LCRO 292/2011

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 5
BETWEEN	**RK** Applicant
AND	**LP** Respondent

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

DECISION

Background

[1] RK (the Applicant) complained about the conduct of LP (the Practitioner). The transaction which gave rise to the complaint was the sale by the Applicant of a franchised business known as "[CBC]" to one DX. The franchisor refused to sign a release unless the Applicant forfeited any claim against the franchisor. The claim sought by the Applicant was a refund of certain purchase margins that she had paid to the franchisor, but which had not been provided for in the franchise agreement or the training manual she had signed.

[2] The Practitioner was the lawyer who acted for the franchisor company CBC.

[3] The Applicant was separately represented by CBD (RL).

[4] The essence of the complaint is that in acting for the franchisor the Practitioner took a position in respect of the payments that the franchisor had been charging (and the Applicant had been paying) which was incorrect as a matter of law and was also an

unreasonable position to take. The Applicant states that this caused her considerable stress and financial hardship.

[5] The particular question was whether certain "purchase margins" which had been paid by the franchisee to the franchisor in respect of sale goods ought to have been refunded, and whether it was appropriate to refuse to consent to the transfer of the business unless the claim to the repayment was relinquished. An important part of the complaint was the fact that the Practitioner (or rather his client the franchisor) would not complete the transfer of the franchise until a number of matters were attended to, the franchisor insisting that the dispute about the payment of the purchase margin had to be dealt with and concluded at the same time as the completion of the transaction. That deed of termination purported to "release and discharge" the franchisor from any obligations in respect of the purchase margins (or any other matter under the franchise agreement).

[6] The Applicant's view was that it was inappropriate for these two matters to be linked together. She considered the purchase margin issue to be quite separate, and one which ought not to have been linked to the settlement of the transfer of the franchise.

[7] The Applicant states that she "had no choice" but to sign the termination deed, and that undue pressure was brought to bear upon her in signing a deed of termination of the franchise (she suggests "blackmail") so that the business could be transferred to the incoming franchisee.

[8] Since the time of the complaint the matter has been before the Disputes Tribunal who found in favour of the Applicant. In the decision of the Disputes Tribunal the referee made a finding of duress. It is important to note that while it is appropriate to take the decision of the Disputes Tribunal into account in this matter, it is by no means determinative. In particular the Disputes Tribunal decided the legal issue of whether the deed of termination was vitiated by a lack of free consent by the Applicant due to duress. The Standards Committee and this Office must determine whether the Practitioner's conduct fell short of appropriate professional standards. That issue was not before the Disputes Tribunal.

[9] It is also important to recognise that the Disputes Tribunal decision was not before the Standards Committee when it made its decision. Through his counsel the Practitioner argues that the decision of the Disputes Tribunal is wrong in law.

[10] The essence of the response made on behalf of the Practitioner is that there was no improper conduct on his part. The following matters are raised in support of that position:

a. This is a commercial matter;

b. The Practitioner was entitled to take a position on behalf of his client;

c. The Practitioner was at all times acting on the instructions of his client;

d. The Practitioner does not owe any duty of care to the Applicant;

e. The franchise agreement required the franchisee to grant a general release on the transfer of the business (in clause 18.11);

f. The Applicant was separately advised;

g. There was no undue pressure to sign the termination deed and it was ultimately a commercial decision for the Applicant; and

h. The issues ought to properly have been raised in a different forum such as arbitration under the franchise agreement.

[11] A further objection raised on behalf of the Practitioner was that the entity which sold the franchised business was in fact a company (M & C Ltd) and not the Applicant. It was asserted that the Applicant did not have standing to make the complaint.

[12] This objection is not sustainable. Section 132(1) of the Lawyers and Conveyancers Act provides that "any person may complain to the appropriate complaints service about the conduct of a practitioner or former practitioner". Accordingly standing is not a relevant issue in the context of making a complaint under the Act. Section 138 of the Act provides some protection against intermeddling complainants in that a Standards Committee may decide to take no further action on a complaint where "the complainant does not have sufficient personal interest in the subject matter of the complaint". That is not the case here.

Issue

[13] It is clear from the material presented by both parties to this complaint that the Practitioner had stated in correspondence that the transfer of the business would not occur unless the franchisee relinquished the claim to a refund of the purchase margin

payments (examples appear in para 14 of the letter dated 11 June 2010 from the Practitioner to the Applicant's lawyer). There are ample other examples in the same vein. The tone of the letters is professional; however the position is quite clear: the franchisor will not agree to the transfer of the business unless and until the claim to the purchase margins was given up.

[14] The matter to be determined in an important one. The question is to what extent is it appropriate for a lawyer to assist a client in promoting the interests of that client to the detriment of a third party. In particular, can a lawyer ever assist a client in engaging in conduct which amounts to a legal wrong against that third party?

Conclusion and Reasons

[15] I conclude that there are circumstances in which a lawyer may assist a client in engaging in conduct which transpires to amount to a legal wrong against a third party. I do not have to determine in this case whether the Disputes Tribunal was correct finding the conduct of the franchisor (through the Practitioner) to amount to duress. However even if it did amount to duress I do not consider that the conduct of the Practitioner fell short of the applicable professional standards.

[16] The starting place of analysis must be the duty of a lawyer to his or her client. This obligation is set out in rule 6 of the Rules of Conduct and Client Care (the Rules) which provides

> In acting for a client, a lawyer must, within the bounds of the law and these rules, protect and promote the interests of the client to the exclusion of the interests of third parties.

[17] That duty is at the heart of the lawyer-client relationship. The lawyer is an agent for the client in conducting the client's affairs. The lawyer is obliged to follow the instructions of the client where it is consistent with their professional duties. The lawyer has a duty of absolute loyalty to the client and may not have regard for the interests of third parties except insofar as they are consistent with his or her instructions and relevant to the protection and promotion of the interests of his or her own client.

[18] There are of course some limits on the ability of a lawyer to harm the interests of others and it will not be an absolute defence to claim that the lawyer was following the client's instructions. Thus for example rule 2.4 provides that

> A lawyer must not advise a client to engage in conduct that the lawyer knows to be fraudulent or criminal, nor assist any person in an activity that the lawyer knows is fraudulent or criminal…

[19] In the present case there is no suggestion that the conduct of the franchisor was criminal. Although the Applicant claimed she had been "blackmailed" into signing the deed of termination which contained the release, this term appeared to have been used in a general sense. In any event the conduct of the franchisor did not approach the criminal standard for blackmail under s 237 of the Crimes Act, nor was the element of a threatened disclosure, damage, or harm required by that section present.

[20] The line between those actions that a lawyer may assist in and those where a lawyer may not assist, has been drawn by rule 2.4 at "fraud or crime". There will be cases where a client wishes to act in breach of civil law obligations in a way that does not amount to a crime (such as breaching a contract). While this is a civil wrong, it is not set apart as criminal and the remedies for such a breach are through a private action in the civil courts. A lawyer can properly give advice to a client which assists a client in breaching such civil (but not criminal) obligations. In the present case this appears to have been the effect of the advice given by the Practitioner (presuming that the finding of the Disputes Tribunal was correct).

[21] To require a lawyer to assist a client only where the conduct of the client was not in breach of any legal obligations (including civil law obligations) would be unworkable. In many cases there will be a tenable argument that a course of conduct is legally sustainable even though at a later date a court or other tribunal concludes that this is not the case. Indeed even under rule 2.4 a lawyer who assists in a course of conduct which is criminal is in breach of the rule only if he/she knows of the criminality or fraudulent nature of the conduct.

[22] The Practitioner argues that at all times he advised his client as to what he considered his client's rights were under the franchise agreement. Exactly what that advice was is privileged and therefore not known. It would be perfectly reasonable for the Practitioner to have advised that the position taken by the franchisor was legally weak and that it was possible that they would be unsuccessful if the Applicant were to pursue the matter.

[23] In the present case there is no evidence that the Practitioner knew the course of conduct to be in breach of a legal obligation. However, even if that were the case it was open to the Practitioner to advise his client that the proposed course of conduct

was (or very likely to be) in breach of a contractual obligation. If the client instructed the Practitioner to pursue that course of conduct then, providing it was not criminal or fraudulent, it was open to the Practitioner to assist in that course of conduct.

[24] However, the present case lies close to the border if the Disputes Tribunal is correct in its finding of duress. Duress involves the coercion of one party's will to the other through the bringing to bear of pressure which is in all of the circumstances illegitimate (*Moyes & Groves Ltd v Radiation New Zealand Ltd* [1982] 1 NZLR 368). It is closely related to the doctrines of unconscionability and undue influence (*Walmsley v Christchurch City Council* [1990] 1 NZLR 199). The former was historically referred to as a species of "equitable fraud" (*Moffat v Moffat* [1984] 1 NZLR 600).

[25] The gravamen of those contractual doctrines is the existence of wrongdoing which is illegitimate, undue, unconscionable or inequitable. Clearly a breach of contract based on those doctrines rests on an element of moral wrongdoing. In some cases a lawyer who knowingly assists in such a course of action will be in breach of rule 2.4 because not only is the conduct in breach of the civil law but it also amounts to conduct which is "fraudulent or criminal".

[26] In the present case the conduct does not fall foul of that rule. Not only is there no evidence that the Practitioner knew that the conduct was in breach of the franchise agreement (although on a balance of probabilities he may well have known that this was a possibility) but the conduct of requiring a release prior to transferring the business was not fraudulent or criminal.

[27] To adopt an alternative position would require a lawyer to refuse to assist a client in engaging in conduct which is later determined to be in breach of a contractual obligation. Not only is this inconsistent with the recognition that a breach of civil law obligations is distinct from criminal wrongdoing, but it would also place an impossible burden on a lawyer to know in advance whether a proposed course of conduct was in breach of a legal obligation or not.

[28] The Practitioner's client was entitled to take an adversarial approach. I do not overlook that the Applicant had her own legal representation, and would presumably have received legal advice about the position taken by the practitioner's client, and options open to her. In this case the Applicant pursued the matter in the Disputes Tribunal as she was entitled to do.

[29] Mention should also be made of some of the other rules of conduct which may appear to be of relevance in the present case. Rule 2.3 provides

> A lawyer must use legal processes only for proper purposes. A lawyer must not use, or knowingly assist in using, the law or legal processes for the purpose of causing unnecessary embarrassment, distress, or inconvenience to another person's reputation, interests, or occupation.

[30] In the present case there is no suggestion that the Practitioner acted for some collateral or ulterior purpose. Rather his actions were aimed at securing rights that the client claimed to be entitled to. While this may have caused distress or inconvenience to the Applicant, this was not due to there being any underlying improper purpose. Materially, it is unlikely that it could be said that the Practitioner used "the law or legal processes". He simply took a negotiating position on behalf of his client which was objectionable to the Applicant.

[31] Mention should also be made of rule 11.1 which provides that "a lawyer must not engage in conduct that is misleading or deceptive or likely to mislead or deceive anyone on any aspect of the lawyer's practice". Those words reflect the formulation found in the Fair Trading Act 1986. The purpose of that rule is to ensure that the lawyer, in operating his or her business, does not mislead clients or prospective clients as to the nature of his or her business. It does not have direct relevance here. Further, it cannot be said that the conduct of the Practitioner was in any way misleading or deceptive given the essentially adversarial framework within which those negotiations were being conducted.

[32] While it would be inappropriate for the Practitioner to have lied to the Applicant or otherwise actively misled her (and in such a case the tort of deceit may well have been committed), that did not occur here. Rather the Practitioner took an aggressive stance on behalf of his client which the Disputes Tribunal later found to be inconsistent with the legal rights of the parties as set out in the franchising arrangements. That conduct does not amount to a professional breach.

[33] It was therefore permissible for the Practitioner to advise his client to seek to improve or clarify their position by requiring the Applicant (or her company) to execute the deed of release. That conduct was not criminal or fraudulent. While it was a very hard line to adopt (and the course adopted by the client was determined to amount to duress and therefore in breach of law by the Disputes Tribunal) such conduct was not in breach of the professional obligations of the Practitioner.

Decision

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

DATED this 1st day of October 2012

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Hanneke Bouchier
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:

RK as the Applicant
LP as the Respondent
LO as Representative for the Respondent
The Auckland Standards Committee 5
The New Zealand Law Society