LCRO 328/2012

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

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

DECISION

Introduction

[1] Mr FE has applied for a review of a decision dated 19 November 2012 by [North Island] Standards Committee [X] determining his complaint about Mr MB's conduct. The Committee determined parts of the complaint on the basis that it lacked jurisdiction to consider them, and decided that further action on the part of the complaint it had jurisdiction over was unnecessary or inappropriate pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act).

Background

[2] In April 2008, with two business colleagues, Mr FE attended Mr MB's offices and signed a waiver of independent advice, and a personal guarantee, securing borrowing by a company that Mr FE had formed, originally as sole director and shareholder. He had resigned as a director by the time he signed the personal guarantee, but remained a shareholder. The waiver had been provided by the lender with the loan agreement, personal guarantee and associated documents dated 29 April 2008.

[3] In large part, Mr FE attributes his situation to his colleague, and the instructions he says the colleague gave. He says those instructions led to him being presented with the personal guarantee and waiver to sign, despite the lender having raised concerns about him having already resigned as a director. At that stage he was the only shareholder in the company.

[4] Mr FE says that at the time he signed the guarantee, he was depressed, and vulnerable. He says his personal interests were inconsistent with those of the company, the lender, and his business colleagues, who were only in the venture to further their own ends at his expense.

[5] Mr FE says when he signed the personal guarantee and waiver, Mr MB was acting for him, both of his business colleagues, and the company. He says that he was coerced into signing the waiver and personal guarantee by his business partner, and Mr MB did not ensure he had a proper opportunity to seek legal advice. He says Mr MB should not have allowed him to waive his right to take independent legal advice before he signed the personal guarantee. He says Mr MB was negligent, and that the waiver is void because his consent was not freely given.

[6] He also says that when he later requested a copy of Mr MB's files relating to him and the company, Mr MB wrongfully refused to release information, and that when he did release information it was incomplete.

[7] The lender later relied on Mr FE's guarantee, and then released him from it on payment of part of the loan amount. Mr FE believes Mr MB should acknowledge his professional failing, be penalised for it, and reimburse him for the losses he suffered.

[8] Mr MB says he was acting for the company in connection with the loan, and acted for the lender "in the limited capacity of arranging proper execution of the Loan documents".[1] He says he met with the three individuals involved at that time including Mr FE, but did not act for any of them then, or after, in their personal capacities. He did, however, later draft company-related documents on instructions from one or more of them.[2]

[9] Mr MB says he had no reason to believe Mr FE was vulnerable, coerced, or otherwise unable to properly consent when he signed the waiver and personal guarantee. He says that he explained the effect of the documents to Mr FE, despite him having signed the waiver, and that he believed Mr FE understood the nature and implications of the documents when he signed them.

---

[1] Letter HH & MB to [law firm] (13 July 2011).
[2] Emails MB to FE (3 July 2008), MB to UA (4 July 2008) TV to MB (14 July 2008).

[10] With respect to Mr FE's requests for files, Mr MB says that at the relevant time Mr FE was not a director or shareholder of the company, and was not entitled to the documents he had requested. Nonetheless, he says when he did provide documents, and omitted some, the omission was accidental, and when he became aware of it, he searched for and located relevant materials and provided those to Mr FE.

[11] Mr FE, however, was not satisfied, and laid a complaint to the New Zealand Law Society (NZLS) alleging that Mr MB had not properly complied with his professional obligations.

Standards Committee

[12] The Standards Committee considered the correspondence received from the parties, recorded the background and considered that three issues arose from Mr FE's complaint, namely whether he had:

(a) acted in a conflict of interest situation;

(b) been negligent; and

(c) failed to provide full and complete records.

[13] The Committee found that the first two issues arose from conduct that occurred before 1 August 2008, and the third arose after that date.

Conflict of Interest

[14] The Committee considered the first two allegations under the provisions of the Law Practitioners Act 1982 (LPA) and Rules of Professional Conduct for Barristers and Solicitors (ROPC) which regulated lawyers' conduct before 1 August 2008, when the Act commenced. The Committee referred to the jurisdictional hurdle imposed by s 35(1) of the Act which says:

> (1) If a lawyer… is alleged to have been guilty, before the commencement of this section, of conduct in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982, a complaint about that conduct may be made, after the commencement of this section, to the complaints service established under section 121(1) by the New Zealand Law Society.

[15] The Committee referred to rule 1.04 of the ROPC, which said: "A practitioner shall not act for more than one party in the same transaction or matter without the prior informed consent of both or all parties".

[16] It noted Mr FE's complaint, and Mr MB's evidence. The Committee accepted Mr MB's evidence that he was not acting for Mr FE, and was therefore not in a position where he was acting for more than one party in the same transaction or matter.[3]

[17] On that basis, the Committee's view was that the conduct Mr FE alleged was not conduct that would[4] have resulted in proceedings of a disciplinary nature under the LPA, and declined jurisdiction to consider the conflict of interest complaint pursuant to s 351 of the Act.

Negligence

[18] The Committee considered the allegation that Mr MB had been negligent in circumstances where he knew that Mr FE had resigned as a director of the company, knew, or ought to have known, that Mr FE was vulnerable, was suffering diminished capacity, and was being forced by his business colleague into signing the personal guarantee and waiver.

[19] The Committee noted Mr MB's evidence that he took instructions from Mr FE (as a director of the company), that he "appeared confident, astute and entrepreneurial", and that, if he was suffering from depression or under undue influence, it was not obvious. He also mentioned that he had corresponded with Mr FE by phone and email, and met with him alone, as well as in the presence of his colleagues.[5]

[20] The Committee again considered the conduct in the context of s 351, and whether proceedings of a disciplinary nature could have been commenced under the LPA. Referring to s 112(1)(c) of the LPA, the Committee said that allegations of negligence would only result in disciplinary proceedings being commenced if the alleged negligence were of such a degree or so frequent as to impact on a practitioner's fitness to practice, or would tend to bring the profession into disrepute.[6]

[21] Again, the Committee's view was that the conduct alleged did not reach the threshold in s 351, and declined jurisdiction.

Provision of records

[22] Mr FE alleges that Mr MB deliberately did not disclose emails that proved he was acting for Mr FE personally as well as the company.

---

[3] Although he acknowledges he was acting for the lender and the company.
[4] The Committee's use of the word "would" is incorrect. Section 351 says "could".
[5] Mr MB did not say whether he had any discussions or correspondence with Mr FE alone before he signed the personal guarantee and waiver.
[6] Law Practitioners Act 1982, s 112(1)(c).

[23] Mr MB acknowledged that some information was inadvertently omitted from the file he provided to Mr FE, but says he promptly provided that when he understood what documents Mr FE required.

[24] Mr MB also referred to documents he had not provided to Mr FE, saying that at the time of the request, Mr FE was no longer a shareholder or director of the company, and was therefore not entitled to the documents, which had come into existence after he had resigned as a director, and transferred his shares.

[25] The Committee accepted Mr MB's explanation, and recorded its view as follows:[7]

> Although the Committee does not condone the failure to provide that email correspondence in the first instance, the Committee does not consider that the failure to place those emails on the file within time reaches the threshold to be considered unsatisfactory conduct. The Committee also notes Mr MB's response that other documentation had not been provided as Mr FE was not a shareholder or director at the time of that correspondence.

[26] The Committee did not consider that the allegations warranted any further action, and decided to take no further action pursuant to s 138(2) of the Act.

[27] Mr FE was dissatisfied with those outcomes and applied for a review on 17 December 2012.

Application for review

[28] Mr FE's review application is based on his concerns that the Committee did not properly consider the evidence provided, and that for various reasons, the decision contains errors and is flawed.

[29] Mr FE wants to recover the costs he incurred in extricating himself from the guarantee, including legal costs, the costs of having to leave the country to escape his situation, and compensation for the mental anguish he says he suffered.

Role of LCRO on Review

[30] 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.

[7] Standards Committee determination (19 November 2012) at [26].

Scope of Review

[31] 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.

Review Hearing

[32] Mr FE and his lawyer attended a review hearing in [city] on 19 January 2015. Mr MB was not required to attend, and the hearing proceeded in his absence.

Review Issue

[33] Although there is no adverse disciplinary outcome for Mr MB, the Committee's decision is amended on review, for the reasons discussed in greater detail below. In essence, the Committee did not apply the correct test to conduct that occurred before 1 August 2008, resulting in it rejecting jurisdiction over the conflict of interest. Having heard from Mr FE in person at the review hearing, I have taken a different view of the evidence that was available to the Committee, but have reached the same conclusion as the Committee, namely that there is no jurisdiction to consider the conflict of interest aspect of the complaint.

[34] Having carefully considered all of the information available on review, I have identified no reason to interfere with the Committee's discretion, or its decision in respect of the allegations of negligence and failure to produce information. The process of review is not a suitable alternative to a court proceeding or for a party seeking documents that may be discoverable in a court proceeding. The findings in respect of those aspects of the decision were open to the Committee, are confirmed on review, and will receive no further attention in this decision.

[35] This decision focuses on the issue of conflict of interest.

Discussion

Conflict of Interest – who was Mr MB acting for?

[36] The first point to make about Mr MB's response to Mr FE's complaint is that he accepts he gave Mr FE legal advice in respect of the guarantee. It is therefore difficult for him to sustain argument that he did not act for Mr FE. Although he could provide legal advice, he could not purport to provide it independently, which is why it was necessary for him to obtain a waiver, thereby modifying his obligations to his clients.

[37] The Committee did not overtly acknowledge evidence that Mr MB was acting for Mr FE, although it correctly identified rule 1.04 of the ROPC as the relevant rule that regulated Mr MB's conduct when he was acting for more than one party in the same transaction. Rule 1.04 requires the prior informed consent of both or all of the parties, before the lawyer can act. Mr MB already had the consent of the lender to act, and for the purposes of this decision, I assume that the company consented through its director. The only contentious aspect of the waiver related to Mr FE's personal right to seek independent legal advice in respect of the personal guarantee.

[38] For a waiver to be effective, it is necessary for the lawyer to obtain all clients prior informed consent. This is because there is a "presumption that the client is vulnerable to advantage taking by the solicitor",[8] and that:

> …what is needed to ensure genuine and informed consent may differ from client to client. A sophisticated client who has had repeated dealings with a solicitor may need little information to know and understand the nature of the conflict of interest and the likely impact of the conflict. On the other hand, a client of limited intellectual capabilities or who is a recent immigrant and wholly unfamiliar with the language and legal system may be at such a disability as to be effectively unable to consent.
>
> The law has long recognised that a person of full capacity may relinquish the benefits of fiduciary obligations owed to him or her:[9]
>
> > the person entitled to the benefit of the rule may relax it, provided he is of full age and sui juris and fully understands not only what he is doing but also what his legal rights are, and that he is in part surrendering them.

[39] Dr Webb describes the need to ensure client consent is real, and the process of obtaining it is a careful one, which includes the obligation on a lawyer to:[10]

> …be alert to the possibility that some improper pressure has been brought to bear on one client to consent to the conflict of duty existing. It is incumbent on the lawyer to take all reasonable steps to ensure any consent is given free of compromising influences. One easy and inexpensive step is to advise each party in the absence of the other to ensure that if there are any awkward questions or indications of improper pressure these are more likely to come to the surface. It has been noted that **in some cases** where a solicitor is acting for more than one party the involvement of a solicitor has too often been a formality or merely served to reinforce [one party's] wishes and undermine any scope for the [other party] to exercise any independent judgement whether to comply.[11] It is clear that **in any such case** the solicitor must not only ensure that both parties expressly wish the lawyer to act and advise in the matter, but to ensure this consent is effected alone and in a situation isolated from the other party and any influence the other party may have.
>
> (Emphases added)

---

[8] *Taylor v Schofield Peterson* [1999] 3 NZLR 434, referred to by the author in *Ethics, Professional Responsibility and the Lawyer* (2nd ed, LexisNexis, Wellington, 2006) at 242.
[9] *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606, 636 per Upjohn LJ, referred to by the author in *Ethics, Professional Responsibility and the Lawyer* (2nd ed, LexisNexis, Wellington, 2006) at 242.
[10] Duncan Webb *Ethics, Professional Responsibility and the Lawyer* (2nd ed, LexisNexis, Wellington, 2006) at 243.
[11] *Royal Bank of Scotland v Etridge (No2)* [2001] [2001] All ER 449 at 487 per Lord Hobhouse.

[40] The emphases added to the text above highlight the fact that the obligations concerned are not absolute in every case, but require the lawyer to consider what advice is appropriate each time a client signs a waiver.

[41] Dr Webb also makes reference to comments by the Privy Council in *Clark Boyce v Mouat,*[12] and that:[13]

> Any consent to a lawyer continuing to act in the face of a conflict of interest must be given freely and the client must be made fully aware of the consequences of such consent. It must be more than a mere giving of an opportunity to seek independent advice. It will be necessary to positively advise the parties to seek independent advice. The person giving the consent must be of full capacity and capable of understanding the problems of a conflict of interest...

[42] Mr FE's evidence includes assertions that he was depressed, anxious, in thrall to his colleague, so terrified that his capacity to think was compromised, a recent immigrant with no immediate family support, unfamiliar with New Zealand culture and legal system, relatively unsophisticated, and had not had repeated dealings with Mr MB or any other lawyer.

[43] He says that Mr MB was not alert to the possibility that some improper pressure was being brought to bear on him to consent to signing the personal guarantee and waiver. He says that Mr MB failed to take all reasonable steps to ensure that his consent was given free of compromising influences by advising him in the absence of his colleagues, thereby depriving him of the opportunity to ask awkward questions or indicate improper pressure. Mr FE is also critical of Mr MB for single-mindedly pursuing his signature on the personal guarantee without exploring whether the lender might have been willing to rely only on the other guarantee that had been provided by the director. He says that without his personal guarantee the loan may still have been available.

[44] He likens Mr MB's involvement to a formality arranged by his colleague, for his colleague's convenience, to serve his ends. He says that Mr MB undermined any scope for him to exercise independent judgement whether to sign the documents.

[45] Mr FE says that he did not make it clear to Mr MB that he expressly wanted him to act and advise on the matter, and took no steps to ensure this consent was effected alone and in a situation isolated from his colleagues, and any influence they may have had over him. He does not believe that Mr MB gave any consideration to what advice may have been appropriate when he signed the waiver, but was more focused on getting the documents signed, and satisfying the lender's requirements.

---

[12] *Clark Boyce v Mouat* [1993] 3 NZLR 641.
[13] Above n 10 at 244.

[46] Mr MB's position is that he had no cause to believe there was anything sinister or suspicious that suggested Mr FE was in a difficult position in relation to his colleagues. His evidence indicates that he took Mr FE at face value. As mentioned above, he says he explained the effect of the documents to Mr FE, despite him having signed the waiver, and says he believed Mr FE understood the nature and implications of the documents when he signed them.

[47] Mr FE's main concern is not that he did not understand what he was committing to or relinquishing, but that, at a time when he was vulnerable and frightened, Mr MB did too little to protect him from being coerced by his business colleague into signing the personal guarantee and waiving his right to independent legal advice before he did so.

[48] Although the coercion aspect of the complaint was before the Committee, the decision does not record the Committee having turned its mind to that aspect of informed consent before deciding that the alleged conduct did not constitute conduct that "would" [sic] have resulted in proceedings of a disciplinary nature under the LPA, and finding it had no jurisdiction to consider the issue pursuant to s 351 of the Act.

[49] On review, counsel for Mr FE says that it was incumbent on Mr MB to take all reasonable steps to ensure his consent was given free of compromising influences. Echoing the concerns expressed by the Privy Council in *Royal Bank of Scotland v Etridge*, he says the simple step of advising him in the absence of his business colleagues would have met that concern.

[50] From Mr MB's perspective, the waiver was a way of limiting his professional obligations to Mr FE. From the lender's perspective, the waiver was necessary to support the personal guarantee that helped to secure the company's borrowings under the loan agreement. The risk to a lender is that a personal guarantee can be avoided for the lack of informed consent, which comes with proper legal advice.

[51] There is no reason to believe there was any conflict between the interests of the lender, the company, or its sole shareholder, who, at the time, was Mr FE. It was in all their interests to transact the loan. If Mr FE had not been a director or shareholder, it could have been said that the loan was patently not in his interests, and was beneficial only to the lender and the company (including any director or shareholder). It was for Mr FE then to decide whether or not he was prepared to personally accept the company's risk, and any risk to the present or future value of his shareholding, by signing the personal guarantee.

[52] Mr FE says he was responsible for making a number of changes to the company's records held on the Companies Office Register. Apparently as a consequence of his

actions, the Companies Office Register records a number of changes to the directors and shareholders between 18 February 2008 and 7 July 2008 that were recorded as having been effected by "FE". In particular the Register records that Mr FE was a director and shareholder of the company until 17 April 2008. He then resigned as a director but remained a shareholder until 25 June 2008.

[53] The personal guarantee is undated, but it refers to the Notice to Guarantor and loan agreement, both of which are dated 29 April 2008. In the materials lodged in support of his complaint Mr FE is somewhat vague about the date on which he signed the personal guarantee and waiver, but indicates that probably occurred in early May 2008. It follows that, as Mr FE was still registered as the sole shareholder in the company until 25 June 2008, it cannot be said that the loan was patently not in his interests when he signed them.

[54] In the circumstances it was reasonable for Mr MB to draw the inference that, as a shareholder in the company, Mr FE personally would want the company to succeed. As the company's success was contingent on it drawing down the loan, there is also nothing improper in Mr MB transacting the loan on the basis that Mr FE understood that he was personally both underwriting the company's risk, and standing to benefit from the company's success.

[55] Although he had resigned as a director, Mr MB's uncontested evidence is that as a shareholder, Mr FE had the power to remove and appoint directors. The position at the time appears to have been that the only way the company could progress its business interests, and potentially return a dividend to him as its sole shareholder, was by securing the loan funding. As Mr FE says, both Mr MB and Mr QS explained to him what would happen to the company's business if it did not obtain the loan funding.

[56] Mr MB's evidence[14] is that as Mr FE was the sole shareholder of the company at the time, it "did not seem odd that he should sign a guarantee of the Loan", and that as far as he was aware, the parties had not invested any money into the company.[15] Mr MB describes Mr FE as the "primary beneficiary of the loan".[16]

[57] Mr MB says that he explained the guarantee to Mr FE, that he did not appear to be suffering from diminished capacity, and that he believed Mr FE accepted at the time that he understood the nature and implications of the guarantee. Mr MB says that Mr FE says he understood that he was "…keen to avoid providing a personal guarantee. That in itself did not seem unusual. It is prudent to avoid guarantees…".

[14] Letter HH & MB to NZLS (26 April 2012).
[15] Letter HH & MB to [law firm] (13 July 2011).
[16] Letter HH & MB to [law firm] (26 October 2011).

[58] The point of the guarantee was to secure the loan. Although Mr FE and his counsel described the guarantee as a "director's guarantee", it is likely the lender would have had no reason to care whether the guarantee was given by a director, shareholder, or someone with no interest in the company at all, so long as they could provide security to back up the guarantee. Mr MB says he was unaware of any undue influence on Mr FE and despite protests to the contrary, is "unconvinced that such pressure existed",[17] at the time the guarantee was signed.

[59] Mr FE says that although he did not, and could not tell Mr MB he was being coerced, he relies on a difference between him and his colleague in age, physical stature, culture and life experience. Without more, the circumstances Mr FE describes were not sufficient to trigger Mr MB's concern that he may be vulnerable, particularly when the transaction concerned should have benefited Mr FE personally through his sole shareholding.

[60] Mr FE also relies on his mental state at the time. The evidence Mr FE has provided indicates that he was not in any diagnosed mental state at the time, nor was he under treatment. No contemporaneous record of Mr FE's mental state in April 2008 was provided to the Committee, or on review. Mr FE relies on a report he obtained in December 2012 in which a doctor expresses the opinion that he "would likely have been still very symptomatic of depression and anxiety in the period of November 2007 to April 2008".[18]

[61] The medical evidence has not been challenged by other expert evidence provided to the Committee, or on review, by Mr MB. However, the medical opinion Mr FE has provided is dated 2012, some four years after the events at issue. The doctor who wrote the report, and provided the opinion, did not see Mr FE at the time, but relied on his colleague's notes of her earlier dealings with Mr FE. Its weight is diminished by those features.

[62] At the review hearing Mr FE confirmed that he did not tell Mr MB he was having difficulties, had recently ceased having counselling, or provide him with any medical evidence supporting his diagnosis. There is no other evidence that supports a finding that Mr MB was given any other overt indication that Mr FE may have been unusually vulnerable.

[63] I do not consider the medical evidence is sufficiently reliable to support a finding that Mr MB knew or ought to have known anything about Mr FE's medical background in 2008 simply on the basis that the doctor thinks it likely he was "very symptomatic" at the time. Mr MB is a lawyer, not a doctor. He can be expected to be observant and alert to

[17] Letter HH & MB to [law firm] (9 February 2012).

the possibility of improper pressure but on the basis of all the evidence Mr FE has provided, he cannot be subject to a professional obligation to have identified symptoms of depression or anxiety that may or may not have been present at the time.

[64] It is also relevant that Mr FE's evidence at the review hearing was that both Mr MB and his father attended on him at the time he signed the personal guarantee and waiver. He says both lawyers alerted him to his right to obtain legal advice before he signed either document. He emphasised the advice Mr QS had given to him as to the consequences of him not signing, including that if he did not sign, the company would not get the money needed to do business. I consider it unlikely that both lawyers would have failed to detect obvious signs of anxiety in Mr FE.

[65] Although Mr FE says he was coerced by his colleague, it is unrealistic in all the circumstances at the time for him to say that Mr MB was under a professional obligation to protect him from accepting the legal obligations imposed on him by the guarantee by ensuring he had a proper opportunity to refuse to sign the waiver.

[66] Ideally, Mr FE could have been separated from his colleagues before he signed the guarantee and waiver. However, on the evidence provided, including the prospective benefit offsetting the risk of the personal guarantee to Mr FE, I do not consider that a failure to separate him from his colleagues constituted a professional failing under the LPA and ROPC that could have led to disciplinary proceedings being commenced.

[67] The decision that the Committee lacked jurisdiction to consider that aspect of Mr FE's complaint is therefore confirmed.

Outcome

[68] All three aspects of the Committee's decision are confirmed on review.

Costs

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

[70] Mr FE 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.

[71] No adverse finding was made against Mr MB either by the Committee, or on review. There is no other reason why he should be ordered to contribute to the costs of this review.

---

[18] Letter Dr DI to LCRO (4 December 2012).

[72] No orders for costs are made on review.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the decision of the [North Island] Standards Committee [X] is confirmed, but modified as set out in this decision.

DATED this 23rd day of February 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 FE as the Applicant
Mr RR as the representative for the Applicant
Mr MB as the Respondent
Mr QS as a related person as per s 213
[North Island] Standards Committee [X]
New Zealand Law Society