LCRO 226/2012

CONCERNING An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING determinations of the [Area] Standards Committee

BETWEEN **RN**

Applicant

AND **QW**

Respondent

The names and identifying details of the parties to this claim have been changed.

DECISION

Introduction

[1] Mr RN has applied for a review of a decision by the [Area] Standards Committee which found that acting for more than one client when the clients' interests conflicted, and failing to register a caveat in 2009 were unsatisfactory conduct on Mr QW's part pursuant to s 12(c) and (a) of the Lawyers and Conveyancers Act 2006.

Background

[2] In August 2009 Mr QW acted for Mr TL and Mr RN as borrower and lender in the same transaction. There are some disputes about how the parties came to Mr QW, but no dispute about the substance of the matter, first that Mr QW acted for both parties and second that he did not register a caveat in 2009 to protect Mr RN's security.

[3] Mr QW says that despite advising both parties that they were clients or former clients so he would not be able to represent them in the lending and borrowing transaction, he bowed to the parties' wishes and accepted their instructions. He says he advised them from the outset that they would have to take independent legal advice, and if they did not, they would have to sign waivers of independent legal advice.

[4] There is some dispute over the extent of Mr QW's retainer with Mr RN. Mr QW has been unable to demonstrate compliance with rules 3.4 and 3.5 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the rules) by providing correspondence sent to either party at the outset describing what he was to do for any of them. Mr RN says he instructed Mr QW to advise him on the adequacy of the securities under the agreement. Mr QW says that is wrong, and that he was retained by both parties simply to document the details of the agreements they had already reached.

[5] There is some evidence of Mr QW being involved in negotiations before the parties signed the agreements, in the form of a series of draft term loan agreements between Mr RN as lender, and Mr and Mrs TL as borrowers.

[6] Mr QW describes the loan as a simple commercial transaction with an "extremely high" return for Mr RN. A term loan agreement and associated security documents were signed in August 2009. Waivers apparently signed by the parties have also been produced although Mr RN subsequently resisted the suggestion that he gave informed consent to Mr QW acting. Mr QW says that Mr RN had ample opportunity and encouragement to take independent legal advice but declined to do so.

[7] Mr QW's handwritten file note dated 20 August 2009 records him having met with both parties and them executing the documents. The note records that all parties were "happy with the deal" and that Mr RN would transfer the money to Mr QW's account on the Friday night so it could be paid to Mr and Mrs TL on Monday, 24 August 2009. Securities, including unregistered mortgages and general security agreements, were given and taken and the money was paid.

[8] Mr QW's office wrote to Mr RN on Tuesday, 25 August 2009 confirming that the documents had been executed and that a caveat had been registered "pursuant to the Mortgage and Agreement to Caveat". Mr QW says that when his secretary wrote on 25 August 2009, she "generally believed that the caveat would get registered as soon as we would submit for registration". That was not correct.

[9] Copies of historical searches of the certificate of title to Address 1 and Address 2 do not show any caveat being registered in or about August 2009. Mr QW says that the caveats were prepared for registration and submitted, but "due to some technical difficulty the caveat did not register until later". He appears to have been unaware of the failed registration until August 2010.

[10] There is no evidence of what prompted the correspondence, but on 9 August 2010, the Registrar-General of Land wrote to Mr QW's office advising that the e-dealing

in 2009 affecting Address 2 had been rejected because an agreement to register a caveat is not a caveatable interest. It is not clear how Mr QW or his secretary came to the view that it could have been.

[11] Mr QW next describes a call from Mr RN to his secretary on 17 August 2010 advising that Mr and Mrs TL had not paid the loan. Mr QW says that on Mr TL's instructions his secretary had by then extended the term of a general security agreement (GSA), one of the securities for the loan, by five years. When Mr RN phoned on 17 August 2010 she told him the term of the GSA had been extended. However, it appears that Mr RN was only prepared to extend the term of the loan for a further two months then he would need the money. It appears that by that stage Mr TL had been in touch with Mr QW and made an appointment for the following day. A note on Mr QW's file records that Mr RN was advised of that, and told to expect further advice.

[12] It appears Mr TL and Mr RN had been in touch with one another over the late repayment, and had discussed some possibilities around repayment. Mr QW made a note that he would write to Mr RN. Mr QW's file contains copies of historical searches of the certificate of title to Address 1 and Address 2 that record the registration of caveats by "Mr RN" in the afternoon of 19 August 2010.

[13] Also on 19 August Mr QW's office wrote to Mr RN proposing to formalise an extension to the loan. Mr TL's explanations for the delays were put forward, and the re-registration of the GSAs was mentioned. The letter says that the whole of the loan had not been re-documented because that was not considered necessary, but that as a matter of caution, an agreement had been prepared confirming the renewal of the "Term of Loan Agreement" and the continuance of the GSAs and reregistration of the charge in the PPSR. Mr RN was advised that once the agreement was signed by Mr and Mrs TL and Company 1 he would also be required to sign.

[14] On 31 August 2010 Mr QW made a file note recording a telephone call he and Mr TL had made from his office to Mr RN. The note referred to Mr RN's desire to have his money protected, and seeking assurances from Mr QW. Mr QW's note says that he was being placed "in a very difficult situation", and records his advice to Mr RN that he should seek independent legal advice.

[15] An agreement was prepared that bears the date 7 September 2010. Its terms extended the term of the loan to 30 October 2010, with no penalty interest being imposed for late repayment, and allowed Mr RN to enforce the terms of the GSA. The terms of the term loan agreement were broadly unaffected. Mr QW witnessed all three

signatures to the agreement, Mr and Mrs TL and Mr RN. However, by email dated 10 September to Mr TL, Mr QW's secretary indicated that Mr, and presumably Mrs, TL had not at that stage executed the agreement.

[16] On 10 September 2010 Mr QW's secretary made a note of a phone call she had received from Mr TL asking why the caveat had been registered against his property. The note says Mr TL's instruction was to register the PPSR but not the caveat.

[17] Mr QW says that the agreement, and presumably its revision, was between the parties, but when Mr TL did not pay, Mr RN started phoning his office and demanding payment from him. Mr QW says Mr RN was undeterred by his protestations that the default had nothing to do with him. Mr QW says he understood the parties were in touch with one another, and knew what the position regarding repayment was.

[18] Mr QW says he suggested to the parties that they have a joint meeting, which occurred in late November 2010. In the course of that meeting Mr QW says he informed the TLs and Mr RN that he could not act for any of them because there was a conflict.

[19] Mr QW's file note of 25 November 2010 refers to meetings involving Mr TL, Mr RN and others, and at some stage Mr QW. It appears Mr TL was having difficulties with the bank, and wanted to ensure the security of Mr RN's position. Options were discussed to relieve the financial pressure on Mr and Mrs TL, involving purchase of property from them by Mr RN. Mr QW's note records his advice to seek independent advice, and his willingness to continue to act if the parties reached an agreement that was acceptable to the bank. He recommended each of them take legal, financial and economic advice before proceeding. Mr QW says his understanding at the end of the meeting was that agreement had been reached between the parties as to the way ahead

[20] On 26 November 2010 Mr HD, on instructions from Mr RN, sent Mr QW with an authority to uplift Mr RN's files to Mr HD.

December 2010

[21] In 8 December 2010 Mr QW wrote to Mr HD enclosing various documents.

[22] Mr HD wrote back on 21 December confirming he acted for Mr RN. Mr HD made inquiries about Mr QW's fees, and handling of matters on behalf of Mr RN,

including documentation of the loan and security arrangements, the advice provided to Mr RN and the date on which Mr QW's office had paid the loan funds from his trust account to the borrowers. Mr HD asked Mr QW to confirm urgently whether he continued to act for Company 1 or the TLs, and noted that no caveat had been registered in August 2009, despite the letter from Mr QW's office dated 25 August 2009 confirming that had been done. Mr HD asked whether Mr QW was aware of the borrowers further extending their borrowing using the same securities after August 2009. Mr HD said Mr RN's security was in jeopardy and gave Mr QW notice of his intention to take immediate steps to recover the loan.

[23] Mr QW refers to various attempts by Mr RN to purchase the TLs' interests, which did not proceed because the first mortgagee bank was not satisfied.

[24] Mr QW provided a copy of a mediation agreement dated 24 February 2011 documenting a meeting at his offices starting at 5pm that day. Attendances are recorded by Mr TL, Mr RN and his lawyer, Mr HD, and another lawyer from Mr QW's firm, Mr BR, whose signature appears above the description "solicitor facilitator". Mr QW also signed the agreement as "Mediator/Facilitator". Mr TL and Mr RN signed to say that the mediation was being held at their request, that neither objected to Mr QW being present, and that they acknowledged they had been required to seek independent legal advice in regard to the mediation. Although there is no record of Mr TL having brought an independent lawyer with him, all parties signed indicating that each of them had brought independent legal representation to the meeting.

[25] The mediation agreement also contains an indemnity from Mr TL and Mr RN to Mr QW's firm, its "partners, employees and agents" (the firm). The indemnity is said to protect the firm from any liability arising from the mediation or subsequent dealings, and an undertaking not to "demand, claim or issue proceedings" against the firm in "this matter". Mr QW's role as mediator/facilitator was said to be for the purpose of using his "advanced knowledge of our particular circumstances in order to better help facilitate the meeting". All matters were not resolved to Mr RN's satisfaction, and on 4 April 2011 he made a complaint to the New Zealand Law Society (NZLS).

Complaint

[26] The background to the complaint is set out in some detail in Mr RN's letter.

The Committee correctly summarised the issues as conflict of interest, negligence, alleged forgery of Mr RN's signature on the waiver, failure to provide files and breach of fiduciary duty. Mr RN blames Mr QW for his losses arising from having lent money to

the TLs. He considers Mr QW cheated him, took advantage and did not protect his money.

[27] Aside from the non-registration of the caveat, Mr QW denied any professional failings. He relied on the waivers and the parties' willingness to both instruct him to document their agreement despite his openness about his previous dealings with both.

[28] As Mr RN denied having signed a waiver, both parties produced evidence from handwriting experts which in both cases indicated that the signature probably was Mr RN's.

[29] Mr RN said Mr QW had been his lawyer for 20 years, and relied on services he had previously provided including assessing the adequacy of securities. Mr RN also provided statements from others including his wife. Mr RN says he relied on Mr QW's advice in relation to the loan to the TLs, says that he raised the question of whether Mr QW could act for both parties, and Mr QW assured him there was no problem.

[30] Mr RN referred to a claim he intended to file for his losses and provided a copy of a decision by this Office LCRO 181/2009 in which Mr QW was ordered to pay compensation to a client.

Mr QW's response

[31] Mr QW replied on 5 October 2011. He accepted that he had not registered the caveat in 2009, acknowledged acting for both parties but says there was no conflict: the parties came to him with an arrangement for him to document. In support, he produced a statement signed by the TLs dated 5 July 2011 which refers to "direct discussions with Mr RN initially" and then having then instructed Mr QW to draw up loan documents with them having undertaken to pay the legal costs of the transaction for both parties. Mr QW repeated that he was not advising Mr RN or Mr and Mrs TL in regards to the security aspect of the transaction, and says Mr RN told him he had seen the valuations of Address 1 and Address 2.

[32] Mr QW said that the purpose of the mediation in late November was to make arrangements satisfactory to both parties for Mr TL to pay the loan back. Mr QW refers to court proceedings threatened by Mr RN's lawyer, and their dealings. The letter from Mr RN's new lawyer set out the details of his claims against Mr QW, which Mr QW denies. Allegations of negligence and breach of fiduciary duty were categorically denied by Mr QW, who threatened complaint against Mr RN's new lawyer to NZLS.

Mr RN's reply

[33] Mr RN maintained his position in submissions, including that Mr QW had contravened rule 6.1 by acting for the borrower and lender in the same transaction, saying it was his duty not to act for both parties to the transactions. He contends that if Mr QW believed that in any way his interest was being compromised, he should have insisted that Mr RN seek independent legal advice if he was not in a position to advise him. Mr RN says Mr QW's omissions severely affected his financial position.

[34] Mr RN contends that there was clearly a more than negligible risk that Mr QW would be unable to discharge his obligations to both parties, and that he could not discharge his obligations to Mr RN. Mr RN does not accept that the work was only transactional.

[35] Mr RN says he did not give informed consent because Mr QW did not explain to him the material risks or alternatives to the proposed course of action and he did not understand those. Mr RN says he does not recall signing the waiver, and does not recall Mr QW having explained it to him. He says he understood that Mr QW was acting in his best interest and "had my back covered" such that if anything was wrong he would tell Mr RN. Mr RN says he trusted Mr QW to give him proper legal guidance, and to look after his best interests.

[36] Mr RN says Mr QW was negligent in not registering the caveat, which enabled the TLs to borrow further against the property and to secure a further mortgage before the caveat was registered. He refers to correspondence from Mr QW's office in August 2009 saying that the caveat had been registered when it had not.

[37] Mr RN also refers to the delay in Mr QW providing his full file upon request.

[38] Mr RN contended that the appropriate orders the Committee should make pursuant to s 156 of the Act, in the event of a finding of unsatisfactory conduct, included compensation. He was also of the view that Mr QW's name should be published to protect the public from Mr QW.

Submissions for Mr QW

[39] Detailed submissions were filed by counsel for Mr QW addressing the issues, explaining the delay in registration of the caveat as an "oversight", and submitting that "whilst it does not excuse this oversight, Mr QW's position is that it did not, in fact, cause any loss or harm to Mr RN".

[40] As to the request that Mr QW provide Mr RN with his files, counsel submits that the delay of two weeks was not undue, and that Mr QW's later delays in providing further information were justifiable, and intended no discourtesy. Again, it is argued that no difficulty or prejudice was caused to Mr RN, and that Mr QW has apologised and repeats the apology.

[41] It was submitted on behalf of Mr QW that a referral of the complaint to the Disciplinary Tribunal is not warranted, and that the conduct complained of is at the lower end of the scale, falling within the jurisdiction of the Committee. Submissions were made on the orders that might follow a finding of unsatisfactory conduct.

Decision

[42] The Committee noted that Mr QW had acted for lender and borrower until 30 October 2010 when Mr QW advised both parties to get separate representation. The Committee referred to rule 6.1:

> A lawyer must not act for more than 1 client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients.

[43] The facts and submissions put on Mr QW's behalf were noted, but the Committee did not accept that the lending was a non-contentious transactional arrangement because Mr RN was lending a substantial sum of money to the TLs in circumstances where "it was imperative that there was sufficient security for the loan".

[44] The absence of terms of engagement limiting the retainer was noted, and the absence of any such limitation left Mr RN with a reasonable expectation that he would be advised in relation to the securities in the terms of the loan agreement. Mr QW was found to have breached rule 6.1 by acting for borrower and lender with no clear limitation on the retainer to either clients, and there was a more than negligible risk that Mr QW was unable to discharge his obligations owed to one or more of the clients.

[45] With respect to obtaining informed consent, as required by rule 6.1.1, the Committee did not consider Mr QW would have been able to act for both parties in the transaction even if he had obtained the prior informed consent of all the parties concerned. Reciting the definition of informed consent set out in rule 1.2 because he had failed to explain "the material risks of and alternatives to the proposed cause of action" to Mr RN, and was required to believe "on reasonable grounds that the client understands the issues involved". The Committee considers that Mr QW having the clients sign a waiver of independence advice did not equate to informed consent.

[46] The Committee did not accept that the waiver was a forgery, on the balance of probabilities, and decided to take no further action on that aspect of the complaint.

[47] The Committee did not pursue inquiry into whether Mr QW had provided competent advice to Mr RN, given the scope of the retainer was limited according to Mr QW's version of events. The Committee's view was that "although the matter may have been documented according to those instructions, had Mr QW not acted for both parties, the advice provided to either of those parties might have been different".

[48] The delay in registering the caveats was found to be unsatisfactory conduct, admitted by Mr QW, pursuant to s 12(a) of the Act, being conduct that fell short of the standards of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

[49] The Committee did not consider further action necessary with respect to the alleged delay by Mr QW in providing Mr RN's documents.

[50] With respect to orders, for compensation, the Committee did not consider Mr RN had sustained any actual loss. It imposed a fine of $2,000 "to reflect the seriousness of the breach", and ordered Mr QW to pay $2,000 in costs to NZLS, giving Mr QW 30 working days in which to comply with the orders. Publication of Mr QW's name was not considered necessary or desirable in the public interest.

[51] Mr RN disagreed with the decision, and applied for a review.

Application for review

[52] Mr RN, represented by Mr VH, applied for a review. The first objection was that the Committee had not ordered Mr QW to pay Mr RN compensation. The basis of Mr RN's protest is that if Mr QW had not acted for him, he would not have entered into the agreement because he would have known that the security was wholly inadequate, and therefore not have suffered a loss. Mr RN says that Mr QW caused his full loss.

[53] Mr RN also considers that further borrowing by the TLs between the agreement being signed and the caveat being registered impacted on the TLs ability to repay him.

[54] With respect to penalty, Mr RN contends that the fine of $2,000 does not adequately reflect the seriousness of the breaches, the substantial amount of money involved in the transaction, the obvious risk of conflict, or the obligation on Mr QW not to have allowed Mr RN to believe Mr QW was protecting his interest as he should. Mr

RN reiterates the "extreme distress and anxiety" caused to him from the loss of such a substantial amount of money, and Mr QW's refusal to acknowledge any culpability, which Mr RN says has added to his stress.

[55] Mr RN seeks compensation of $25,000 and a review of the penalty.

Mr QW's reply

[56] On 25 September counsel for Mr QW filed submissions in response to the application for review. Mr QW's initial submissions were confirmed and counsel advises that Mr QW had complied with the orders made by the Committee.

[57] Mr QW says Mr RN has not provided any evidence to support his assertion that he sustained loss as a result of the late lodgement of the caveats. Complexities in calculating any loss are highlighted and Mr RN's intention to pursue a civil claim is mentioned. It is submitted that Mr QW's failure to register the caveats in a timely manner was not a direct cause of Mr RN's loss, and thus it is not correct to award compensation as he requests. Counsel submits that the lodging of caveats would not have stopped the bank increasing its lending under the existing mortgage, or affected the bank's right to recover through a mortgagee sale; neither would the caveat have outranked the first registered mortgage.

[58] It was submitted for Mr QW that while considerable material has been provided, copies of the valuations, bank documents and evidence of Mr RN's prior experience as a private lender are relevant and have not been provided. The submission is made that the decision was "clear, cogent and correct, appropriate for the circumstances of the complaint and that no further penalty or order is warranted or should be made". This Office is invited to confirm the decision, and make no order for costs on review.

Further submission for RN – 7 November 2012

[59] Counsel for Mr RN raised issues around the caveat and Mr QW's relationship with the TLs. The latter was supported by evidence from Mr DL, who previously borrowed money from Mr RN, and Mr QW was involved in the lending and securities registration.

Submissions of QW – 23 October 2012

[60] Mr QW's strenuous denial of a deliberate failure to lodge caveat because he had a personal relationship with the TLs was confirmed and he repeated his evidence that the oversight was regrettable.

[61] Further correspondence was received which added nothing of substance to the submissions, but confirmed Mr QW consented to the matter being determined in his absence.

[62] On 6 March 2013 Mr RN declined consent to matters being determined in his absence, and requested a hearing. In 2014 Mr RN sent an email describing Mr QW's three month suspension from legal practice in March 2014 on the basis on his admission of a charge of negligence or incompetence in his professional capacity of such a degree as to reflect on his fitness to practice or as to tend to bring the profession into disrepute. In that case Mr QW had breached the terms of the solicitor's certificate when he acted for the lender and was instructed to secure a mortgage and term loan agreement for a property. Mr QW had failed to obtain the signature of a guarantor or covenantor despite certifying the covenantor had executed the agreement. Mr QW's suspension was based on conduct by an employee, with the Tribunal commenting that "thus it is quite clear that the practitioner was let down by his employee". Mr QW's conduct fell "just on the side of the negligence/incompetence fence",[1] but was also "relatively close to misconduct". The decision refers to Mr QW having implemented "strict policies against acting for more than one party", by March 2014, and also relates to "three other unsatisfactory conduct findings relating to the practitioner's behaviour between 2008 and 2011".[2] The present matter is understood to be one of those three.

Review hearing

The parties attended a review hearing in Auckland on 2 May 2016. Both were represented. Written submissions were handed up by counsel for Mr QW.

[63] After the hearing Mr RN was allowed a period in which to respond, which he did by submissions received on 9 June 2016. Mr QW's response to those submissions was received on 17 June 2016. All of the information provided has been taken into account on review.

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[1] *Auckland Standards Committee 5 v Khan* [2014] NZLCDT 15 at [12].
[2] At [16].

[64] Broadly speaking, the submissions of 2 May summarise the position at that date. The absence of proof supporting the allegations that Mr QW deliberately failed to lodge caveats in a timely fashion and had a personal relationship with Mr TL, and suffered a loss as a result of the actions of Mr QW is highlighted. The escalation in Mr RN's allegations is referred to, and the lack of any support for the allegation Mr QW was acting in a manner to support his own interests is noted. The discord between Mr QW's understanding that the parties had agreed to the terms of the transaction and simply wanted him to document it, and Mr RN's evidence that if he had received advice as to the nature of the transaction and the risks to him, he would not have entered into it was mentioned.

[65] *Mr Romford v Mr Marlborough*[3] is relied upon as the basis of the submissions that the more serious the allegation the stronger the evidence needs to be before a conclusion can be reached that the allegation is established on the balance of probability.

[66] As to penalty, *Wislang v Medical Council of New Zealand*[4] is referred to as authority for the proposition that the functions of penalty include:

- Punishing the practitioner;
- A deterrent to other practitioners;
- To reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct.

[67] It is important to mark out unsatisfactory conduct as unacceptable, and to deter other practitioners from failing to pay due regard to their professional obligations.

[68] *Daniels v Complaints Committee 2 of the Wellington District Law Society*[5] is relied upon for the proposition that the penalty function of the Tribunal does not have punishment as its primary purpose, although some orders inevitably will have some such effect. Reference is made to the predominant purposes of advancing the public interest, including: the protection of the public; maintaining professional standards; imposing sanctions on the practitioner for breaching duties; and the provision of rehabilitation in appropriate cases. The starting point for penalty is the gravity of the misconduct and culpability of the practitioner, with the various mitigating and aggravating features being taken into account when fixing penalty. Acknowledgement

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[3] Mr *Romford v Mr Marlborough* LCRO 123/2009.
[4] *Wislang v Medical Council of New Zealand* [2002] NZAR 573 (CA).
[5] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850 (HC).

of error and acceptance of responsibility are matters for mitigation. Prior transgressions are also relevant, including good and poor behaviour.

[69] Counsel submits that the finding of unsatisfactory conduct was correct and should not be disturbed on review. Conduct is said to be at the lower end of the scale of unsatisfactory conduct pursuant to s 12. The broad scope of the definition of unsatisfactory conduct is referred to, and the absence of features that warrant referral to the Tribunal is emphasised. Counsel submits that no increase in penalty is warranted, the fine is adequate and consistent with both decisions made at the time, and should not be increased simply because penalties may generally have increased in the meantime.

[70] Compensation is resisted, with reference being made to the principles of *Hadley v Baxendale*:[6]

> These are damages which 'may fairly and reasonably be considered either as arising naturally i.e. according to the usual course of things from such breach itself and damages which may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. Thus to be recoverable, the losses must naturally flow from the breach of contract … notwithstanding the distinction between a contract on the one hand and a professional retainer such as arises in this case, these principles are a useful guide to approaching the remedial claims that have been made.

[71] The difficulties with proving causation and loss were emphasised. Cases where the LCRO had made compensation orders were referred to, although compensation was resisted and argued as inappropriate.

[72] Counsel submits an adverse decision relating to Mr QW dated 18 March 2014, referred to above, which resulted in a suspension should be discounted because the current decision is one of the matters referred to in that decision. Mr QW is said to have "already faced an increased penalty as a result of this matter" in the Tribunal, so that to increase the penalty in this matter "involves a concept of double jeopardy".

[73] Counsel submits the penalties should be confirmed.

Mr RN's reply – 8 June 2016

[74] Mr RN expressed the view that the decision felt to him "like a slap on the wrist for QW". He referred to Mr QW's disciplinary history, the need for deterrence, similarities between the present conduct and "previous incidents", the three month suspension, and the need to protect the public "from such lawyers".

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[6] *Hadley v Baxendale* (1854) 9 Exch 341; 156 ER 145 and LCRO 149 & 150/2009 at [9].

[75] Mr RN says Mr QW lied to him about the value of the equity supporting his securities, challenges Mr QW's competence and advice, says there was some personal interest for Mr QW in intentionally misguiding Mr RN. Mr RN suggests Mr QW pressurised witnesses and was acting like a "mafia or a Don King". He refers to Mr QW being involved as a trustee of one of Mr TL's trusts, and the conflict that raises, which was a point that surfaced at the review hearing for the first time.

[76] Mr RN refers to his primary objective is to have harsher penalties imposed on Mr QW, and for his name to be published. He says he totally relied on Mr QW's advice, and would never have lent the money without Mr QW's apparent support.

[77] Mr RN confirmed that on 16 November 2012 he had secured judgment in sum of $217,599 against the TLs. He says he does not want Mr QW's money, but "wants him punished … to ensure that he is deterred from repeating this". Mr RN accuses Mr QW of fabricating evidence, lying, and the need for justice to be done, and seen to be done. Mr RN encourages a focus on the initial advice given by Mr QW, including the value of the security. He says at the time he was not an "experienced lender" but has become more educated along the way. Mr RN refers to consumer rights, the amount Mr QW made from his involvement in the transaction, and emphasises the need for publication to protect the public. Mr RN says his request for compensation was aimed at increasing the penalty as a means of deterring Mr QW from future similar mistakes.

Mr QW's response

[78] Counsel for Mr QW provided submissions dated 17 June 2016 opposing the suggestion that matters might be sent back to the Committee. Affidavits provided by Mr RN are said not to contain fresh evidence such that remission is required, and if the complaint were returned to the Committee for determination, that would cause delay and prejudice to Mr QW and contravene the requirements of the Act for complaints to be dealt with in an expeditious manner and in accordance with natural justice. Counsel argues that it is too late in the proceeding to accept fresh evidence. Counsel relies on the comments of Duffy J in *Complaints Committee No. 1 of the Auckland District Law Society v P*[7] and in particular the fact that "the discretion to omit fresh evidence should be sparingly used and not to provide litigants with an opportunity to bolster their case on appeal". Counsel submits the evidence does not meet the test for "fresh evidence" for the reasons explained in the submissions.

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[7] *Complaints Committee No. 1 of the Auckland District Law Society v P* (2001) 18 PRNZ 760 (HC).

[79] As to delay, the date of the conduct, 14 August 2009, is raised and the time the complaint and review processes have taken. The obligation under the Act to conduct reviews expeditiously and in accordance with natural justice are emphasised, with the overall question submitted as being whether Mr QW has suffered an unacceptable abuse of process by reason of delay. Counsel's submission is that a referral back to the Committee would be an unacceptable abuse of process. Counsel submits that I should determine the review.

RN response – 16 June 2016

[80] Mr RN requests a referral back to the Standards Committee pursuant to s 209 on the basis that the case is serious, and he wants a proper investigation. He says Mr QW's "unprofessional behaviour" is a new development in the course of the case and that justice should not be time bound.

Analysis of review grounds

[81] The grounds of review are only that the penalties are not sufficiently harsh, and that Mr RN should receive the maximum available compensation, $25,000. The review application is dated 31 July 2012, at which time Mr RN had not secured judgment by default against the TLs. Since then, his drive for compensation has abated and the thrust of his review application turned to a plea that harsher penalties should be imposed on Mr QW.

[82] As the review progressed, Mr RN's concerns expanded, became more personal and increasingly serious. The process of review is not the place to air concerns about a practitioner's integrity for the first time, particularly where the allegations lack proper evidential support.

[83] The question on review is whether the penalty imposed by the Committee adequately reflects the unsatisfactory conduct. That is the issue Mr RN first raised.

Discussion

[84] The functions of penalty were discussed in *Wislang*, which notes they include:

- Punishment;
- Deterrence;
- Professional and public opprobrium.

[85] Mr QW accepts that he acted for both parties, and accepts the Committee's finding that his conduct in doing so was unsatisfactory. He acknowledges having failed to register the caveat in 2009. That is effectively an acknowledgement that he did not properly supervise Mr WS as he is obliged to by rule 11.3.

[86] Nothing that Mr RN has added in the meantime really affects the seriousness of the conduct. The facts speak for themselves. The escalation of Mr RN's concerns is unfortunate, but not prejudicial to Mr QW in terms of the outcome of this review. Mr QW did not cover himself in glory in carrying out his retainer with Mr RN and the TLs.

[87] The question then is whether a fine of $2,000 is adequate punishment. Looking at the overall gravity of Mr QW's conduct, a fine of $2,000 is not beyond the bounds of what can be expected in the circumstances. The level of fine is a matter of discretion for the Committee.

[88] Although there are lengthy arguments from Mr RN about why the fine should be increased, none of those reaches a point where it is persuasive enough to depart from the Committee's exercise of its discretion. It is particularly relevant that this matter is one of three mentioned in the Tribunal decision on which Mr RN relies. Counsel's submission that there is a risk of double jeopardy is accepted.

[89] I understand that Mr RN feels cheated, but the reality is that he exercised his legal remedies and secured judgment against the TLs not long after he filed his application for review. Nonetheless, he continued his pursuit of compensation for some time, abandoning it at the eleventh hour, on the basis that he did not realise compensation was not a penalty. It is not. In any event, Mr RN says he does not want Mr QW's money.

[90] The costs order made by the Committee is also unremarkable.

[91] Mr QW has paid both the fine and the costs. There is no reason to take this matter any further.

[92] In all the circumstances, the Committee's decision is confirmed.

Referral back – s 209.

[93] For completeness, I note that while the option of referring matters back to the Committee was considered, the fact that the application for review was centred on penalty is the primary reason for not referring it back. I accept counsel's submission that the evidence does not qualify as new evidence, and that fresh evidence was not

invited. I note, however that this Office is charged with a review function and that further information can be obtained at the LCRO's discretion. Nonetheless, I have been assisted by counsel's careful submissions, and can find no cogent reason to refer matters back to the Committee.

Decision

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

DATED this 8th day of September 2016

D Thresher
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 RN as the Applicant
Mr QW as the Respondent
Ms QW as a related party
[Area] Standards Committee
The New Zealand Law Society