and purchase of the [address] land and for transfer of legal title to UVWL; and

(m) QLL understood that a similar arrangement was in place in respect of XYZL; and

(n) the standard option agreements do not contain any obligation for option payments made to be held on trust by QLL; and

(o) those documents simply record that option payments are to be paid to UVWL or XYZL in cleared funds to the bank account nominated by UVWL or XYZL; and

(p) the option agreements do not refer to option payments as “deposits” nor did they contain any representation to the effect that option payments are being held by QLL as a stakeholder; and

(q) QLL was not involved in the resource consent process for the development; and

(r) QLL did not consider that its involvement in any way provided assurances or representations to any purchasers; and

(s) accusation that QLL had been engaged in “cross-border money laundering” or fraudulent activities of any nature was vehemently denied; and

(t) allegation that QLL had some form of obligation to conduct due diligence in relation to the development is rejected on grounds that such obligation would extend well beyond the ambit of the instructions received.

[27] The Standards Committee delivered its decision on 24 August 2018.

[28] The Committee determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) that no further action on the complaint was necessary or appropriate.

[29] In reaching that decision the Committee concluded that:

(a) The further information provided by Mr KB did not add anything to his earlier complaint; and

(b) Mr KB’s second complaint was essentially a repeat of his earlier complaint

Application for review

[30] Mr KB filed an application for review of his second complaint on 2 October 2018.

[31] The outcome sought is that funds paid to QLL be repaid, together with interest.

[32] Mr KB submits that:

(a) The decision of the Standards Committee had failed to give sufficient consideration to the fact that the developers had not obtained resource consent for the proposed development at the time the FRR agreements were being promoted; and

(b) the development site was consented some two years after XYZL and UVWL were placed in voluntary liquidation; and

(c) the Standards Committee had failed to appreciate that neither XYZL nor UVWL owned the land over which it was selling options to purchase, at the time those options were being marketed; and

(d) the Complaints Service, in refusing to investigate his second complaint, was concealing "organised fraud"; and

(e) new evidence had been provided which should have persuaded the Committee that it was appropriate to reconsider his complaint; and

(f) option agreements issued by UVWL and XYZL during 2011 and 2012 were issued in respect to land for which no resource consent had been issued; and

(g) the option agreements prompted by UVWL and XYZL were fraudulent.[2]

[33] Mr KB concludes that the Committee's failure to consider his second complaint, was unconscionable in that it was, in neglecting to conduct an investigation, sanctioning "organised fraud".

[34] Subsequent to filing his review application, Mr KB filed further submissions.

[35] Those have been considered, but I record that on 7 December 2020, the parties were advised that no further information would be accepted for filing by the Legal Complaints Review Officer (LCRO).

[36] In a note issued on that day, I advised the parties that:

(a) the circumstances in which a Review Officer would consider new material filed on review were limited; and

[2] In his review application, Mr KB provides further explanation as to why he considers the transaction to have been fraudulent, including criticism of the failure of the companies to issue a registered prospectus, and alleged breaches of the Securities Act 1978.

(b) a Review Officer will not, in the course of conducting a review, consider fresh complaints, being matters that were not put before the Standards Committee; and

(c) it was not the role of the LCRO to conduct investigations into allegations of commercial fraud.

[37] In material filed with the LCRO subsequent to filing his review application, Mr KB:

(a) provided a copy of correspondence forwarded to the New Zealand Financial Markets Authority (FMA) (this correspondence having been copied to various Government Ministers including the Minister of Police); and

(b) advised that the Serious Fraud Office had commenced an investigation into the activities of UVWL and XYZL in 2013 and had concluded that investigation in 2016 with advice to the complainants that the SFO had determined that there was insufficient evidence to reach the threshold necessary to advance a prosecution; and

(c) advised that approximately 30 investors had lodged conduct complaints against Q Law Limited in 2013, but the complaints had not been upheld; and

(d) advised that a complaint had been made to the President of the New Zealand Law Society; and

(e) advised that two investors had attempted to lay complaints with the Police; and

(f) advised that a complaint had been lodged with the Office of the Ombudsman; and

(g) advised that a director of UVWL and XYZL had been successfully prosecuted and convicted in respect to charges arising from the director's management of two finance companies; and

(h) provided a site plan for the development, this to support Mr KB's contention that the plan was fraudulent; and

(i) provided a copy of correspondence forwarded to the then Minister of Commerce; and

(j) submitted that Mr WQ and Mr LT had overriding duties as Officers of the Court, to verify if its client was entitled to receive money that was deposited to its trust account

[38] The lawyers were invited to comment on Mr KB's review application.

[39] Mr WQ submitted that:

(a) the decision of the Standards Committee was correct; and

(b) additional information provided by Mr KB added nothing further to the complaint that had been considered by a Standards Committee in 2014; and

(c) information provided by Mr KB in respect to the prosecution of a company director on a matter unrelated to the [city 1] development appears to widen the issues of complaint, and embrace issues irrelevant to the matters which are the subject of review; and

(d) there was no basis to review the decision reached by the [Area] Standards Committee [X].

Review on the papers

[40] After completing an initial appraisal of the file, I concluded that the matter may be helpfully advanced by directing a conference be set down to provide an opportunity to traverse a number of issues with Mr KB.

[41] The lawyers were advised that they were not required to attend the conference and confirmed that they had no objection to the conference proceeding.

[42] The conference proceeded on 14 May 2019.

[43] The issues traversed at that conference went somewhat beyond what I had originally anticipated. Mr KB provided a comprehensive account of his position and filed further submissions following the conference.

[44] In those submissions he raised concern that the Committee that had investigated his complaint had little experience investigating matters which involved "deception". He was concerned that the Committee had failed to identify the issues

engaged by his complaint. He noted that three investors had attempted to recover monies lost by commencing and advancing proceedings against QLL in the High Court, but that the judge had "thrown out" their claim.

[45] Mr KB submitted that correspondence he had sighted on QLL letterhead, recorded that if purchasers failed to exercise their right of first refusal, purchasers would be refunded monies paid.

[46] After receiving further submissions and informing Mr KB that no further information would be received, Mr KB was advised that the matter would be heard on the papers. Mr KB indicated his consent to that approach.

[47] Section 206(2) of the Act allows a Legal Complaints Review Officer (LCRO) to conduct a review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[48] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party. On the basis of the information available, I have concluded that the review can be adequately determined in the absence of the parties.

Nature and scope of review

[49] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[3]

> … 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" …
>
> … 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.

[3] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

[50] More recently, the High Court has described a review by this Office in the following way:[4]

> 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.

[51] 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.

Analysis

[52] The issues to be addressed on review are:

(a) Is Mr KB's complaint of July 2018 a repetition of his earlier complaint which was the subject of a decision issued by the [City] Standards Committee [X] on 20 March 2014?

(b) If Mr KB's complaint of 18 July 2018 raises different and distinct issues to those investigated by the Standards Committee in 2014, do the conduct complaints raised identify issues that require a disciplinary response?

Is Mr KB's complaint of July 2018, a repetition of his earlier complaint which was the subject of a decision issued by the [City] Standards Committee [X] on 20 March 2014?

[53] Mr KB considered that his initial payment made to secure a right of first refusal to purchase a property would be secured, as it was to be deposited to a New Zealand based solicitor's trust account.

[54] He was understandably shocked when the development companies went into liquidation. That distress was exacerbated when he learnt that funds paid into the New Zealand solicitor's trust account had been released to the development companies.

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

[55] Mr KB considers that Mr WQ and Mr LT, as the directors of the law firm holding funds, breached duties and obligations owed to him and other investors by releasing funds.

[56] In advancing this argument, he contends that role of the lawyers was akin to that of a stakeholder, and that they were obliged to retain funds until those funds could be released to facilitate the finalising of the purchase of the home he had contracted to buy.

[57] Mr KB is critical of the Committee's decision to refuse to investigate his complaint on grounds that his complaint had already been the subject of a Committee investigation. He submits that the Committee's refusal to investigate essentially amounts to the Committee sanctioning fraudulent conduct.

[58] The initial question to consider is whether Mr KB's second complaint replicates his first.

[59] The approach to be adopted by a Review Officer when considering a second complaint against a lawyer in circumstances where it is contended that the subject matter of the second complaint essentially replicates the subject matter of the first was considered in *LO v RT* LCRO 202/2017 (4 February 2019). This case is relevant to the subject of this review, being that it was a review advanced by one of Mr KB's fellow investors with a similar complaint against the directors of QLL.

[60] In *LO v RT* it was noted that "in general, it is not open to a complainant who has been unsuccessful with their complaint, to start the process again by the filing of a second complaint that rehashes the ground covered by the first. The general description of claims or complaints which are repetitive, is that they are an abuse of process".[5]

[61] The fact that the current complaint may have been made in good faith, without an actual intent to abuse the disciplinary process, is not the crucial point. The end focus is on the effect on the party who is the subject of the complaint.

[62] The critical point, as an English court has explained it, is that a person "ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation".[6]

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[5] At [35].
[6] *Gleeson v J Wippell & Co Ltd* [1977] 3 All ER 54 (Ch).

[63] In delivering his judgment in *R (on the application of Coke-Wallis) v Institute of Chartered Accountants in England and Wales*, Lord Collins remarked that:[7]

> In Australia it was held that a doctor who had been censured by a Medical Board could not subsequently be the object of a second inquiry into alleged infamous conduct: *Basser v Medical Board of Victoria* [1981] VR 953. See also in New Zealand *Dental Council of New Zealand v Gibson* [2010] NZHC 912 (dentist bound by findings of disciplinary tribunal). In some cases the same result has been achieved by finding that the disciplinary tribunal is functus officio after the first decision: *Chandler v Alberta Association of Architects* [1989] 2 SCR 848 (Canadian Supreme Court). In the United States, in *Florida Bar v St Louis*, 967 So 2d 108 (Fla 2007) and *Florida Bar v Rodriguez*, 967 So 2d 150 (Fla 2007) the Supreme Court of Florida accepted that res judicata principles applied to successive complaints brought by the Bar ...

[64] He did go on to say that:

> But it has also been said that res judicata or double jeopardy principles may not apply to disciplinary bodies because their "disciplinary requirements serve purposes essential to the protection of the public, which are deemed remedial, rather than punitive": *Spencer v Maryland State Board of Pharmacy*, 846 A 2d 341, 352 (Maryland Court of Appeals, 2003); cf *Re Fisher*, 202 P 3d 1186, 1199 (Sup Ct, Colorado, 2009).

[65] It must be emphasised that if a Committee is to reconsider a complaint that has already been the subject of a Committee determination, there must be compelling reasons advanced to merit any further inquiry.

[66] In rare cases, a person may relitigate an earlier complaint. Those uncommon cases are generally confined to those circumstances where a party uncovers further and relevant evidence that was not available at the time that the first complaint was made.[8]

[67] In those cases, it would fall initially to the Committee charged with making inquiry into the second complaint, to consider whether the fresh information that had come to light, was relevant, and information that the Committee considered should have been produced, or was not able to have been produced, when the first complaint was under consideration.

[68] But it is critical to emphasise that the complaints process is not a process which provides opportunity to parties to bring complaints against the lawyer on an

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[7] *R (on the application of Coke-Wallis) v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1 at [58].

[8] See *Rae v International Insurance Brokers (Nelson Marlborough Ltd)* [1998] 3 NZLR 190 (CA) at 192 where the court said:

> The conventional requirements are that the further evidence must be fresh, it must be credible and it must be cogent. Evidence is not regarded as fresh if it could with reasonable diligence have been produced at the trial.

evolving basis. The need for finality, and the requirement for complaints to be dealt with expeditiously, would be seriously compromised if parties were able to respond to findings adverse to them by simply filing further complaints.

[69] Nor is it acceptable for complainants to attempt to avoid allegation of filing repetitive complaints, by "tweaking" their complaints in an attempt to convince that new matters have been raised.

[70] It can be reasonably expected, for the most part, that parties who have concerns about a lawyer's conduct, are able to identify and articulate those concerns, and garner all relevant evidence, at the time the concerns arose.

[71] Attention then turns to the question as to whether Mr KB has, in filing his second complaint,[9] raised new issues of complaint, or alternatively, whether he has provided fresh evidence of sufficient robustness such as to persuade me that the consumer protection and regulatory objectives properly require a further consideration of the matters raised by Mr KB in his initial complaint.

[72] In his complaint filed on 18 July 2018, Mr KB contends that he has "new evidence showing the underlying sale of FRR options is probably fraud operation because there was no resource consent granted for subdivision of [address] site during 2011 and 2012".

[73] In what he describes as an "Investigation Report" accompanying his complaint, Mr KB provides an expansive account of inquiries undertaken by him that establishes that the directors of both UVWL and XYZL were aware, when undertaking the sale of option agreements, that no resource consent had been issued for the proposed development site.

[74] I accept that Mr KB's inquiries may have provided him with more comprehensive account of the timing of the issuing of the resource consents, but it is not the case that this issue was not squarely put before the Standards Committee who considered his first complaint.

[75] In its decision of 20 March 2014, the CSCX recorded Mr KB's complaint as being complaint that the development company:[10]

> … did not have resource consent for the development, nor was there any record of site ownership, which Q Law must have known when the FRR agreements were completed. He also says that Q Law facilitated the money transfer to [XYZL] and became a willing participant in cross-border money laundering.

[9] Dated 18 July 2018.
[10] At [7].

[76] At paragraph [15] of its decision, CSCX noted it had considered the concerns raised by Mr KB as to the development company's failure to obtain the necessary consents. The Committee concluded that it was not satisfied that there was evidence to show that QLL had acted inappropriately in this regard, or that there was evidence of fraudulent conduct by QLL that required further investigation.

[77] It is clear that CSCX also addressed the issue as to the capacity in which QLL received and held funds. The Committee was satisfied that the FRR agreement clearly stated that payments were to be made to the developer in cleared funds to a nominated bank account. The Committee was satisfied that QLL was required to disburse the funds in accordance with its client's instructions.

[78] Further, the Committee concluded, that it did not consider that there was any duty owed by QLL to the investors that would require the lawyers to undertake additional scrutiny of its client or the development.

[79] I have noted that Mr KB has, in the course of advancing his review, provided a raft of submissions.

[80] The material covered by those extensive submissions in significant part, addresses broader issues than those specifically engaged by his complaints against the lawyers.

[81] The purpose of the conference convened with Mr KB was, in part, an attempt to assist Mr KB in identifying the specific aspects of his complaints which engaged the lawyers.

[82] Whilst Mr KB provides a significant amount of information in support of his review application, his complaints against Mr WQ and Mr LT are, in my view, essentially identical to those that were the subject of investigation by CSCX.

[83] I am satisfied that the Committee's decision of 20 March 2014 provides compelling evidence of that Committee having considered complaints identical in nature to those which are the subject of this review.

[84] Mr KB does attempt to broaden the scope of his complaint (for example by reference to the broader obligations owed by the lawyers as officers of the court). However, a careful examination of the extensive iteration of Mr KB's complaint gives clear indication that Mr KB's complaint of July 2018 is essentially a rehearsal of the earlier complaint.

[85] Mr KB complains that the Standards Committee erred in concluding that Mr KB had an adequate right or remedy that he could exercise in relation to QLL and the failed development. It is his view that the first Committee failed in its duty to properly investigate his complaints, and avoided its obligation to do so, by concluding that Mr KB had other adequate remedies available that he could exercise.

[86] The first Committee noted that the Serious Fraud Office had commenced an investigation into the development.

[87] After what appears to have been a lengthy investigation. Mr KB advises that the outcome of that investigation was a decision reached by the SFO that it had insufficient evidence to advance a prosecution.

[88] Mr KB now argues that the SFO's decision to take no steps, has denied him an opportunity to seek redress in another forum, thus opening the door for the Committee to consider a further complaint.

[89] With respect to Mr KB, he has not been denied an opportunity to have his concerns investigated. An investigation was completed by the SFO, being precisely the type of remedy that the CSCX had concluded was an appropriate forum for addressing the concerns that Mr KB had raised. The fact that the SFO decided not to take its enquiries further, does not provide invitation to Mr KB to ask a Committee to investigate further.

[90] It could reasonably have been expected that a comprehensive investigation by the SFO would, inevitably, have examined the financing arrangements organised by the development companies, the legality of the FRR agreements, and the role that QLL had played in allowing its trust account to be used as the nominated bank account for payments made to the company.

[91] Mr KB's thorough submissions reflect his resolute and determined attempts to identify and bring to account those parties responsible for the financial losses suffered by the investors in the [city 1] development.

[92] But I remind myself that the two critical issues which are at the forefront of this review, are questions as to whether Mr KB's second complaint was appropriately dismissed on grounds that it replicated an earlier complaint, and if not, whether Mr KB's complaint that the lawyers had a duty to retain funds received and had breached duties and obligations owed to him by releasing funds, is established.

[93] I am satisfied that the second complaint filed by Mr KB mirrors the first.

[94] Having reached that finding, I do not consider that I am required to address the second limb of the review inquiry, but in fairness to Mr KB and in recognition of the considerable amount of work he has put into advancing his review, I propose to provide further explanation as to why I would have been reluctant, and indeed consider myself unable, to conclude that the lawyers had breached duties and obligations owed to Mr KB.

If Mr KB's complaint of 18 July 2018 raises different and distinct issues to those investigated by the Standards Committee in 2014, does the conduct complaints raised identify issues that require a disciplinary response?

[95] Mr KB argues that QLL had a duty to hold funds received.

[96] Mr WQ submits that funds received were his client's funds, and that his obligations were strictly defined by reference to the obligations owed to his client.

[97] At issue is the capacity in which QLL held funds received.

[98] At the heart of that issue, is the question as to whether QLL were entitled to disburse investor funds on the basis of argument that funds were their client's funds and were required to be dispersed in accordance with instructions received from their client, or whether QLL had an obligation on receiving investor funds, to hold those funds and to disburse only on receipt of instructions sanctioned by the investors. The issue engages consideration as to whether QLL's relationship with the investors approximated that of lawyer/client, or whether QLL received investors funds in the capacity akin to that of a stakeholder.

[99] Mr KB advised that a group of [Country A] and [Country B] based investors had instructed an [City 2]-based law firm (DEF) to "look for ways to recover their option money".[11]

[100] He reports that after "nearly 5 years, there was no recovery success by [DEF]".[12]

[101] Further, Mr KB notes that "three [nationality] attempted to claim back the money from Q Law in the High Court but the judge threw out their claim".[13]

[102] Mr KB provided no citations for any decisions arising from this litigation, however I think it probable that he was referring to the decisions in:

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[11] Mr KB, complaint submissions (18 July 2018) at [1].
[12] At [1].
[13] Mr KB, submissions (24 May 2019).

(a) *BM v Q Law Ltd* [2014] NZHC XXX;

(b) *BM v Q Law Ltd* [2014] NZHC XXX;

(c) *BM v Q Law Ltd* [2015] NZCA XX; and

(d) *BM v Q Law Ltd* [2015] NZCA XXX.

[103] In *BM v Q Law Ltd* [2014] NZHC XXX, the High Court considered an action against QLL and its directors brought by investors under the Fair Trading Act 1986.

[104] In that action, it was pleaded that QLL held funds received as stakeholders, and were prevented from releasing funds without the joint instructions of the investors and developers.

[105] The issue which is at the heart of Mr KB's complaint was squarely before the Court. The Court noted that there were competing positions on the question as to whether QLL required the authority of the investors to release funds that had been deposited by those investors to the firm's trust account, but that it was not required in the context of the way in which the case before it had been pleaded, to make a definitive finding on the question as to whether QLL held the investor's funds as a stakeholder.

[106] The plaintiff's claim in *BM v Q Law Ltd* [2014] NZHC XXX did not succeed in the first instance in respect to claims brought under the Fair Trading Act 1986, but the question as to whether the directors of QLL had acted with due propriety was given careful attention when the Court addressed the merits of the plaintiff's dishonest assistance claim in *BM v Harkness Law Ltd* [2014] NZHC XXXX.

[107] At paragraphs [32]–[46] of the Court's decision in *BM v Q Law Ltd* [2014] NZHC XXXX, the Court commented briefly (by way of obiter comments) on the substantive merits of the dishonest assistance claim, concluding that there was "sufficient circumstantial evidence to found a case for suspicion".

[108] The Court noted that the plaintiffs had tread carefully with allegations made against QLL and that no accusation was made that Mr WQ had engaged in fraudulent conduct. The Court treated the allegations made against the defendants as constituting claims of reprehensible conduct.

[109] The Court identified aspects of the development scheme which could potentially give grounds for concern. To the extent that those concerns related to Mr WQ's involvement, the court noted that:

(a) Mr WQ was responsible for drafting contractual arrangements that were described by the court as “unusual”; and

(b) was aware that the promoters of the development were all carrying “baggage”; and

(c) the fact that the development companies were corporate trustees for trading trusts gave concern as to whether there was adequate protection for external creditors; and

(d) the purchasers were not New Zealanders and Mr WQ was aware that the purchasers were without legal advice.

[110] The Court concluded that a “combination of circumstances would be enough to create a sense of suspicion in the mind of the ordinary, honest person that this was a scheme which was likely to cause loss to those who dealt with the companies”.[14]

[111] Whilst the Associate Judge had considerable concerns about the [city] development, he concluded that the plaintiffs were unable to sue for dishonest assistance, as they lacked standing to do so. What is left open by the Court, is the possibility that other plaintiffs (such as liquidators) could advance a claim for dishonest assistance.

[112] To the extent that the Court’s decision in [2014] NZHC XXXX has relevance to the conduct complaints which underpin this review, the decision identifies possible concerns regarding Mr WQ’s involvement in the development.

[113] But the decision falls well short of reaching conclusion that it had been established that Mr WQ had acted improperly.

[114] The plaintiffs proceeded to appeal the Associate Judge’s decision on the claim advanced under the Fair Trading Act 1986.[15]

[115] The appeal was heard on 11 May 2015, and a judgment issued on 4 September 2015: *BM v Q Law Ltd* [2015] NZCA XXX.

[116] In the course of the appeal, argument as to whether QLL had allowed its trust account to be used, in a way that was misleading to investors, was further traversed.

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[14] *BM v Q Law Ltd* [2014] NZHC XXXX at [41].
[15] *BM v Q Law Ltd* [2014] NZHC XXX.

[117] In advancing its argument on appeal, the plaintiffs sought leave to adduce further evidence. That evidence was said by the plaintiffs to comprise:

(a) correspondence of a generic nature prepared by Mr WQ, which recorded that QLL was familiar with the [city 1] development and that guarantees were in place to protect purchasers of the options, and to give those purchasers comfort that their investments were secure; and

(b) evidence that Mr WQ had advised some potential investors that option payments would be utilised only for the payment of specific accounts and invoices that related directly to the development project.

[118] QLL and Mr WQ responded to the plaintiff's application to adduce further evidence, with indication to the court that they also would wish to provide the court with further evidence.

[119] In considering the evidence that had been put before the Associate Judge, the Court of Appeal concluded that it was "… reasonably arguable that use of a solicitors' trust account, which is to receive monies that are to be either refunded or applied towards a purchase in respect of a development yet to be carried out, was likely to convey to a reasonable [nationality] investor that the money would be held on trust although the Option Agreement did not expressly say so."[16]

[120] The appeal was successful. Leave was granted to both parties to file further evidence.

[121] Whilst it is important to emphasise that the Court of Appeal's decision of 11 May 2015 solely addressed the grounds of appeal and application to adduce further evidence, the matters identified by the applicants as being matters on which further evidence would be adduced, would likely have strengthened the investor's view that QLL had failed to manage funds deposited to the firm's trust account prudently.

[122] That view would have been reinforced by the Associate Judge's finding that there was sufficient circumstantial evidence that QLL would have been in a position to "be suspicious of the propriety of the directors' conduct".[17]

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[16] *BM v Q Law Ltd* [2015] NZCA XXX at [64].
[17] [2015] NZCA XXX at [34].

[123] As at 4 September 2015 when the Court of Appeal's judgment was delivered, the question as to whether QLL had acted appropriately in managing funds paid to its trust account, was squarely before the court.

[124] But I have no indication that the proceedings were advanced further.

[125] I have had research staff complete a database search to establish if there are any further published decisions of the Court recording the proceedings referenced by Mr KB, and am informed that there appears to be no record of the case being advanced further, subsequent to the Court of Appeal's decision to grant the appeal.

[126] It is not appropriate to speculate as to why the proceedings appear to have not proceeded further. I cannot discount possibility of the parties reaching settlement. I can only consider the evidence before me and would reiterate that Mr KB's reference to proceedings before the Court was confined to brief mention of the fact that three [nationality] citizens had had their claims against QLL and Mr WQ dismissed by the court.

[127] Mr KB argues that the LCRO should reverse the Committee's decision. He submits that the Lawyers Complaints Service is assisting parties to commit fraud. He says that he has an expectation that the evidence of criminal wrongdoing he believes he has provided, should oblige the LCRO to "investigate the fraud".[18] Mr KB complains that indication from the LCRO that he would not be provided opportunity to "send further evidence of fraud", does not present as encouraging for him or the 400 other investors who have lost their savings.

[128] Mr KB and his fellow investors suffered a considerable financial blow as a consequence of the failure of the [suburb] development.

[129] The promoters of the development appear to have designed and marketed a development project that provided negligible security for investors who had entered into agreements to exercise a right of first refusal to purchase.

[130] Mr KB's conviction that the scheme was a contrivance to defraud investors is understandably bolstered by the knowledge he subsequently acquired as to the backgrounds of the individuals promoting the scheme, and on him becoming aware that the developers had not secured the necessary consents to allow the development to proceed.

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[18] Mr KB, correspondence to LCRO (4 December 2020).

[131] But in advancing argument that the LCRO should conduct a broad investigation into allegations of fraudulent and criminal conduct, Mr KB misunderstands the scope of a Review Officer's jurisdiction.

[132] The task of a Review Officer is to exercise the powers of review conferred by the Act, which provides jurisdiction to a Review Officer, to review all the aspects, or any of the aspects of an inquiry carried out by a Standards Committee in relation to the complaint or matter to which the final determination relates.

[133] Mr KB's plea for his complaints of fraudulent conduct on the part of the developer companies' directors to be further investigated, together with his request that the LCRO cure perceived deficiencies in the way in which New Zealand regulatory bodies provide oversight of, and provide protection for, overseas investors, are matters that fall well outside the scope of a Review Officer's jurisdiction.

[134] To the extent that Mr KB's concerns focus on issues of professional conduct, there is insufficient evidence to establish to the required legal threshold, that QLL breached duties and obligations owed to Mr KB.

[135] The difficulty that Mr KB has in establishing grounds for complaint that QLL failed to manage funds he had deposited to the firm's trust account appropriately, is that the question as to whether Mr WQ breached obligations owed to Mr KB is not one that is able, at first instance, to be determined through the process of review.

[136] I accept that Mr KB may, indeed does, have difficulty in understanding why the Complaints Service has refused to take action on two of his complaints.

[137] Not surprisingly, he sees the issue in black-and-white terms. He has good reason to be critical of the developers.

[138] But the question as to whether QLL breached professional obligations by allowing the firm's trust account to be the repository for investors funds, is not capable at first step, of being determined by a LCRO.

[139] Mr KB may fairly, and will likely, question as to why the Complaints Service and LCRO, being authorities charged with direct responsibility for overseeing the conduct of lawyers, cannot deal with what he perceives to be a relatively straightforward complaint that a lawyer has released, without authority, funds held in a trust account.

[140] The answer is that it is not, in my view, possible for either a Standards Committee, or a Review Officer, to determine the extent of the obligations owed by QLL to Mr KB and his fellow investors, by simple reference to the relevant provisions of the Act, trust account regulations, and conduct rules which customarily provide direction as to the obligations incurred by a lawyer when receiving funds into a trust account

[141] QLL's position is that the firm owed no obligation to Mr KB as they were acting at all times on the instructions of their client. That position is advanced on the back of argument that the FRR agreement clearly directed that investors were to lodge funds to a nominated bank account.

[142] The issue then focuses on the interpretation of the provisions of the FRR agreement and, in particular, whether the agreement, in directing that payments were to be made to the QLL trust account, absolved QLL of responsibility to consider the interests of the investors.

[143] It is clear from an examination of the discussion in [2014] NZHC XXX, where the plaintiffs had called an expert witness to give evidence and Mr WQ had provided an opposing view on that evidence, that the question as to whether QLL were required to hold funds received as a stakeholder was contestable.

[144] The court, as was noted, was not called on to make a determination on the issue, and nor was the issue addressed in the proceedings that followed.

[145] But what the decisions that have been before the court in proceedings brought by Mr KB's fellow investors reinforce, is that the pivotal and critical issue as to whether QLL owed fiduciary duties to Mr KB such as would have required the firm to deal with funds received from Mr KB as if he was of client of the firm, are matters that can only be properly determined by a court.

[146] It is in that forum that expert evidence can be called, witnesses heard and cross-examined, evidence received as to the broader circumstances of the transaction, including oral representations made by various parties, and consideration given to other documentation relevant to the transactions.

[147] The proceedings brought by the three [nationality] investors, whilst diverted somewhat in the initial stages by the manner in which those proceedings had been pleaded, were an attempt to properly determine the extent of QLL's liability.

[148] As noted, I have no evidence before me as to how those proceedings were concluded.

[149] However, putting the proceedings brought by the [nationality] investors to one side, Mr KB and a number of his fellow investors made determined efforts to seek legal redress having, as Mr KB explained, instructed lawyers over a period of some five years, to explore avenues and options available to recover funds.

[150] That determined action to pursue a civil remedy must be considered alongside the lengthy SFO enquiry which would inevitably have considered the role QLL played in facilitating the transactions. These efforts, along with attempts to pursue redress by way of complaint to various government departments, government ministers and complaint to the Police, have failed to produce evidence of any improper conduct on the part of QLL.

[151] If following an examination in an appropriate forum, it was concluded that the contractual arrangements entered into between the investors and the development companies did not provide a shield for argument that QLL had failed in its duty to protect the investors, Mr KB would, armed with evidence of that nature, be equipped to bring a further complaint. Such evidence would be sufficient to justify a Committee exercising its discretion to reconsider a complaint.

[152] I have considerable sympathy for Mr KB and his fellow investors.

[153] It is regrettable that in the fevered environment of a promotional event likely designed with purpose to first and foremost promote sales, investors who had little understanding of New Zealand regulatory law, were diverted from and clearly not alerted to, the desirability of their obtaining independent legal advice before entering into arrangements that required them to deposit funds to a New Zealand based lawyer's trust account.

[154] Having concluded that Mr KB's second complaint replicates his first and having further concluded that Mr KB has failed to provide sufficient evidence to support complaint that Mr WQ or Mr LT breached obligations or duties owed to Mr KB, I see no basis to interfere with the decision of the Standards Committee.

Publication

[155] Pursuant to s 206(4) of the Act I direct that this decision be published so as to accessible to the wider profession in a form anonymising the parties and bereft of anything as might lead to their identification.

Decision

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 JANUARY 2021

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R Maidment
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 KB as the Applicant
Messrs WQ and LT as the Respondents
[Area] Standards Committee [X]
New Zealand Law Society