LCRO 251/2010

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 4
BETWEEN	**MS CX** of Auckland Applicant
AND	**MR WZ** of Auckland Respondent

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

DECISION

Background

[1] In 2009 the Applicant was in a relationship with Mr CY. Mr CY was the sole director of a company (CZ Limited). All but one of the shares in that company were owned by the DA Family Trust, the trustees of which were the Applicant, Mr CY and the Respondent.

[2] The Applicant and Mr CY owned a property at Long Bay against which was secured a substantial mortgage as well as a funding facility for the company.

[3] The Trust owned another property at Whangaparoa through a company, DB Limited, from which I understand the company operated its business.

[4] Early in 2009, the CZ (2003) Limited was having difficulties, and Mr CY was pressing the Applicant to make an inheritance that she was shortly to receive from her late mother's estate available to the company. He told the Applicant that if she did not

make those funds available the business would go into liquidation and she would lose her inheritance anyway.

[5] The Respondent had acted for the Applicant for many years and had also acted for Mr CY through his joint purchases with the Applicant. He had also acted for them in establishing the Trust which was the shareholder of the companies, and was a trustee of that trust.

[6] Upon hearing the statement from Mr CY(i.e., that her inheritance was at risk) the Applicant telephoned the Respondent to make an appointment to discuss her situation. By that time, she had come to the conclusion that her relationship with Mr CY was going to come to an end, but that had not happened at that stage.

[7] In late March / early April, she met the Respondent together with her son, primarily to discuss the question as to whether her inheritance was at risk. They had formed the view that Mr CY had probably been trading the company in an insolvent state, and was therefore liable personally to creditors, as the director of the company. The Applicant was not a director.

[8] As a result of the comments made by the Respondent at this meeting, the Applicant formed the view that what Mr CY had said was correct and that her inheritance was at risk if the company went into liquidation.

[9] The Respondent says that the focus of the meeting was on the Applicant's liability to the bank and that he had made it clear to her that her inheritance was at risk in that regard, as she had a personal liability to the bank. He denies, however, that he in any way advised her that she was liable for company debts, or that her inheritance was at risk if the company went into liquidation.

[10] The Respondent says that he made it clear to the Applicant that he could not act for her and that she needed to obtain independent legal advice. He took no notes of the meeting, did not create a file, and did not render an account. He says that he obliged the Applicant by meeting with her out of a sense of duty, having acted for her in excess of 20 years.

[11] The Applicant says that on the basis of her understanding that her inheritance was at risk anyway, she paid $94,500 directly into the company's account and $45,000 into the mortgage account, which was seriously in arrears. In fact, a Property Law Act Notice had been issued, although this was not revealed to the Respondent. These payments were made on 26, 27 and 29 April 2009.

[12] A document was signed by Mr CY, in which he agreed that these payments were to be repaid from a potential insurance recovery. The document read:-

> I, CY, guarantee that I will reimburse CX the business interruption insurance money when it comes through. This is to replace the $140,000 taken from CX's inheritance from Trustees Executors from my mother's estate.

The reference to "my" mother's estate was incorrect, and should have referred to the Applicant's mother's estate.

[13] This document is dated 1 April 2009, which must have been very close to the date of the meeting with the Respondent – indeed, if that meeting had taken place in early April it would have pre-dated that meeting. The payments however were not made until late April.

[14] In August/September 2009 the Respondent met with the Applicant and her son again, this time in a city cafe. Again, the Respondent says he urged the Applicant to get independent legal advice as he could not act for her.

[15] On 4 September 2009, the Respondent received a letter from Mr DC, a barrister who had been instructed to act for the Applicant. Mr DC indicated that the Applicant was agreeable to the Respondent acting for Mr CY in relation to negotiating a property settlement, but on the basis that if negotiations became acrimonious, or it became necessary to issue Court proceedings, then the Applicant would require Mr CY to obtain separate advice.

[16] The Respondent contacted Mr CY, and acted for him while the parties endeavoured to reach agreement. However, that was not possible, and the Respondent ceased acting for Mr CY.

[17] The company was placed into liquidation in November 2009 and it is apparent that the proposed source for repaying the monies advanced by the Applicant (the insurance money) did not eventuate.

[18] On 11 May 2010, the Applicant wrote to the Respondent requesting that he make arrangements with Mr CY to institute the weekly payments which had been discussed in repayment of the monies advanced. The Respondent replied the following day advising that he did not have instructions, and that the Applicant should instruct Mr DC to chase up Mr CY.

[19] On 4 June 2010, the Applicant wrote to the Respondent, alleging negligence on his part for failing to make the Applicant aware of the provisions of the Property

(Relationships) Act 1976, which provide that any monies received by way of an inheritance is separate property. She alleged that as a result of the Respondent's negligence she had operated on the basis that her inheritance was at risk if the company went into liquidation, and had therefore made the funds available in an attempt to ensure that the company survived.

[20] This was followed by the complaint to the Law Society on 3 August 2010.

The Standards Committee decision

[21] The Standards Committee considered the complaint and determined, pursuant to section 138(2) of the Lawyers and Conveyancers Act 2006, to take no further action. This section provides that a Standards Committee may, in its discretion, decide to take no further action if, having regard to all the circumstances, any further action is inappropriate or unnecessary.

[22] The Committee noted that the advances had been made by the Applicant without reference to the Respondent and also noted the response from the Respondent in which he indicated that he had urged the Applicant to seek independent legal advice and in which he denied telling the Applicant that her inheritance was relationship property.

[23] The Applicant has applied for a review of that decision. She maintains that the Respondent clearly advised her that her inheritance would be lost if the company went into liquidation, and is unhappy with what she describes as manipulation of the truth throughout the complaint.

[24] She seeks financial compensation in the sum of $95,000 lost through the liquidation of the company.

The review

[25] The review took place by way of a hearing on 16 June 2011 attended by the Respondent, the Applicant and her son.

[26] Section 211 of the Lawyers and Conveyancers Act provides that the LCRO may confirm, modify or reverse any order of the Standards Committee. In doing so, the LCRO may exercise any of the powers of the Standards Committee and / or direct the Standards Committee to reconsider and determine the whole or any part of the complaint.

[27] The Standards Committee and the LCRO have the ability to order a practitioner to pay compensation to any person where it appears that person has suffered loss by reason of any act or omission of the practitioner but the amount of compensation that can be awarded is limited to $25,000. Consequently there is no jurisdiction to compensate the Applicant to the extent that she requests.

[28] Before any compensation order can be made, the Standards Committee or the LCRO must first make a finding that the conduct of the Respondent constituted unsatisfactory conduct in terms of section 12 of the Act, being conduct which did not meet the standard of competence that could be expected of a reasonably competent lawyer (section 12(a)) or conduct unbecoming (section 12(b)). Serious negligence constitutes conduct unbecoming.

[29] A finding of unsatisfactory conduct can only be made in respect of a practitioner's conduct while the practitioner is providing "regulated services". This is the first matter that must be decided.

Was the Respondent providing regulated services?

[30] The term "regulated services" is defined in the Act as being "services that a person provides by carrying out legal work for any other person." "Legal work" in turn is defined as being "advice in relation to any legal or equitable rights or obligations."

[31] The Respondent denies that he was providing regulated services when he met with the Applicant and her son. He states that he met with them out of a sense of professional obligation, having acted for the Applicant for a period in excess of 20 years. He states that the meeting he had with the Applicant and her son was always prefaced with his advice that he could not act for the Applicant. He did not open a file, he did not take notes, and he did not render an account for the meeting.

[32] This is a difficult situation for a lawyer who wishes to oblige a longstanding client, yet is constrained from offering advice for ethical reasons. The only course that is open to a solicitor in these circumstances which will not compromise his or her position, is to decline to comment, or to meet with the client. Any attempt to indulge the client only results in uncertainty as to the status of any comments made as has happened in this case.

[33] The Applicant and her son argue that they viewed the meeting as one between solicitor and client, as it was logical that in times like this they would turn for assistance to the solicitor who had acted for the Applicant for many years. They say they

understood that from the time of the meeting onwards they would not be able to seek advice from the Respondent, but that they were entitled to rely on any advice offered at that meeting. They disagree with the Respondent's contentions that the discussion was general in nature and argue that there was specific advice offered particularly around the liability of the Applicant pursuant to the mortgage.

[34] Having heard both parties, it is clear that each party had a different perception of the basis on which the meeting took place. In coming to a view on this aspect, I tend to adopt what I consider was the perception of the Applicant.

[35] Although the relationship between the Applicant and the Respondent was a long-standing one that could be considered to be approaching a friendship, nevertheless, the parties did not meet on a social basis. Any meetings between the parties had only had been for the purpose of discussing legal issues, and this meeting took place during business hours at the Respondent's office. The potential insolvency of the company was discussed, and by reason of that, the potential for personal liability of the director. Following on from that, the extent to which the Applicant's inheritance was exposed to any claims was also discussed, although the content of that discussion is in dispute.

[36] Overall, I have come to the view that the Respondent was providing regulated services during the course of that meeting, and hence the pre-requisite for a finding of unsatisfactory conduct is established.

[37] In passing, I compare that first meeting, with the subsequent meeting that took place in the coffee bar. Given the circumstances in which that meeting took place, and what would seem to be a more general discussion in which the Applicant was again urged to seek independent legal advice, I would not categorise that meeting as one in which the Respondent was providing regulated services.

The advice

[38] The critical question to be decided is what advice did the Respondent provide at that meeting in late March / early April. The Applicant says that the question of major concern to her, was whether the inheritance she was about to receive from her mother's estate would be at risk in the event that the company went into liquidation. There were two potential sources of exposure. The first was by reason of the mortgage secured over the property owned by the Applicant and Mr CY, and the second was to creditors of the company.

[39] With regard to the mortgage, the Respondent confirms that he did advise the Applicant that her inheritance would be at risk to the mortgagee of the property, as the Applicant was personally liable for that borrowing.

[40] It appears that there was a facility in place which could be drawn on by Mr CY acting alone, and borrowing from the bank had increased dramatically without the Applicant's knowledge.

[41] In this instance, the advice provided by the Respondent, and understood by the Applicant, was correct, and correctly understood. The Applicant was personally liable to the mortgagee and consequently her inheritance was at risk in that regard. What does not seem to have been discussed, was whether or not the bank had acted correctly in allowing the borrowing to be increased without the Applicant's knowledge, but it must be assumed that was the case.

[42] The issue which has been the subject of misunderstanding, resulting in the Applicant making funds available to the company, is whether the Applicant's inheritance was at risk by reason of the liquidation of the company.

[43] The Applicant and her son formed the view that the advice provided by the Respondent was that the inheritance was at risk. Despite close questioning, I remain somewhat confused as to the basis on which they understood this could be the case.

[44] I initially came to the conclusion that they understood what they were being advised, was that the Applicant was liable by reason of her being in a relationship with Mr CY, for any liability incurred by Mr CY. On this basis, the nature of her assets (i.e. whether relationship property or not) would be irrelevant, in that if the Applicant were personally liable for Mr CY's debts, then her assets would be at risk regardless of whether the property was relationship property or separate property.

[45] Notwithstanding that the Applicant and her son confirmed that this was their understanding following their discussions with the Respondent, I consider that there must have remained some misunderstanding between myself and the Applicant and her son. The concept that a person assumes a liability by reason of the actions of a partner (or spouse) is not one that would readily be accepted.

[46] The alternative scenario, in which the Property (Relationships Act) would have some relevance, is that they formed the view based on what the Respondent was telling them, that because the inheritance was relationship property Mr CY would have

a claim to it and that therefore the Applicant was obliged to make the funds available to Mr CY.

[47] The question as to whether or not the funds made available represented all or part (or half) of the Applicant's anticipated inheritance was apparently not discussed at the meeting, but it seems that they considered that all of the inheritance was at risk. This in itself is odd when considering this scenario, as Mr CYwould only have been entitled to one half of the inheritance if that, given that that relationship contributions were unequal.

[48] Another view of the Applicant's understanding, is that they considered that because the inheritance was relationship property that somehow Mr CY became entitled to all of it, or entitled to direct how it was utilised, and that therefore the Applicant had no choice but to make it available to him.

[49] The Respondent denies that he indicated that the inheritance to be received constituted relationship property. He provided some detail of his experience in relationship property law, including the fact that he had considerable experience in arguing claims to separate property. He also has considerable company law expertise, although it would not take a great deal of knowledge to be aware that a shareholder is not liable for a company's debts or for the liabilities of a director who has caused the company to trade whilst insolvent.

[50] Even the Applicant's friends with whom she discussed the matter subsequently, expressed surprise that this could be the case.

[51] The degree of uncertainty that I have over the understanding held by the Applicant and her son, points to the conclusion that they formed a mistaken understanding as to the Applicant's liabilities following their discussions with the Respondent.

[52] The acknowledgement signed by Mr CY that he would repay the funds from an anticipated insurance payment adds to the uncertainties as to the understanding of the Applicant, as an acknowledgement that the funds would be repaid, is not synonymous with the view that Mr CY had an entitlement to the funds.

[53] There is certainly no doubt that on several occasions, the Respondent stressed to the Applicant that she needed to take independent legal advice. It seems that the decision to advance the money was taken some time prior to 1 April 2009, being the date on which the acknowledgement was signed by Mr CY. There was some time

however before the funds were actually paid over, and given the expressions of doubt that were being made to the Applicant, it is surprising that she did not heed the urgings of the Respondent to take independent legal advice before paying over the funds.

[54] I do not mean that to be in any way a criticism of the Applicant. She and her son had clearly formed a view as to what it was the Respondent had told them, and she says, she verified this view before the funds were paid out. However, I can only consider that the view formed was formed as a result of a misunderstanding, as any lawyer with a modicum of knowledge about relationship property and company law, would not have provided the advice that the Applicant suggests the Respondent did.

[55] There is a hint in the letter accompanying the application for review, that the Respondent may have been favouring Mr CY by providing the alleged advice to the Applicant. In support of this, it is noted by the Applicant that the Respondent continued to represent Mr CY while the Applicant was to take independent advice.

[56] However, there is no evidence that the Respondent was acting for Mr CY at the time the meeting took place, and he did so subsequently with the express agreement of the Applicant through her lawyer, Mr DC.

[57] In all of the circumstances, I have come to the view, that the Applicant and her son were mistaken in their understanding of what it was the Respondent was saying as to the Applicant's liability for the company indebtedness. This necessarily leads to the conclusion that there can be no finding of unsatisfactory conduct against the Respondent and the decision of the Standards Committee must stand.

Decision

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

DATED this 20th day of June 2011

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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:

CX as the Applicant
WZ as the Respondent
The Auckland Standards Committee 4
The New Zealand Law Society