

LCRO 45 & 46/2014

CONCERNING

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of the [Area] Standards Committee [X]

BETWEEN

PO

Applicant

AND

RQ

Respondent (045/2014)

AND

FE

Respondent (046/2014)

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

DECISION

Introduction

[1] Mr PO has applied to review decisions by the [Area] Standards Committee [X] dated 29 January 2014 to take no further action in respect of his complaints concerning the conduct of the respondents, Mr RQ and Mrs FE.

Background

[2] The background to Mr PO's complaint against Mr RQ and Mrs FE is comprehensively set out in the Committee's decision in relation to the complaint against Mrs FE. That background only bears brief summary for the purposes of these applications for review.

[3] At the relevant time, Mrs FE was a registered legal executive employed by the law firm HFE Law (HFE). She was supervised by the then only principal in the firm, Mr RQ. HFE's offices were in [Town], Northland.

[4] The complaint against Mrs FE was that the legal advice and work done by her on behalf of Mr PO was incompetent.

[5] The complaint against Mr RQ was that he inadequately supervised legal work being done on Mr PO's behalf by Mrs FE, and failed to give Mr PO competent advice.

[6] On or about 23 August 2009 Mr PO entered into a contract to purchase a backpacker's business in Hamilton. Mr PO lived in [City] at the relevant time.¹

[7] The vendor of the backpacker's business, L Ltd, was also the owner of the premises. The parties entered into a lease of the premises for 30 years.

[8] The law firm [QPD] acted for L Ltd.

[9] The date for fulfilling conditions was eventually agreed as 11 September 2009, with settlement to take place on 1 October 2009.

[10] After settlement Mr PO identified several issues with the premises which he said were not apparent in the agreement he signed, and about which he maintains that he should have received legal advice when he entered into the agreement, from either or both of Mr RQ and Mrs FE.

[11] The issues identified by Mr PO were substantial, and meant that projected income from the business was significantly less than anticipated. There were also costs involved in remedying defects.

[12] Mr PO estimated his losses from the purchase as being in the region of \$150,000.

[13] Within [HFE], Mr PO's purchase file was predominantly managed by Mrs FE. She consulted with Mr RQ from time to time about aspects of the purchase.

The complaint

¹ Mr PO subsequently registered a company, [Business], which he nominated as the purchaser. Throughout this decision, for ease of reference, I will refer to "Mr PO" as the purchaser.

[14] Through his lawyer, Ms XY, Mr PO lodged a complaint with the New Zealand Law Society Complaints Service (Complaints Service) on 2 September 2013, against both Mr RQ and Mrs FE. The substance of Mr PO's complaint was that:

- (a) Mr PO had been "seriously misled" by L Ltd as the vendor of the backpacker's business.
- (b) The business was non-compliant with Council regulations. Whereas Mr PO was informed that the premises could accommodate 42 beds, in fact only 32 were permitted. Mrs FE failed to advise Mr PO to ensure that the 42-bed assurance given by the vendor was included in the agreement, and also failed to advise him to seek information from the Council as to building use.
- (c) Alterations to the premises had not been approved by the Council.
- (d) The actual position meant that the realistic gross monthly income was reduced by approximately \$5,000 monthly.
- (e) Mr PO entered into a 30-year lease, and Mrs FE failed to advise that this was unusual.
- (f) Mrs FE failed to advise Mr PO to ensure that the agreement gave him the first right to purchase the building.
- (g) Mrs FE was aware that Mr PO had never purchased a business before.
- (h) Initially the business was to have been purchased by Mr PO and his mother, Mrs PQ; subsequently it was purchased in Mr PO's name only with Mrs PO as a guarantor. Mrs PO did not receive any independent legal advice about the guarantee.
- (i) Mr PO negotiated a surrender of the lease and as a result incurred losses exceeding \$150,000.
- (j) The complaints against Mr RQ are that he failed to supervise Mrs FE, and failed to provide competent advice.
- (k) Throughout, Mrs FE appeared to be acting alone and was running [HFE]'s practice rather than being under Mr RQ's supervision.
- (l) Mrs FE breached the obligation imposed by r 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the

Rules), which is “to always act competently”. Although she was a non-lawyer, as a legal executive Mrs FE is subject to the same disciplinary regime as lawyers.

Responses:

Mrs FE

[15] Mrs FE’s response to the complaint is dated 30 September 2013. That response was comprehensively set out in the Standards Committee’s decision, at [21]-[32]. Having read Mrs FE’s response, I agree with the Committee’s summary of it, and it is not necessary for me to set it out in detail.

[16] In simple terms Mrs FE’s response was:

- (a) Her role was not to give advice and she always informed clients that she was not a lawyer and did not give advice. This included Mr PO.
- (b) If advice is required beyond basic information that she gave, then Mrs FE always advised that an appointment with Mr RQ was necessary.
- (c) The agreement was signed by Mr PO before [HFE] was instructed.
- (d) Mrs FE pointed out to Mr PO that a 30-year lease was highly unusual but he nevertheless indicated that it was acceptable to him.
- (e) Mr PO attended to the due diligence. Mrs FE recommended that he obtain financial advice about the business.
- (f) Mr PO assured Mrs FE that he was progressing enquiries with the Council as to compliance with licensing and safety.
- (g) Mrs FE was concerned that Mr PO might declare the agreement unconditional without having finance in place.
- (h) Mr PO advised Mrs FE that his due diligence enquiries were satisfactory, that he had obtained finance and executed a lease to the premises. He instructed Mrs FE to inform the vendors that the agreement was unconditional.
- (i) Mrs FE had reservations about the obligations imposed on the lessee in the lease but Mr PO told her that he was happy with the lease.

- (j) Mrs FE informed Mr PO that he and his mother ought not to sign the lease until they had received legal advice from Mr RQ. She asked Mr PO for a list of any questions that he had, but did not receive that from him.

Mr RQ's response

[17] Mr RQ responded to the complaint against him, in his letter to the Complaints Service dated 11 October 2013. He had been given a copy of Mrs FE's reply dated 30 September 2013.

[18] A summary of Mr RQ's response is:

- (a) "Mrs FE's ... record of events accords with [his] recollection of the progress of the matter".
- (b) Neither Mr RQ nor Mrs FE was providing financial advice to Mr PO.
- (c) Mr RQ properly supervised Mrs FE throughout the transaction in the same way that he did with all matters: he saw each piece of incoming and outgoing correspondence and was available whenever Mrs FE needed to raise any matter.
- (d) Mr RQ was aware that Mrs FE had encouraged Mr PO on a number of occasions to meet with Mr RQ, but that Mr PO "did not take this opportunity".
- (e) It has never been the case that Mrs FE ran the practice at [HFE]. Given her substantial experience as a legal executive (and working in law offices before obtaining that qualification) it would not be unusual for her to operate with a certain degree of autonomy.
- (f) Mrs FE has nevertheless always deferred to solicitors in the firm, sought assistance when needed and kept Mr RQ up to speed with matters that were at all outside the simplest of conveyancing matters.

Comment by Ms XY on behalf of Mr PO

[19] In her letter to the Complaints Service dated 1 November 2013, Ms XY commented on each of Mrs FE's and Mr RQ's responses as follows:

- (a) Ms XY agreed that it was not part of [HFE]'s retainer to provide financial advice.
- (b) There is a lack of correspondence and file notes on [HFE]'s file corroborating Mrs FE's claim that she encouraged Mr PO on more than one occasion to meet with and take advice from Mr RQ about the purchase.
- (c) Mr PO also maintains that he rang to speak to Mr RQ about the lease before signing it, and was told by Mr RQ that "Mrs FE was doing it and all was well".
- (d) Ms XY points to a lack of time records on the file, and to a lack of documents recording Mr RQ's supervision of Mrs FE.

Standards Committee decision

[20] The Standards Committee delivered separate decisions in relation to Mrs FE and Mr RQ, both on 29 January 2014.

[21] In each, the Committee determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act), that no further action on the complaints was necessary or appropriate.

Mrs FE

[22] The issue for consideration identified by the Committee in Mrs FE's case was identified as being:²

- (a) Whether Mrs FE was incompetent when advising Mr PO in respect of the acquisition of a backpacker's business.

[23] In deciding to take no further action, the Committee determined that:

- (a) Mr PO's allegation that Mrs FE was incompetent "is entirely without foundation".

² Standards Committee decision at [6].

- (b) Mrs FE appears to have acted appropriately at all times.
- (c) Mrs FE suggested on several occasions that Mr PO make an appointment with Mr RQ to obtain legal advice before signing the lease. Mr PO ignored Mrs FE's invitations.
- (d) "It is difficult to see what more Mrs FE could have done in the circumstances".³

Mr RQ

[24] The issues for consideration identified by the Committee in Mr RQ's case were:⁴

- (a) Whether Mr RQ was incompetent when advising Mr PO in respect of the acquisition of a backpacker's business.
- (b) Whether Mr RQ failed to adequately supervise Mrs FE when she provided advice in respect of the acquisition of the backpacker's business.

[25] In deciding to take no further action the Committee determined that:⁵

- (a) The complaint that Mr RQ was incompetent was "misconceived" given that Mr RQ did not in fact advise Mr PO.
- (b) Mr RQ appropriately supervised Mrs FE. Mr RQ's practice of reviewing incoming and outgoing correspondence meant that he provided an appropriate level of supervision over Mrs FE's work.

Application for review

[26] On Mr PO's behalf, Ms XY filed matching applications for review covering both decisions on 3 March 2014.

[27] Ms XY submits:

- (a) The Standard Committee gave insufficient reasons for preferring Mrs FE's version of events over that of Mr PO's, concerning the issue of

³ Standards Committee decision at [35].

⁴ Standards Committee decision at [6].

⁵ At [23]–[27].

whether she informed Mr PO that she could not provide legal advice and that this should be given by Mr RQ.

- (b) The Committee gave no reasons for preferring Mr RQ's version of events.
- (c) Mr RQ has since been struck of the roll of barristers and solicitors. This affects his veracity in the current matter.
- (d) The lack of anything on [HFE]'s client file to show that Mrs FE advised Mr PO to seek advice from Mr RQ, was not taken into account by the Committee.
- (e) Although Mr RQ may not have advised Mr PO, he is still responsible for Mrs FE's incompetence in not giving adequate advice.⁶

Responses

[28] Mrs FE responded to the application for review in her letter to this Office dated 8 April 2014. She noted that most matters raised by Mr PO in his application were dealt with by her in her response to his complaint.

[29] Mrs FE said that "at no time did I tell Mr PO (or indeed any client at any time) that I could '*do the same job as a lawyer*' nor that I had been working in the firm since I left school".⁷

[30] Mr RQ, in his letter to this Office dated 8 April 2014, said that he relied upon the submissions he made to the Complaints Service.

Nature and scope of review

[31] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:⁸

... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

The Review Officer has broad powers to conduct his or 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. These powers extend to "any review" ...

⁶ Citing *Canterbury-Westland Standards Committee 2 v XY* [20XX] NZLCDT X.

⁷ Letter from Mrs FE to LCRO (3 April 2014) at para 1.

⁸ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

... the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[32] More recently, the High Court has described a review by this Office in the following way:⁹

A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[33] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

- (a) Consider all of the available material afresh, including the Committee's decision; and
- (b) Provide an independent opinion based on those materials.

Statutory delegation and hearing in person

[34] As the Officer with responsibility for deciding this application for review, I appointed Mr Robert Hesketh as my statutory delegate to assist me in that task.¹⁰ As part of that delegation, on 16 May 2017 in [City], Mr Hesketh conducted a hearing at which Mr PO appeared in person, and Mrs FE and Mr RQ attended separately by telephone.

[35] The process by which a Review Officer may delegate functions and powers to a duly appointed delegate was explained to the parties by Mr Hesketh. They indicated that they understood that process and took no issue with it.

[36] Mr Hesketh has reported to me about that hearing and we have conferred about the complaint, the application for review and my decision. There are no additional issues or questions in my mind that necessitate any further submissions from either party.

⁹ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

¹⁰ Lawyers and Conveyancers Act 2006, sch 3, cl 6.

Analysis

Mr PO's submissions at hearing

[37] Mr PO noted that at the time of this purchase, he was 25 years old and had never previously been involved in a sale and purchase agreement, or with a commercial lease.

[38] His position is that throughout Mrs FE assured him that "everything [was] under control".

[39] Mr PO believes that his first discussion with Mrs FE was in June 2009, when he telephoned her and said that he was buying the backpacker's business. He recalls Mrs FE telling him to send her the relevant papers, which he did.

[40] That particular version of the sale did not proceed, as Mr PO considered the price to have been too high. However, in August 2009, he and the vendor (who was also the landlord) agreed to a different pricing structure (lower price and higher rent). Mr PO said that he saw Mrs FE and Mr RQ and in their presence signed both the agreement and the lease; this was on 1 October 2009.

[41] Mr PO considers that Mrs FE's account of her involvement in the transaction is untruthful. His view is that Mrs FE manipulated Mr RQ, and "ran the office [at HFE]". She told Mr PO that Mr RQ "just signs what [she] tells him to". She further told Mr PO that she had been working in law offices for 40 years and "knew as much as a lawyer".

[42] Mr PO recalls meeting Mr RQ once, when he signed the agreement and the lease on 1 October 2009. He never spoke to Mr RQ on the telephone; all telephone communications were with Mrs FE. He received no written communication from Mr RQ.

[43] He said that he only spoke to Mrs FE on four to five occasions over the course of the six weeks before settlement. On each occasion, he initiated the call.

[44] Mr PO acknowledged that he had a friend in Hamilton who was an accountant, and who had looked at the books of the business. He said that the real estate agent who brokered the agreement had said that "everything was legal".

[45] Mr PO also went to the Council in [City] to enquire about any resource consent issues.

[46] It is clear that Mr PO holds Mrs FE and to a lesser extent Mr RQ responsible for the failure of the business. He calculated his losses as being in the region of \$150,000.

Mrs FE's submissions at hearing

[47] As did the Standards Committee, this Office has a copy of [HFE]'s original file in connection with Mr PO's purchase. When setting out the submissions that Mrs FE and Mr RQ made at the hearing before Mr Hesketh, I will interpose (where relevant) information from that file.

[48] Mrs FE said that before her retirement in November 2014, she had 38 years' experience working in legal offices. She became a registered legal executive in 1990.

First approach

[49] Mrs FE's recollection was that she was first approached by Mr PO's mother, after Mr PO had signed the second conditional agreement. That agreement and the lease had been emailed to [HFE] by [QPD] on 28 August 2009.

[50] Mrs FE recalls suggesting to Mr PO's mother that he should obtain legal advice from a lawyer in [Suburb] (this being where Mr PO's parents lived).

[51] [HFE] and [QPD] exchanged emails in early September in connection with the finance date in the agreement and the lease. In an email to [QPD] dated 2 September 2009, Mrs FE noted that "the lease is being considered by [Mr PO] and his financial advisers and I have not received any queries to date".

[52] [QPD] sent Mrs FE a further version of the lease on 9 September 2009, in which amendments had been made to the annual rent and the monthly repayment amounts.

[53] Mrs FE's recollection is that, after initial telephone contact in early September, during the retainer she had two meetings with Mr PO.¹¹ The first of these meetings was on 10 September 2009, after Mr PO had signed the agreement.

¹¹ Letter [HFE] (terms of engagement) to Mr PO (2 September 2009). That letter, signed by Mr RQ, referred to Mr PO's "recent meeting with [Mrs] FE".

10 September 2009 meeting and follow-up

[54] At the 10 September 2009 meeting Mr PO indicated that the amended lease sent by [QPD] on 9 September 2009 was incorrect, and that he and L Ltd had negotiated a different amount (including purchase price). Mrs FE raised this with [QPD], who in an email dated 10 September 2009 confirmed that “the parties have agreed” (to the figures provided by Mr PO to Mrs FE).

[55] Also at the 10 September 2009 meeting, it was also discussed that Mr PO would set up a company, with the shareholders being him and his mother, as the nominee purchaser. Mrs FE advised [QPD] accordingly in a letter dated 11 September 2009.

[56] Mr PO attended to the formalities of registering the company, with the assistance of his accountant.¹²

[57] Also on 11 September 2009 Mrs FE sent Mr PO a fax attaching a further amended agreement that she had received from the broker. She noted the importance of making the agreement unconditional by 5pm that date, and wished him luck with speaking to the bank about finance.

[58] Mrs FE said that Mr PO was insistent upon making the agreement unconditional, whereas her advice to him over the telephone was twofold: first, she expressed reservations about this course and secondly, she “tried to get through to Mr PO that he needed to see a lawyer”.

[59] Mrs FE said that Mr PO then agreed that he would make the agreement unconditional as to finance only. It appears however that Mr PO had not secured finance at that time, although he was confident of doing so.

[60] Having been instructed by Mr PO to do so, Mrs FE wrote to [QPD] on 11 September 2009 and declared the agreement “unconditional as to finance”.

[61] The remaining conditions were declared satisfied by Mr RQ, in both a telephone discussion with and in writing to [QPD], on 14 September 2009.

[62] Mrs FE wrote to Mr PO on 17 September 2009 and pointed out that he had not completed certain Companies Office requirements. She also asked him to let her know “how [he] was progressing with the finance application”. Mrs FE also told Mr PO that his parents “will need to ... see Mr RQ as there will most likely be guarantees

¹² Further letter [HFE] to [QPD] (11 September 2009).

involved. Banks require a solicitor to witness signatures to guarantees and to provide a certificate to the Bank”.

[63] Mr PO replied by email the following day and advised Mrs FE that finance had been approved. He asked for “some form of agreement done up in relation to the loan [from his parents]. [They] have not asked for it but [I] think it is important legally and also means [I] can claim the interest back”.

[64] Mr PO also asked Mrs FE whether he needed to form a second company, or whether he should form a trust. He said that “that can be organised later on”.

[65] On 28 September 2009 Mr PO raised an issue about GST on the purchase with Mrs FE, and asked her to resolve that with [QPD].¹³

[66] The only other reference to this issue is in an email from [QPD] to [HFE] on 29 September 2009, in which [QPD] indicated that “[L Ltd and Mr PO] have been in discussion ... with regards to GST”. [QPD] then suggested an amendment to the agreement to reflect the result of those discussions.

[67] Mrs FE confirmed acceptance of the proposed amendment and referred to discussions between Mr PO and the broker as well as “[Mr PO’s] own enquiries” about the GST issue.¹⁴

25 September 2009 meeting

[68] The second meeting was on 25 September 2009 and included Mr RQ. Also in attendance were Mr PO’s parents. [HFE] had opened a separate file for the parents in relation to money they were borrowing to assist their son with his purchase.

[69] The 25 September 2009 meeting dealt only with the issues of the parents’ loan and consequent refinancing. By then the sale and purchase agreement had been declared unconditional (on 14 September 2009) and settlement was six days away.

[70] Mr PO was committed to the terms he had agreed in both the agreement and the lease.

[71] Mrs FE is clear that Mr PO did not sign any documents in [HFE]’s office in connection with the purchase, including any lease documents.

¹³ Email Mr PO to Mrs FE (28 September 2009).

¹⁴ Letter [HFE] to [QPD] (29 September 2009).

[72] It would appear that when it was executed, the parties only signed one counterpart of the lease. Mr PO was not given a copy of that, and nor was one forwarded to [HFE].¹⁵

[73] Settlement was concluded on 1 October 2009.

Fees

[74] [HFE] charged Mr PO \$1,316.25 (including GST) for its work in connection with the purchase. The description of the work in its invoice was:

Legal fee on purchase of business and attending to settlement	\$600
Fee on perusing lease and associated matters	\$200
Fee on Deed of Acknowledgement of Debt	\$350
Forms, postage and copying	\$20
GST	\$146.25

[75] [HFE] charged Mr and Mrs PO a GST and disbursement inclusive fee of \$1,060 in relation to them guaranteeing Mr PO's loan. This included discharging an existing mortgage and registering another.

Other comments by Mrs FE

[76] To Mr PO's claim that she told him that "she knew more than most lawyers", and that "Mr RQ always signed anything [she] put in front of him", Mrs FE was emphatic in her denials. She said that with all clients, she made it very clear that she could not give legal advice and that the lawyers who employed her were there for that purpose.

[77] Mrs FE's clear impression was that Mr PO was attending to many aspects of the purchase himself. For example, Mr PO had said that an accountant friend would be looking over the books of the business. As well, Mr PO approached the Council directly to make enquiry about consent and permitted usage issues.

[78] Mr PO had also advised Mrs FE that both the sales broker and the vendor were being very helpful to him. He said that both had persuaded him that the lease with its 30year term was "good". Mrs FE said that her response to this was that the

¹⁵ Email [QPD] to [HFE] (21 October 2009). It would seem that [QPD] forwarded [HFE] a certified copy of the lease that the parties had signed, sometime after 21 October 2009.

broker was being paid by the vendor, meaning that the broker would be unlikely to disagree with anything that the vendor said to Mr PO about the sale.

[79] Most of the contact between Mrs FE and Mr PO occurred by telephone, and Mrs FE said that she regularly stressed that Mr PO needed to take legal advice about the purchase. She said that she “tried to get through to him that he needed to see a lawyer”.

[80] Finally, Mrs FE recalled that on the unconditional date (11 September 2009) she made four telephone calls to Mr PO, concerned about the lease. Mr PO assured her that “he had someone in Hamilton to talk to about the lease” and Mrs FE assumed that this was a lawyer.

[81] As well as the term of the lease (30 years), Mrs FE was concerned that it was not in the usual Law Society format. She emphatically denies telling Mr PO that there was “nothing wrong” with the lease. In her view, it was problematic, hence her push for Mr PO to obtain legal advice about it.

Mr RQ's submissions at hearing

[82] Describing Mrs FE, Mr RQ said she was an “old school” legal executive. By this he meant that she was careful and methodical, and never held herself out as a lawyer-equivalent. He observed that Mrs FE was “a stickler for not overstepping the line in the sand as she saw it”.

[83] Mr RQ said that Mrs FE was “dedicated to the firm” and always deferred to him as principal, and when he was in partnership with others, to those principals as well. Mr RQ commented that Mrs FE’s work had always been of a very high standard, but that if she had concerns or questions, she always sought a principal’s advice and guidance.

[84] Mr RQ commented that it was “not [Mrs FE’s] language to say that [he] would sign anything that she put in front of [him]”. He noted that she would never have given him anything irregular and asked him to sign it. Moreover, he did not simply sign what his legal executive asked him to.

[85] He said that it was his practice at the time to see each and every piece of incoming and outgoing correspondence in [HFE], whether letter, fax or email.

[86] Mr RQ had a general awareness of Mr PO’s file. He was, for example, aware that Mrs FE had advised Mr PO to get legal advice about the lease in particular.

Mr RQ was aware from what Mrs FE had told him that Mr PO was attending to many of the aspects of the purchase either himself, through his friend who was an accountant or in connection with the broker and the vendor.

[87] It is clear from [HFE]'s file that almost all the emails and letters were sent by or to Mrs FE. Mr RQ's overt involvement appears to have been restricted to sending the letter of engagement to Mr PO (2 September 2009), and informing [QPD] that the balance of the conditions in the agreement were satisfied (14 September 2009).

[88] Doubtless, Mr RQ was also involved in the formal arrangements in relation to the funds coming into and going out of [HFE]'s trust account, and to Mr and Mrs PO's refinancing.

Discussion:

Mrs FE's competence

[89] Mr RQ's letter of engagement to Mr PO is dated 2 September 2009. In that letter, Mr RQ describes the scope of his retainer as being "to act for [Mr PO] on the purchase from [L Ltd]". He noted that Mr PO had had "a recent meeting" with Mrs FE.

[90] As the principal and only lawyer in [HFE], Mr RQ had the overall and ultimate responsibility for the retainer.

[91] The retainer, as described in the letter of engagement, was not a limited retainer. A limited retainer arises, for example, when a lawyer agrees to act on specific aspects of a transaction. This might include limiting the retainer to witnessing documents, providing proof of identification, receiving and paying-out funds, or registration. Generally, if the parties agree in advance that the retainer is to be limited, those limited aspects can be expected to be identified in the letter of engagement.

[92] As noted, Mr RQ's letter of engagement was not limited in any way. That being said, in my assessment and by his own actions Mr PO placed limitations on the scope of the advice he sought from Mrs FE and Mr RQ.

[93] I note for example that Mr PO's initial contact and meeting with Mrs FE occurred after he had signed the conditional agreement (dated 23 August 2009). Her reaction was that he should obtain legal advice in [Suburb], where his parents lived.

[94] Mr PO argues that the significant issues for him after settlement were bed numbers (32 instead of the 42 represented by L Ltd), uncertified building work and other issues with the premises.

[95] Mr PO undertook almost all of the due diligence arrangements in [City] either himself, or in conjunction with his accountant friend and the broker and vendor. On the critical issue of Council related issues, Mr PO undertook that enquiry himself.

[96] I accept that he had never entered into any type of agreement for sale and purchase before this, and, in that sense, he may not have known what to look for and what questions to ask, and may have been a soft target for an enthusiastic vendor.

[97] However, it is also clear that Mr PO resisted Mrs FE's suggestions to speak to a lawyer — whether one in [Suburb] or Mr RQ — and reassured her that he had those matters in hand.

[98] My conclusion is that Mr PO's instructions were infrequent and limited.

[99] There are significant differences between Mr PO's version of the nature of his dealings with Mrs FE (and to a lesser extent, Mr RQ), and Mrs FE's recollection. It is Mr PO's position that he relied upon Mrs FE to advise him, and throughout she assured him that all was in order. He took comfort from her confidence that she effectively ran the practice at [HFE].

[100] I note, however, a significant error in Mr PO's account of what took place, and when.

[101] Mr PO said that on 1 October 2009 he saw Mr RQ and in his presence signed both the agreement and the lease. 1 October 2009 was the date that the purchase was settled and Mr PO took ownership of the business.

[102] From a transactional point of view, it is very unlikely that events would have occurred in that sequence. Signing both an agreement and a lease is more likely to occur several weeks before settlement, and neither requires the presence of a lawyer.

[103] This is particularly so when an agreement is conditional. Those conditions must be satisfied before the settlement date and so any agreement must have been executed prior to that date.

[104] As well, a review of [HFE]'s file reveals that the agreement was signed on 23 August 2009, and amended by the parties in [City] on more than one occasion after

that. The final version of the agreement was sent to [HFE] by the broker on 12 September 2009.

[105] It appears that the lease was signed by Mr PO and L Ltd, also in [City]. Only one counterpart was signed, and neither Mr PO nor [HFE] received a copy of the executed document until after 21 October 2009; itself three weeks after settlement.

[106] Moreover, on 29 September 2009, Mrs FE wrote to Mr PO attaching a completed settlement statement, the Deed of Acknowledgement of Debt (between Mr PO and his parents) and a copy of the title to the land on which the business was situated.

[107] Mrs FE concluded this letter by saying "I take this opportunity to thank you for your instructions. If I can be of assistance in the future please let me know. Kind regards and good luck with the venture".

[108] This would suggest that no further meetings were required, all necessary documents had been signed and settlement would proceed on 1 October 2009, as indeed it did. The letter has all the features of a closure letter by a lawyer to their client.

[109] Critically, it is significant that both the agreement and the lease were signed in Hamilton, and that in relation to the agreement, there was more than one iteration before agreement as to terms was reached. Those events appear to have occurred in the latter part of August, and the early part of September.

[110] It may be that Mr PO is confused about the date, as there had been a meeting at [HFE]'s offices on 25 September 2009, only six days earlier. With the passage of time since these events in 2009 it is understandable that Mr PO might not be accurate with dates, especially those in such close proximity with one another.

[111] I conclude from the above that Mr PO did not meet Mr RQ on 1 October 2009, and nor did he sign the agreement and the lease in his presence on that date.

[112] In relation to Mr PO's belief that documents were signed by him at [HFE], it seems more likely that these were the guarantee documents and the Deed of Acknowledgement of Debt.

[113] Those attendances, which included Mr PO's parents, were carried out by Mr RQ.

[114] Mr PO's confusion reveals a fundamental misunderstanding of the purchase process.

[115] In my assessment, this misunderstanding arises not because Mrs FE failed to explain that process, but because Mr PO dealt with the majority of the issues involved in getting agreement with the vendor, and undertaking due diligence. The formal parts of the transaction were left to [HFE] and these were of less importance to Mr PO, who was more focussed on getting agreement with the vendor, and getting the business underway under his stewardship.

[116] Where he has sought advice from Mrs FE, has been in relation to the formation of another company or a trust (which he noted could be attended to later), and GST.

[117] Even in relation to that latter issue, it appears from [QPD]'s correspondence to [HFE] that their respective clients dealt with one another directly about GST and resolved it between themselves.

[118] Further, I do not accept Mr PO's view that Mrs FE was untruthful in her description of their dealings. Mrs FE's evidence was given some eight years after the events in question, and without the benefit of [HFE]'s file in front of her. Her recollection was largely consistent with the documents and correspondence on that file, and where there were differences, they were of no consequence.

[119] Mr PO also said that he had sent an email to Mrs FE asking whether he and his mother should meet Mr RQ. He said that he sent that "early on in the transaction". However, Mr PO did not have a copy of that email.

[120] [HFE]'s file reveals that Mr PO sent Mrs FE the following four emails before settlement on 1 October 2009:

- (a) 11 September, advising her of the shareholding and directorship of [Business].
- (b) 18 September, in connection with finance approval, the need for an agreement between him and his parents relating to their loan to him and a query (to be dealt with "later on") about a second company or a trust. Other matters raised in the email concerned matters that Mr PO was attending to.
- (c) 28 September, in relation to GST.

- (d) 29 September, querying whether [HFE] had received the settlement figure.

[121] On the other hand, in her email to Mr PO dated 17 September 2009, Mrs FE indicated the need for Mr PO and his parents to see Mr RQ in relation to the loan and guarantees.

[122] I accept that [HFE]'s file as given to the Standards Committee, and which forms part of the material this Office, is complete. Accepting that, there is no email from Mr PO to Mrs FE asking whether he and his mother should meet Mr RQ. His emails, such as they are, reveal that he is attending to matters himself. His only substantive query, concerning GST, was then dealt with by Mr PO directly with L Ltd.

[123] That being said, there is validity to the criticisms raised by Ms XY on Mr PO's behalf in her submissions to the Standards Committee, when she said that there was a lack of any file noting to record that Mrs FE had made a number of suggestions to Mr PO to see Mr RQ for advice.

[124] At the hearing Mrs FE seemed surprised that there were no file notes to this effect. She referred to her long-standing habit of making file notes, but acknowledged that if there were none, then "with hindsight she could have made more file notes". She referred to the way in which client time was recorded by [HFE] at this time, which was on a separate document not forming part of the client's physical file, and wondered whether she might have made file notes of discussions on those records. She recalled doing so on some matters.

[125] As to the whereabouts of those time records, given Mr RQ's inability to practice since August 2013 and Mrs FE's retirement in October or November 2014, neither was able to say where they might be.

[126] As indicated, there is merit in Ms XY's criticism. However, the clear picture that I have is that Mr PO was happy to attend to the detail of the agreement in [City], and did so placing reliance upon what his accountant, the broker, the vendor and the Council told him. Those discussions informed the decisions that he independently made, and which he was willing to make without the benefit of legal advice.

[127] Ms XY has also referred to the fact that in 2013 Mr RQ was struck off the roll of barristers and solicitors, for a matter of dishonesty.¹⁶ She submitted that his evidence in the present matter should be looked at with caution as a result.

¹⁶ *[Area] Standards Committee [X] v RQ [20XX] NZLCDT XX.*

[128] Generally, such a submission is a reasonable one to make. However, on the issue of supervision both Mr RQ and Mrs FE were consistent with one another — specifically that Mrs FE did not effectively run the practice at [HFE], she did seek guidance and she did defer to lawyers in that firm. To conclude that Mr RQ's evidence is suspect on that point would involve coming to a similar conclusion about Mrs FE's evidence.

[129] I find it difficult to accept that Mrs FE would have been as bullish about her role and status as Mr PO has suggested. She was experienced, senior and qualified but I am satisfied that she was aware of the important limitations in her role. The fact that both Mr RQ and Mrs FE confirmed that, for example, Mr RQ saw all incoming and outgoing correspondence is strongly suggestive of a principal who was careful about management.

[130] Lawyers act for, respond to and give advice to clients on the basis of the instructions that they receive from those clients. A lawyer cannot force their advice upon a client. If their client chooses to instruct their lawyer for some purposes but not others, then the lawyer's conduct can only be measured against those matters on which they were instructed.

[131] The Committee concluded its decision in the complaint about Mrs FE by noting that "it is difficult to see what more Mrs FE could have done in the circumstances".¹⁷ It is difficult to find fault with that conclusion.

Mr RQ's supervision

[132] Mr PO complained that Mr RQ inadequately supervised Mrs FE, and that he ought also to have advised him more comprehensively about the purchase. He suggests that had this occurred, he would not have been in the position of being misinformed by L Ltd.

[133] It is clear that the majority of the day to day work on the file was carried out by Mrs FE. Mr PO's position is that, in effect, she gave the orders and Mr RQ obliged. His view was that Mrs FE ran the practice at [HFE].

[134] Were this true, it would certainly raise issues about supervision and leadership.

[135] However, both Mrs FE and Mr RQ were at pains to say that, first, Mr RQ saw (and by implication approved or noted) each piece of outgoing and incoming

¹⁷ Standards Committee decision (in the complaint against Mrs FE) at [35].

correspondence, however sent and received. This is the gold-standard of supervision and I accept that this was the arrangement at [HFE].

[136] Such an arrangement would, in my view, quickly identify issues with Mrs FE's work. None has been reported by Mr RQ.

[137] Secondly, both Mr RQ and Mrs FE confirmed that she spoke to him about any issue of concern that she had with a file, and sought guidance. Mr RQ recalls discussions with Mrs FE about Mr PO's purchase (although he cannot recall the detail). What is clear is that Mrs FE was not simply forging ahead with the matter without consulting Mr RQ.

[138] Thirdly, Mrs FE roundly rejected Mr PO's assertion that she boasted about being autonomous and effectively directing Mr RQ. This is entirely inconsistent with the office practices in general described by Mr RQ and Mrs FE and their own recollections of the transaction which included the two of them discussing issues.

[139] Mr RQ's hands-on involvement with Mr PO seems to have been restricted to an attendance involving Mr PO and his parents. That attendance concerned Mr PO's loan from them, the formal documenting of that loan and Mr and Mrs PO's remortgaging to provide the loan. No issue has been raised that any of those attendances and the consequent advice were inadequate.¹⁸

[140] Mrs FE said that she advised Mr PO more than once that he should meet Mr RQ to discuss the purchase, but Mr PO declined to do so.

[141] It is difficult to disagree with Mr RQ's comment in his response to the complaint that "it would be highly irregular for me to force a client to meet with me..."¹⁹

[142] I agree with the Committee's conclusion that Mr RQ's supervision of Mrs FE in this matter was appropriate.

Conclusion

[143] In traditional litigation terms, the failure of Mr PO's business might have led to a claim of misrepresentation against L Ltd, and possibly the broker. The seemingly

¹⁸ In its decision on the complaint against Mr RQ, the Committee noted that Mrs PO "did not receive any independent legal advice about the guarantee" (at [18]). This, being a conflict issue engaging r 6.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, was mentioned briefly in Mr PO's complaint but was not taken further by the Committee. It has not been raised by Mr PO in his application for review. I do not propose to address that issue other than to note the strict operation of r 6.1 in circumstances such as these.

¹⁹ Letter from Mr RQ to the Complaints Service (11 October 2013) at para 2.

fatal problems with the business included the numbers of beds actually allowed (32 as opposed to the 42 represented), together with defects in the building. Occupancy of course affects income, and income drives the ability to meet commitments.

[144] An attempt may also have been made to include [HFE] as a defendant in any such litigation, on the basis that the firm negligently failed to give Mr PO relevant advice.

[145] Mr PO's complaint to the Complaints Service, prepared by his lawyer, is framed in the classic language of negligence.

[146] The Limitation Act 1950 (as applied until 1 January 2011, when replaced by the Limitation Act 2010) by now almost certainly precludes such a proceeding being brought.

[147] In this case Mr PO has elected to pursue his claim for compensation, based on a claim that Mrs FE and Mr RQ were negligent or incompetent, through the complaints process rather than through the courts.

[148] Lawyers who are negligent or incompetent can face a disciplinary outcome. Generally, the complaints process will look to see whether a court has considered that issue, and be guided by any findings made. Courts are better placed than a Standards Committee or this Office to determine whether a lawyer has been negligent.

[149] Where the matter has not been considered by a court, it is open for the issues of competence and negligence to be considered through the complaints process.

[150] Having assessed the matters canvassed at the hearing before Mr Hesketh, including [HFE]'s file in relation to this transaction, in my view it is far from clear that either or both of Mrs FE and Mr RQ share any of the responsibility for the failure of Mr PO's business. Their involvement as legal executive and lawyer respectively was minimal and almost exclusively confined to matters of form rather than substance. This much is clear from the fact that Mr PO attended to so much of the pre-settlement arrangements himself and without asking for advice about those matters.

[151] To rely upon a lawyer's advice about an issue a client must first indicate that they are seeking that advice. In my assessment Mr PO gave no indication that he required advice on the key issues affecting his purchase, which, as it unfortunately happens, became the very issues which led to the failure of his business.

[152] I see no grounds which could persuade me to depart from the Committee's decision.

Decision

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

DATED this 3RD day of October 2017

R Maidment
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 PO as the Applicant
Mr RQ as the Respondent
Mrs FE as the Respondent
[Area] Standards Committee [X]
New Zealand Law Society