LCRO 26/2013

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [City] Standards Committee [X]
BETWEEN	**HJ** Applicant
AND	**MN** Respondent

DECISION

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

Introduction

[1] Mr HJ has applied for a review of a decision dated 14 December 2012 by the Wellington Standards Committee 1, in which the Committee concluded that Mr MN had breached rule 3.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) by failing to provide Mr HJ with client information in writing on the principal aspects of the service he would provide, in advance. His failure in that regard had given rise to confusion for Mr HJ. The Committee otherwise concluded that Mr MN had generally complied with his professional obligations. The Committee ordered Mr MN to pay $500 costs and expenses to the New Zealand Law Society (NZLS), and censured him for the breach of rule 3.4.

Background

[2] Mr HJ was director and shareholder in a [GG] franchise, which operated through his company [PR Limited (PRL)]. In November 2010 he secured a potential purchaser for the business, and instructed Mr MN. Mr MN gave advice about the sale, and the distribution of the sale proceeds, including payments that would have to be made to various creditors, recognising that Mr HJ may be ultimately liable with respect to any shortfall.

[3] Shortly after Mr MN was instructed, IRD served a statutory notice on him requiring him to deduct a substantial amount from any proceeds of sale he received in his trust account on the sale of [PRL], and pay that money to IRD. The amount IRD required considerably exceeded the proceeds of sale under the proposed agreement. Mr MN also ascertained the existence of an undischarged general security agreement (GSA) held by a bank that could be discharged in the course of the sale process.

[4] Mr MN then offered Mr HJ three options to consider, given the company's difficult financial situation, and his position as director and shareholder. The option that caused Mr HJ some consternation included a suggestion that he might exclude IRD from the sale process by enabling the proposed purchaser to deal direct with other parties, on whose cooperation the agreement was contingent.

[5] Before any agreement was finalised, but after Mr HJ had carried out a stock take, he handed the keys to the business premises over to a representative of the franchisor, Mr OQ. He says that Mr OQ then gave them to the proposed purchaser,[1] so that he could continue to operate the business seamlessly, pending completion of the agreement. That situation caused problems later when the sale and purchase agreement was not concluded, and the HJs as shareholders, appointed Mr SE as liquidator in early December 2010.[2]

[6] Mr HJ appears to have been very open with Mr SE, and Mr SE in turn objected to advice Mr MN had provided in relation the company's obligations to IRD and his refusal to disgorge his file or the deed of release of the GSA.

[7] Mr HJ sent a letter generally outlining his interactions with Mr MN, and querying his conduct and the advice he had provided.[3]

Standards Committee

[8] The Standards Committee distilled 10 areas of complaint from the materials Mr HJ provided, all of which relate to dichotomies between Mr HJ's legal rights and obligations personally, and as a company director. Mr HJ also questioned whether it was proper for Mr MN to have arranged with the bank to release a GSA, without his instructions.

[9] Mr HJ said when he had first approached Mr MN, his objective had been "to minimise the tax consequences of actions". Mr MN says he did not tell him that.

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[1] Evidence of HJ at the review hearing.
[2] Companies Office Register, [PRL] [(Company No.) In Liquidation].
[3] Letter HJ to NZLS (21 December 2010).

[10] Mr HJ was also concerned that the advice Mr MN had given him had exposed him to increased risk, and he holds Mr MN responsible for the consequences when those risks materialised. He also says that Mr MN did not give him any terms of engagement or explain his rights as a director and shareholder in [PRL].

[11] Mr MN accepted that he did not provide terms of engagement, and said that his instructions were limited to acting on the sale.

[12] The Committee appointed an investigator, who provided a report on the insolvency-related aspects of the matter, and provided that to the parties. The Committee then convened a hearing, after receiving the parties' comments and submissions on it, as well as comments from Mr SE which were broadly critical of the investigator's report.

[13] The Committee considered whether the investigator having been a partner in a firm which had acted for the franchisor, had a conflict of interest in preparing the report, and decided he did not.

[14] As Mr MN did not claim to have provided client information in writing in accordance with rule 3.4,[4] the Committee recorded a finding of unsatisfactory conduct against him for that failure. It also noted:[5]

> Mr MN's failure to provide client care information, appeared to have the effect of creating an element of confusion in Mr HJ's mind as to whether Mr MN was acting for the company or Mr HJ personally. Mr MN's advice to Mr HJ, that he seek expert advice, was given on the basis that he acted for Mr HJ personally and not the company. In the Committee's view, had Mr HJ been put on notice about this, Mr MN's role would have been clear including the advice he could provide and Mr HJ could have then sought someone else to provide independent legal advice for the company.

[15] The decision records the Committee's consideration of the areas of concern it had highlighted, focusing on the legal advice Mr MN had provided, and the release of the GSA. It proceeded generally on the basis that Mr MN was acting for Mr HJ personally on the sale of the company's business, considered the investigator's report, and concluded that Mr MN had generally complied with his professional obligations. It fined him, and ordered him to pay costs.

[16] Mr HJ was dissatisfied with delays in the Committee's process, and perceived defects in the investigator's report, and applied for a review.

Review Application

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[4] Letter MN to NZLS (15 January 2011).
[5] Standards Committee determination (14 December 2012) at [25].

[17] Mr HJ's review application is not a challenge to the disciplinary outcome for Mr MN recorded in the Committee's decision. It is a criticism of the process, first, by the investigator in his enquiry which he says resulted in deficiencies in the report, and second, delays by the Committee in reaching its decision. He says his experience of the complaints process has diminished his trust in the legal profession overall.

Role of the LCRO

[18] The role of the Legal Complaints Review Officer (LCRO) on review is to reach her own view of the evidence before her. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting her own judgement for that of the Standards Committee, without good reason.

Scope of Review

[19] The LCRO has broad powers to conduct 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. The statutory power of review is much broader than an appeal, and gives the LCRO discretion as to the approach to be taken on any particular review and the extent of the investigations necessary to conduct that review.

Discussion

Standards Committee Process and Investigator's Enquiry and Report

[20] Mr HJ's review application raises concern over delays in the Committee process between him raising his complaint on 15 December 2010,[6] and the Committee determining it on 14 December 2012. The first point to make is that, if there had been a significant delay in the Standards Committee process, there is very little this Office could do about that.

[21] It is apparent that the majority of the delay related to the period when the investigator was engaged in his enquiry and report writing. He acknowledged that delay in his report dated 4 July 2012, which began with the words "I apologise for my delay in providing you with my report", and continued with an explanation that various professional commitments had distracted him from properly considering the matters raised and completing the report.

[6] Above n 3.

[22] Mr HJ's letter to NZLS related to issues that required careful consideration by an appropriately qualified person. The Committee appointed the investigator because he was "a senior practitioner and has extensive experience in insolvency matters".[7]

[23] While Mr SE, in his role as liquidator, takes issue with the investigator's report, it reads as carefully considered, comprehensive, and responsive to the points apparently raised by Mr HJ in his letter to NZLS recording the company's final weeks under his directorship, before Mr SE stepped in. It is important to remember that Mr SE has statutory obligations as liquidator, and that it is very likely that his opinions on the situation are coloured by those. He cannot be criticised for that.

[24] The report explains some of the professional and legal issues arising from Mr HJ's letter to NZLS. Whilst I accept, on the basis of Mr HJ's and Mr MN's evidence at the review hearing, that the report contains factual errors, the points raised are not adverse to Mr MN, and make no material difference to the Committee's determination. The investigator's report is simply the product of his enquiries. It has little or no evidential value of itself. It was not binding on the Committee, nor is it binding on this Office. It is, however, helpful in that it identifies some of the practicalities faced in administering insolvent companies in the approaches to liquidation, and the management of competing claims.

[25] The report can be characterised as an expert opinion. The investigator was under no obligation to make enquiries of, or to discuss his report, with Mr HJ. It was open to him to rely on the information provided to the Committee, and if he considered he needed further information, to request it. Plainly he did not.

[26] There is nothing to the concern raised about conflict of interest between the investigator and the franchisor.

[27] The Committee had the investigator's report, and Mr SE's general comments before it, along with copies of cases the investigator and Mr SE considered relevant.

[28] It was not the Committee's job, nor is it the role of this Office, to determine whether either of them was right.

[29] The Committee's role, and that of this Office, is to identify whether Mr HJ's letter to NZLS raised any disciplinary concerns. The fact that at least two different opinions are available simply confirms that the matter is not settled. It does not show that any disciplinary consequences should necessarily follow for Mr MN.

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[7] Letter NZLS to HJ (26 August 2011).

[30] I am mindful that the scope of review may be broad, and that I have discretion as to the approach to be taken on any particular review. Although Mr HJ does not raise any concerns about the substantive decision, I have reviewed the information available including the whole of Mr MN's file, and the investigator's report. I have also had the benefit of hearing from both parties at the review hearing on 3 March 2015.

[31] I have given some thought to whether Mr MN was in a position where he was acting for two clients, as he says he was,[8] where their interests may have come into conflict. Although Mr HJ was ultimately personally responsible for company debt, and was also responsible for directing the sale of the business, I cannot conclude on the facts before me that there was the risk of the conflict.

[32] Overall, I am unable to identify any disciplinary concerns not already addressed by the Committee. I can identify no reason to interfere with the decision, which is therefore confirmed.

Delay

[33] The concern Mr HJ has registered about delay in the Standards Committee process is communicated to NZLS through this decision, a copy of which is served on NZLS pursuant to s 213(1)(a) of the Act.

Outcome

[34] Pursuant to s 211(1)(a) the Committee's decision is confirmed, and there is no reason to depart from the orders the Committee has made requiring Mr MN to pay $500 of costs and expenses and be censured.

Costs

[35] An LCRO has a wide discretion to consider costs pursuant to s 210 of the Act, and the LCRO's Costs Orders Guidelines.

[36] Mr HJ was entitled to apply for a review, and did so. He has not conducted himself in a manner that would attract an order for costs against him.

[37] An adverse finding was made against Mr MN by the Committee with respect to his acknowledged failure to provide information in compliance with rule 3.4, and that finding has been confirmed on review.

[8] Evidence of MN at the review hearing.

[38] Mr MN acknowledged that early in the complaints process he had failed to provide information. He has done nothing to add to the costs of this review, and there is no other reason why he should be ordered to pay costs.

[39] In the circumstances, no costs orders are made on review.

Decision

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

DATED this 11th day of March 2015

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 HJ as the Applicant
Mr MN as the Respondent
[City] Standards Committee [X]
New Zealand Law Society