

**LEGAL COMPLAINTS REVIEW OFFICER  
ĀPIHA AROTAKE AMUAMU Ā-TURE**

[2021] NZLCRO 113

Ref: LCRO 76/2020

**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**

**FV**

Applicant

**AND**

**GT**

Respondent

**DECISION**

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

**Introduction**

[1] Miss FV has applied to review a determination by the [Area] Standards Committee [X] dated 12 March 2020, in which the Committee determined to take no further action on her complaints about her former lawyer, Mr GT.<sup>1</sup>

**Background**

[2] At the relevant time (2018 and for some years before then) Miss FV was the sole director and shareholder of [ABC] Ltd ([ABC]).

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<sup>1</sup> Miss FV instructed Mr GT in connection with a company in which she was the sole director and shareholder ([ABC]). For ease of reference in this decision I will simply refer to Miss FV as though she was Mr GT's client.

[3] Miss FV lived in Christchurch. Her home had been damaged in the Christchurch earthquakes of September 2010 and February 2011. The adequacy of repairs became an issue between Miss FV, the Earthquake Commission (EQC) and her insurers ([Insurance Company B]).

[4] Eventually, in early 2018, agreement was reached whereby Miss FV's claim was accepted. She was told that she would receive a lump sum payment in cash (the insurance pay-out), although a precise figure was not indicated.

[5] From about 2014, [ABC] accumulated tax debts – predominantly income tax and GST (the tax debts). This was largely due to business and cashflow difficulties related to the Christchurch earthquakes and Miss FV's personal circumstances as a result of those earthquakes.

[6] Whilst Miss FV was negotiating with EQC and [Insurance Company B] in connection with her home repairs claim, she was also endeavouring to negotiate a payment plan with IRD in relation to [ABC]'s tax debts.

[7] It was Miss FV's intention to apply at least some of the insurance pay-out that she anticipated receiving, towards the tax debts.

[8] By late 2017 little progress had been made with IRD negotiations, as Miss FV was unable to provide sufficient evidence of a clear and manageable payment plan.

[9] IRD decided to initiate liquidation proceedings against [ABC] in the High Court (the liquidation proceedings), and did so in November 2017.

[10] On 18 January 2018 Miss FV spoke to Mr GT about the liquidation proceedings, which were then scheduled to be heard on 25 January 2018. She explained that she was anticipating receiving an insurance pay-out and required more time to finalise that and negotiate a payment plan with IRD.

[11] Mr GT successfully persuaded IRD to agree to an adjournment of the liquidation proceedings, and the Court granted this until 22 February 2018.

[12] At about this time, agreement was reached between Miss FV, EQC and [Insurance Company B] about the insurance pay-out, although there was no clear indication as to how much that would be and when payment would be made.

[13] By 21 February 2018 negotiations with IRD had not advanced much further. However Mr GT persuaded IRD to agree to a second adjournment of the liquidation

proceedings to enable the negotiations to continue, and the Court granted this until [redacted] 2018.

[14] By [redacted] 2018 matters had not been resolved with IRD, and the Court placed [ABC] into liquidation.

### **Complaint**

[15] Miss FV lodged her complaint against Mr GT with the New Zealand Law Society Complaints Service (Complaints Service), on 12 July 2019. She said:

- (a) Mr GT arranged an initial adjournment of the liquidation proceedings against [ABC] with IRD, on 25 January 2018. The eventual adjourned date was [redacted] 2018.
- (b) On the afternoon of [redacted] 2018 and again on the morning of [redacted] 2018, IRD informed Mr GT that they would be proceeding with the liquidation proceedings as no arrangement had been reached.
- (c) Mr GT had not responded to IRD's earlier emails or phone calls.
- (d) On [redacted] 2018 Mr GT's business partner informed Miss FV that there had been no obligation for Mr GT to attend the hearing on [redacted] 2018. Another law firm subsequently advised Miss FV that this was not the case.
- (e) Mr GT "negligently did not respond to IRD requests". As a result, IRD continued with the liquidation proceedings and the Court placed [ABC] into liquidation.
- (f) Nevertheless, [ABC] continued to trade under the liquidators and successfully continued to do so after Miss FV purchased it back from them.
- (g) If Mr GT had attended court on [redacted] 2018, as he had been instructed to do so, a payment plan could have been put in place with IRD. The anticipated source of the funds was the insurance pay-out.
- (h) Emails to Mr GT from IRD showed that he failed to maintain contact with them.

- (i) Mr GT emailed Miss FV in the morning of [redacted] 2018 advising her that the liquidation proceedings were continuing that day. Miss FV did not read that email until the afternoon of [redacted] 2018. This was the first that she was aware that the matter would be proceeding on that date.
- (j) Miss FV assumed that Mr GT would nevertheless have attended the hearing.
- (k) The liquidators informed Miss FV, when they turned up to the company's premises late on the afternoon of [redacted] 2018, that she should obtain legal advice as "this should not have happened."

[16] Miss FV calculated her costs as a result of what she described as Mr GT's negligence, as being \$212,381.45.

[17] Attached to Miss FV's complaint were a number of documents, including relevant email exchanges between IRD and Mr GT.

### **Response**

[18] Mr GT responded to Miss FV's complaint in his letter to the Complaints Service dated 19 September 2019. He said:

- (a) [ABC]'s tax liability was income tax and GST, going back to 2014.
- (b) IRD issued the liquidation proceedings in November 2017. Miss FV's initial payment proposal was rejected by IRD on 19 December 2017.
- (c) Miss FV first instructed Mr GT on 18 January 2018. Her instructions were "to seek an extension of time to [defer] any proceedings so as to enable her to raise the money required to meet [[ABC]'s] obligations."
- (d) Miss FV was intending to use the insurance pay-out to settle [ABC]'s tax debts with IRD.
- (e) Mr GT obtained an adjournment of the liquidation proceedings until 22 February 2018, wrote to Miss FV confirming that and encouraged her to "get moving".

- (f) On 21 February 2018 Miss FV's insurers informed her that her claim had been accepted, but did not indicate when she could expect to receive the insurance pay-out.
- (g) This information was relayed to IRD, who agree to a further adjournment of the liquidation proceedings until [redacted] 2018.
- (h) On [redacted] Mr GT endeavoured to secure a further adjournment of the liquidation proceedings, but IRD would not agree to this. [ABC] was put into liquidation by the Court on [redacted] 2018.
- (i) Throughout, Mr GT "was in telephone communication with Miss FV and ... was continuously advised by [her] that she was relying on the [insurance] pay-out [which] was not far away."
- (j) Mr GT "did what [he] could" in arranging for the liquidation proceedings to be adjourned, but ultimately because no concrete payment proposal was made, which was acceptable to IRD, [ABC] was liquidated.
- (k) Miss FV was well aware that an adjournment had been arranged until [redacted] 2018, and that there was a risk of the matter proceeding on that date.

[19] Mr GT attached copies of what he submitted were relevant emails confirming his response to Miss FV's complaint.

### **Comment by Miss FV**

[20] In an email to the Complaints Service dated 2 October 2019 Miss FV commented on Mr GT's submissions, and said that he "did not fulfil his legal obligations ... which in turn cost [Miss FV her] business of 12 years being placed into liquidation."

[21] Miss FV submitted that Mr GT had neglected to respond to IRD and that he was negligent, the result of which was "catastrophic to [her], mentally, financially and physically."

### **Standards Committee's Notice of Hearing**

[22] The Committee resolved to inquire into Miss FV's complaint, and so set the matter down for a hearing on the papers. It issued a Notice of Hearing dated

21 November 2019, and identified the following conduct issues arising from Miss FV's complaint:

- (a) Whether Mr GT should have made a formal request to IRD for an extension of time on 21 February 2019?
- (b) Whether Mr GT should have communicated to Miss FV that there was no formal extension granted by IRD and that IRD could move to a liquidation proceeding at any time?
- (c) Whether Mr GT should have explained the consequences of a liquidation proceeding to Miss FV?
- (d) Whether there was a reasonable expectation by Miss FV that Mr GT would represent her at any subsequent liquidation proceedings if it were to go ahead?

#### **Mr GT's submissions responding to the Notice of Hearing**

[23] Through counsel, Ms IP, Mr GT made detailed submissions addressing the issues identified by the Committee in its Notice of Hearing. In summary, Ms IP submitted:

- (a) When she first instructed Mr GT, Miss FV was confident that she would receive an insurance pay-out which would enable her to settle [ABC]'s debt with IRD.
- (b) Although Mr GT was not a litigator, he had previously successfully negotiated extensions of time with IRD, on behalf of clients. He agreed to do so on Miss FV's behalf.
- (c) Mr GT's "sole instructions were to try to delay the liquidation proceedings, and allow Miss FV time to obtain [the insurance pay-out]."
- (d) Mr GT wrote to IRD and asked if the liquidation proceedings could be adjourned on the basis that Miss FV was expecting to receive an insurance pay-out. On 23 January 2018 IRD agreed to an adjournment, until 22 February 2018.
- (e) Mr GT informed Miss FV that she was "very lucky" that the matter was adjourned, and that Miss FV needed to get some indication as to when she could expect to receive the insurance pay-out.

- (f) Not having heard from Miss FV by early February, Mr GT contacted her by email. They subsequently spoke by telephone and she updated him about the insurance pay-out. Mr GT suggested she might look for alternative funding, but Miss FV said that that would not be possible.
- (g) On 21 February 2018 Miss FV was advised that her insurance claim had been accepted but that there would need to be further discussions about the amount of the insurance pay-out. No indication was given as to when the matter was likely to be settled and the payment made.
- (h) Mr GT forwarded this information to IRD, and agreement was reached that the liquidation proceedings could be further adjourned until [redacted] 2018 to enable the funds to be received.
- (i) IRD raised some queries with Mr GT on 1 March 2018 and he said that he would obtain instructions. On the same date Mr GT emailed Miss FV with a request for instructions.
- (j) Miss FV indicated that she was meeting with [Insurance Company B] on [redacted] 2018 and would have further information by then.
- (k) On [redacted] 2018 IRD contacted Mr GT's office and spoke to his secretary, advising her that the liquidation proceedings were going ahead the following day. Mr GT's secretary forwarded this information to Mr GT in an email; he forwarded that email to Miss FV and unsuccessfully tried to telephone her. However, Miss FV did not reply.
- (l) On Monday morning, [redacted] 2018, IRD sent Mr GT a further email noting that because no agreement had been reached about payment of the tax debts, it would proceed with the liquidation proceedings that day. Once again Mr GT forwarded that email to Miss FV (and also tried to telephone her) to obtain instructions, but was unsuccessful. He left a voicemail message for Miss FV but she did not return his call.
- (m) Miss FV did not instruct Mr GT to attend the hearing on [redacted] 2018.
- (n) The insurance pay-out was not received by Miss FV until the middle of June 2018.

[24] As to the issues identified by the Committee in its Notice of Hearing, Ms IP submitted:

- (a) Despite Miss FV being unable to progress the issues in connection with the insurance pay-out by 21 February 2018, Mr GT was nevertheless able to persuade IRD to agree to a further adjournment of the liquidation proceedings until [redacted] 2018. This was arranged by telephone. It would not have made any difference to the eventual outcome of the liquidation proceedings if Mr GT had arranged the February adjournment in writing.
- (b) Mr GT copied Miss FV into all of his communications with IRD, and also spoke to her by telephone on several occasions. Miss FV was aware, at all times, of the meaning and potential effect of the liquidation proceedings.
- (c) Neither Mr GT nor any other lawyer in his law firm were ever instructed by Miss FV to appear in court on the liquidation proceedings. Instructions were to secure IRD's consent to those proceedings being adjourned so that Miss FV could negotiate a payment plan with IRD.
- (d) By the time that the liquidation proceedings had been issued by IRD, [ABC] was several years in debt to IRD; it had not complied with the initial Notice of Statutory Demand and there was no realistic proposal to settle the tax debts.
- (e) Despite this Mr GT was able to obtain IRD's consent to two adjournments of the liquidation proceedings. Matters became unstuck because by [redacted] 2018 there was still no concrete payment proposal: Miss FV still did not know how much she would receive, and when she would receive it, from the insurance pay-out.

#### **Comment by Miss FV**

[25] In an email to the Complaints Service dated 23 February 2020, Miss FV said the following:

- (a) Her losses had risen since lodging her complaint.
- (b) Prior to [ABC] being liquidated on [redacted] 2018, Miss FV's credit rating had been excellent, as was [ABC]'s.



- (c) It is not disputed that [ABC] had lapsed in its obligations to IRD – this was why Miss FV approached and instructed Mr GT.
- (d) Mr GT’s attitude and approach was “cavalier and non-urgent.”
- (e) Mr GT ignored and avoided emails and telephone calls from IRD. He made no attempt to negotiate a payment plan with IRD.

### **Standards Committee determination**

[26] The Committee identified the following issues to be determined:<sup>2</sup>

- (a) Whether Mr GT should have responded to IRD’s correspondence of [redacted] 2018 earlier than the afternoon of [redacted] 2018?
- (b) Whether Mr GT failed to take all reasonable steps to advise Miss FV that the hearing was going ahead on [redacted]?
- (c) Whether Mr GT should have explained the consequences of the company being liquidated to Miss FV?
- (d) Whether Mr GT breached r 4.2 [of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules)] by not appearing at the hearing on [redacted]?

### **Response to IRD correspondence**

[27] The Committee held that Miss FV had been advised by Mr GT that the liquidation proceedings had been adjourned until [redacted] 2018.

[28] Further, the Committee was satisfied that Mr GT spoke to Miss FV on 1 and 2 March 2018, and was advised by her that she did not think that she had received her insurance pay-out, but was having a further meeting with the insurers on [redacted] 2018.

[29] In those circumstances, the Committee considered that it was reasonable for Mr GT to await further instructions from Miss FV, following the [redacted] 2018 meeting, before discussing the position further with IRD.

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<sup>2</sup> Standards Committee determination at [10].

[30] It was the Committee's view that the hearing went ahead on [redacted] 2018, not because Mr GT had waited until [redacted] 2018 before discussing a further adjournment with IRD, but because Miss FV still did not have funds to settle the tax debt.

[31] Accordingly, the Committee considered that no conduct issues arose in relation to this issue of complaint.

### **Failure to advise Miss FV of hearing date**

[32] The Committee found that on 21 February 2018 Mr GT and IRD corresponded about progress in relation to Miss FV's insurance pay-out. It also found that Mr GT and IRD spoke on the telephone, probably on that date, and agreed that the hearing scheduled for 22 February 2018, could be adjourned. The parties agreed to [redacted] 2018.

[33] The Committee repeated that it was satisfied that Mr GT had advised Miss FV of the fresh date ([redacted] 2018), and said that it was satisfied that she "must have known or ought to have known that IRD proceeding with the hearing on [redacted] was a real possibility."<sup>3</sup>

[34] Nevertheless, the Committee was concerned that Mr GT had not kept any file notes of his 21 February 2018 discussion with IRD, and nor had he followed up with Miss FV prior to the hearing date to advise her that in the absence of any agreement with IRD for a further adjournment, the hearing would be proceeding on that date.

[35] Despite those reservations, the Committee was satisfied "that Mr GT took all reasonable steps one would expect from a solicitor in the circumstances to advise Miss FV that the hearing was going ahead on [redacted]."<sup>4</sup>

### **Consequences of liquidation**

[36] This issue did not arise directly out of Miss FV's complaint, but was identified by the Committee after it reviewed Mr GT's file.

[37] The Committee noted that it could not find any "formal record of advice being provided to Miss FV on the consequences of the company being liquidated."<sup>5</sup>

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<sup>3</sup> At [12.4].

<sup>4</sup> At [12.8].

<sup>5</sup> At [13.1].

[38] The Committee said that “it would have been prudent to outline the consequences of the company being liquidated, (namely the fact that the company effectively loses ownership of its assets)”, but held that “this advice would [not] have changed Miss FV’s actions in any way or the end result of the company being liquidated.”<sup>6</sup>

[39] The Committee was further satisfied that Miss FV must have been aware of the severity of the situation, because she instructed Mr GT. It also held that there was “no evidence to suggest that Miss FV did not know what would happen if the company was liquidated”.<sup>7</sup>

[40] In the circumstances the Committee was not satisfied that Mr GT’s conduct in this regard fell below the standard of competence and diligence reasonably expected of a lawyer.

#### **Breach of r 4.2 of the Rules**

[41] The Committee summarised r 4.2 of the Rules as “[requiring] a lawyer to complete the regulated services required by a client, subject to certain exceptions” and said that Miss FV’s complaint was that Mr GT was instructed to attend the hearing (on [redacted] 2018), and failed to do so.<sup>8</sup>

[42] In relation to the scope of Mr GT’s retainer, the Committee noted in his submissions that his instructions were limited to negotiating an extension of time with IRD. It was satisfied that there was no evidence that Miss FV had instructed Mr GT to attend any of the hearings.

[43] Again, the Committee recorded its conclusion that Miss FV was aware that the hearing was proceeding on [redacted] 2018, and could have instructed Mr GT to attend.

[44] As well, the Committee was satisfied that Mr GT’s attendance at the hearing on [redacted] 2018 would not have made any difference to the outcome, namely that the company would have been liquidated. It noted Mr GT’s attempt to secure a further adjournment, together with the fact that he had been successful in doing so on earlier occasions.

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<sup>6</sup> At [13.3].

<sup>7</sup> At [13.4].

<sup>8</sup> At [14.1].

[45] However, the difficulty for Miss FV was “poor compliance history and there being no set time frame for the insurance funds being received.”<sup>9</sup>

[46] Despite the above, the Committee was of the view that Mr GT, whose practice areas were conveyancing and commercial law but not litigation, “could have confirmed the nature of his practice area with Miss FV ... and instruct a barrister/litigation specialist to be on stand-by should the IRD proceed to the hearing.”<sup>10</sup>

[47] The Committee considered that “Mr GT could have also taken more care to confine the scope of his services in the letter of engagement sent to Miss FV.”<sup>11</sup>

[48] Nevertheless, the Committee did not consider that Mr GT’s failures to attend the hearing on [redacted] 2018 amounted to a breach of r 4.2 of the Rules.

### **Concluding remarks**

[49] Although the Committee was not satisfied that Mr GT’s conduct was unsatisfactory, it nevertheless commended to him the importance of keeping accurate file notes of conversations, as well as taking more care to clarify the scope of his services.

### **Review Application**

[50] Miss FV filed her application for review on 1 May 2020. She said:

- (a) The Committee had treated her unfairly.
- (b) Mr GT’s negligence, which resulted in [ABC] being liquidated, caused her “financial ruin”.
- (c) Mr GT should have negotiated with IRD and also should have appeared at the liquidation hearing as he was instructed to do. He knew that Miss FV was due to receive an insurance pay-out.
- (d) Mr GT elected not to communicate with IRD until the hearing date on [redacted] 2018.
- (e) Mr GT was wrong to say that he had spoken to Miss FV on the telephone “several times [in the week] prior to the hearing [on [redacted] 2018]”.

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<sup>9</sup> At [14.6].

<sup>10</sup> At [14.7].

<sup>11</sup> At [14.7].

[51] Miss FV attached a copy of her original complaint, to her review application. She referred to the financial losses that she said she had suffered, and which were included in her complaint.

### **Response by Mr GT**

[52] In a letter to the Case Manager dated 12 May 2020, Mr GT submitted that because Miss FV's review application had been lodged by her outside the statutory time limit, there was no jurisdiction for a Review Officer to consider the matter.

### **Jurisdiction to consider review application**

[53] In his response, Mr GT correctly identified the jurisdiction issue raised by Miss FV's review application: specifically that it was lodged by her outside the thirty working-day time limit prescribed by s 198 of the Act.<sup>12</sup>

[54] Miss FV lodged her review application 33 working days after the date on which the Committee's determination was served, given to or otherwise brought to her attention.

[55] Ordinarily there is no discretion to extend the thirty working day period.

[56] However, as will be observed, Miss FV's review application was lodged during the 2020 COVID-19 lockdown across all of New Zealand.

[57] At the time Parliament recognised that filing deadlines and other time limits prescribed by a myriad of enactments, regulations and rules would, if strictly enforced, lead to significant hardship for many litigants. Accordingly, temporary relief legislation was enacted which gave decision-makers a discretion in appropriate cases to extend otherwise inflexible deadlines.

[58] Against that background Miss FV's review application was referred to a Review Officer to consider whether to exercise the relevant discretion and allow her review application to be accepted for filing.

[59] In a comprehensive and carefully reasoned Minute dated 8 June 2020, Review Officer Maidment considered the arguments for and against accepting Miss FV's late-

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<sup>12</sup> A review application must be lodged and the prescribed filing fee must be paid within 30 working days after the Standards Committee's determination is served on, given to or otherwise brought to the applicant's attention.

filed review application, and determined that in the circumstances it was proper to accept it for filing.<sup>13</sup>

[60] Counsel for Mr GT has raised objection to Review Officer Maidment's Minute, on grounds that Miss FV's review application was filed before the temporary relief legislation came into force, and that legislation could not be retrospectively applied.<sup>14</sup>

[61] I consider that it would be wrong in principle for me to reconsider the late-filing issue. To do so would be to effectively review a decision of a colleague on a substantive issue affecting the jurisdiction of a Review Officer to conduct a review hearing.

[62] The proper vehicle for that is a judicial review application under the Judicial Review Procedure Act 2016.

### **Substantive response by Mr GT to the review application**

[63] On Mr GT's behalf, counsel Ms IP responded to Miss FV's review application, as follows:

- (a) Miss FV first approached Mr GT on 18 January 2018. At this time, liquidation proceedings had already been commenced by IRD and were due to be heard on 25 January 2018.
- (b) Miss FV instructed Mr GT she was confident that she would be receiving an insurance pay-out, which would satisfy [ABC]'s debt to IRD.
- (c) Mr GT successfully negotiated an adjournment of the liquidation proceedings for, initially, four weeks, and then a further [redacted] until [redacted] 2018.
- (d) Miss FV was unable to make progress in obtaining her insurance pay-out, and had no indication of when that might occur. By [redacted] 2018, IRD were unwilling to delay matters further and would not agree to a further adjournment of the liquidation proceedings.
- (e) Miss FV's review ground that the Committee's determination was unfair, is not supported by any reasons nor by the determination itself.

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<sup>13</sup> Miss FV's explanation for the delay in lodging her review application, was set out in her email to the Case Manager dated 6 May 2020. This was forwarded to Mr GT, who responded in his letter to the Case Manager dated 12 May 2020.

<sup>14</sup> Letter from Ms IP to the Case Manager (26 June 2020).

- (f) Miss FV was “well aware” that the liquidation proceedings were scheduled to be heard on [redacted] 2018.

### **Comment by Miss FV**

[64] In an email to the Case Manager dated 30 June 2020, Miss FV provided what she described as her “final summary” of her case.

[65] Miss FV referred to her significant health difficulties, noting that she was unable to work in full-time employment and that it was “imperative that [she] was able to hold on to [her] business where [she] had four staff.”

[66] Miss FV referred to the damage her home had suffered as a result of the Christchurch earthquakes, and her ongoing difficulties with both EQC and her insurers over repairs. She said that after approximately seven years of negotiation, it was finally agreed that she would receive an insurance pay-out.

[67] At this time, Miss FV was also endeavouring to negotiate with IRD to set up a payment plan in connection with unpaid tax, however this was dependent upon receiving the insurance pay-out. She considered that it was necessary to instruct Mr GT, as she was finding the negotiations stressful and they were also affecting her already marginal health.

[68] Miss FV said that Mr GT was aware of her health difficulties. She said that Mr GT expressed confidence in arranging a payment plan with IRD, but he failed to contact her insurers to obtain details of the pay-out, so that these could be given to IRD as part of setting up a payment plan.

[69] Miss FV submitted that Mr GT “avoided phone calls” from IRD, “[buried] his head in the sand” and “[placed] everything back on [her] at 4 o’clock the day before liquidation” thereby giving her no time within which to make other arrangements.

### **Further comment by Mr GT**

[70] In a letter to the Case Manager dated 1 July 2020, Ms IP responded to Miss FV’s 30 June 2020 submissions, as follows:

- (a) Miss FV’s “final summary” of her case contains fresh matters not previously raised by her as part of her complaint.

- (b) In particular, she now asserts that Mr GT was instructed to negotiate a settlement plan with IRD, which included contacting her insurer for relevant documentation.
- (c) Despite this being a fresh issue, not before the Committee, Mr GT denies that those were his instructions. This is supported by the contemporaneous correspondence which included him saying to Miss FV that she “[needed] to get an indication as to when the funds are available.”
- (d) Mr GT also denies informing Miss FV that she would be successful in negotiating a satisfactory payment plan with IRD. Ms IP emphasised that Mr GT had not been instructed to undertake those negotiations with IRD.
- (e) In particular, Ms IP noted that Miss FV’s insurers had given no indication as to when she might expect to receive her pay-out.

### **Review on the papers**

[71] This review has been undertaken on the papers pursuant to s 206(2) of the Lawyers and Conveyancers Act 2006 (the Act), which allows a Review Officer to conduct the review on the basis of all information available if the Review Officer considers that the review can be adequately determined in the absence of the parties.

[72] In anticipation of that process being followed, on 4 August 2020 the parties were given an opportunity to make submissions as to whether they wished Miss FV’s review application to proceed by way of a hearing in person, or a hearing on the papers.

[73] The parties were advised that a lack of any response would be regarded as consent to the hearing proceeding on the papers.

[74] Miss FV did not respond to the Case Manager’s letter.

[75] In an email to the Case Manager dated 10 August 2020, Ms HS on Mr GT’s behalf indicated that if Miss FV consented to the hearing proceeding on the papers, so too would he.

[76] On the basis of the information available, I concluded that the review can be adequately determined on the papers and in the absence of the parties. The parties were informed of this in a letter from the Case Manager dated 15 September 2020.



[77] I record that having carefully read the complaint and response, the Committee's decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party.

### **Nature and scope of review**

[78] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:<sup>15</sup>

... 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" ...

... 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.

[79] More recently, the High Court has described a review by this Office in the following way:<sup>16</sup>

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.

[80] 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.

<sup>15</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

<sup>16</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

**Discussion:*****Issues***

[81] I have identified the following conduct issues:

- (a) Did Mr GT represent Miss FV/[ABC] competently and in a timely manner consistent with the terms of his retainer?<sup>17</sup> In particular, in relation to:
  - (i) Advice about the liquidation proceedings;
  - (ii) Communications with IRD;
  - (iii) Negotiations with IRD.
- (b) Did Mr GT fail to appear in court in the liquidation proceedings, when instructed by Miss FV to do so?

***Preliminary observations***

[82] As a preliminary point, I consider that it was inevitable that [ABC] would be put into liquidation by the High Court on [redacted] 2018.

[83] The reality for [ABC] was that it had GST and income tax defaults reaching back to 2014. Miss FV has not suggested that [ABC] had any defence to those tax debt claims, or to the liquidation proceedings themselves. Her position was always that the tax debts were owing but that she needed time to organise matters so that they could be paid.

[84] Miss FV's position was perfectly reasonable and indeed responsible: many defaulting taxpayers simply refuse to engage with IRD.

[85] However, a taxpayer in [ABC]'s position has very little leverage and to a large extent relies on the patience and good will of IRD. Eventually IRD has a duty to proactively take steps to enforce payment of unpaid revenue.

[86] I consider that Mr GT's efforts in securing two adjournments of the liquidation proceedings on [ABC]'s behalf – for a total of some [redacted] weeks – was a reflection of his competence and attention to [ABC]'s immediate legal needs in the face of, by then, three to four years of tax debt.

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<sup>17</sup> Rule 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

[87] There could have been no legitimate criticism of IRD if they had declined to agree to any of the requested adjournments, and instead pressed ahead with the liquidation proceedings.

[88] Of course, the benefit of securing any adjournment is lost if the reason for the adjournment cannot be advanced. In [ABC]'s case that reason was to provide opportunity to secure funds, put a proposal before IRD and if necessary negotiate the detail of the proposal.

[89] Self-evidently, a proposal must come from [ABC], through Miss FV, in the first instance. Neither Mr GT, nor any other lawyer, can prepare a proposal without proper financial basis for doing so, and that information must come from Miss FV in the first instance.

[90] I accept that Miss FV sincerely believed that she would be able to finance [ABC]'s tax debts from her insurance pay-out. Indeed, I would go so far as to suggest that this was a reasonable expectation.

[91] However, it required (as Mr GT advised Miss FV) a concerted and pro-active push by her to nail down either the pay-out itself, or some clear details about how much it would be and when she could expect to see it.

[92] Whatever the reason for Miss FV being unable to arrange the pay-out – or even obtain concrete details of it – within those [redacted] weeks of 2018, by the time that [redacted] 2018 came around there was insufficient detail to persuade IRD to agree to a further deferral of the liquidation proceedings.

[93] I am not for one moment suggesting that Miss FV is responsible for being unable to provide concrete details to IRD; it may well be the case that both EQC and [Insurance Company B] were tardy or even difficult, or that the unique commercial pressures which resulted from the Christchurch earthquakes and the tens of thousands of people affected by them, meant that things took considerably longer to process.

[94] But the fact remains that IRD was not satisfied with progress and considered that the appropriate course was to proceed with putting [ABC] into liquidation. And as I have indicated above, there is no suggestion that [ABC] had any substantive defence to the liquidation proceedings.

[95] The above comments inform how I approach the conduct issues which are raised by Ms FV's complaint.

**Conduct issues:***Failure to appear in court*

[96] Although strictly not in chronological order, I propose to deal first with the issue of whether Mr GT should have appeared in the High Court when the liquidation proceedings were called, and finally dealt with, on [redacted] 2018.

[97] The observations that I have made above are relevant to an overall assessment of that conduct issue.

[98] Mr GT's position is that he had no expertise in litigation so never imagined that he would appear in court to argue [ABC]'s position, and that in any event he was not instructed to do so – his retainer was limited to securing adjournments of the liquidation proceedings.

[99] On the other hand, Miss FV's expectation was that Mr GT would represent [ABC] in court if necessary.

[100] On this point, I prefer Ms FV's evidence. To that extent, I disagree with the Committee's conclusions about this issue, which was specifically focused on whether or not instructions were given by Miss FV to Mr GT to appear in court on [redacted] 2018.

[101] In my view, the matter is slightly more nuanced than that.

[102] First, as noted by the Committee, Mr GT's letter of engagement described the retainer as being for "IRD matter" with the related services being "receiving instructions, attendances and all matters incidental thereto."

[103] If, as Mr GT contends, his retainer was limited to negotiations and explicitly did not include court appearances, then I would have expected his letter of engagement to make that clear. Arguably, references to "attendances and all matters incidental thereto" includes appearing in court if necessary.

[104] Secondly, in his email to IRD dated 18 January 2018, sent on the day on which he was instructed by Miss FV, Mr GT said the following:

We acknowledge [IRD's] letter of the 19 December declining the request previously made but we are instructed if we can't get agreement to request a deferment in the High Court.

[105] Mr GT copied Miss FV into this email.

[106] There is no corresponding advice from Mr GT to Miss FV at that time – let alone at any other time during the retainer – to the effect that if it was necessary “to request a deferment in the High Court”, then counsel would need to be instructed.

[107] In my view it was reasonable for Miss FV to expect that Mr GT would, as part of “attendances and all matters incidental thereto”, either appear in court or arrange for someone else to appear in court, if necessary.

[108] There is academic support for that conclusion. In *Lawyers’ Professional Responsibility* the learned authors say:<sup>18</sup>

The retainer may include both express and implied terms. Usually, express terms are (or should be) documented in writing, in which case their meaning and scope is determined, like any other contract, on a process of construction. But unlike ordinary contracts between arm’s length parties, an ambiguity in those terms will likely be construed *contra proferentem* (that is, strictly) against the lawyer, at least for the typical (inexperienced) lay client. As the lawyer drafts the retainer, it is reasoned, he or she should not benefit from an ambiguous expression. Such an approach aligns with both the incidents of fiduciary law imposed on lawyers in client dealings ... and the law treating the lawyer-client relationship as one of influence....

[109] I acknowledge that Mr GT had not filed any documents in the liquidation proceedings, recording himself and his law firm as the solicitor/s on the record for [ABC].

[110] In that event, at least on [redacted] 2018 when IRD had indicated it would not agree to a further adjournment of the liquidation proceedings, Mr GT’s obligations as an officer of the court would have compelled an attendance by him, or by someone on his behalf, to (if nothing else) seek leave to withdraw.

[111] Nevertheless, as I have indicated I consider that Miss FV had a reasonable expectation that, if it was necessary to do so on any of the scheduled dates, Mr GT would appear in court on [ABC]’s behalf, or arrange for someone else to do so.

[112] The fact that Mr GT was unable to contact Miss FV on [redacted] 2018, does not militate against that reasonable expectation.

[113] However, although Mr GT may technically have breached r 4.2 of the Rules by not appearing, or arranging for an appearance, in court on [redacted] 2018, I regard that as a relatively inconsequential breach for the reasons I have outlined above: namely that, by [redacted] 2018, it is inevitable that [ABC] would be put into liquidation by the High Court and that an appearance by counsel on its behalf would not have avoided that.

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<sup>18</sup> GE Dal Pont *Lawyers’ Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2017) at [3.25] (citations omitted).

*Competence and timeliness*

[114] To recap, the specific issues are:

- (i) advice about the liquidation proceedings;
- (ii) communications with IRD;
- (iii) negotiations with IRD.

[115] Rule 3 of the Rules states:

In providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

[116] There is neither magic nor mystery about the above requirements.

[117] To act competently means to do so acceptably. It does not mean that success must follow, or that the lawyer performed an outstanding job.

[118] To act in a timely manner means to complete tasks within an acceptable time limit, having regard to the nature of the work being undertaken.

*Liquidation advice*

[119] The issue of whether Mr GT gave Miss FV advice about the consequences of liquidation, was one identified by the Committee upon examining Mr GT's file. In its determination the Committee said that it "found no formal record of advice being provided to Miss FV on the consequences of the company being liquidated."<sup>19</sup>

[120] It would come as no surprise to lawyer or layperson to say that if a lawyer is instructed in a Court matter, part of that retainer would involve the lawyer advising the client not only about the litigation process, but also possible outcomes and consequences of those outcomes.

[121] Translated to Mr GT's retainer, which according to his letter of engagement was in connection with "IRD matter" and involved "receiving instructions, attendances and all matters incidental thereto", it is reasonable to say that this would include giving advice about the consequences of the High Court putting [ABC] into liquidation.

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<sup>19</sup> Standards Committee determination at [13.1].

[122] Indeed, it would present as unusual for a lawyer not to discuss the potential for liquidation and what that might mean, with a client facing that prospect; particularly in a case where there was in fact no substantive defence to the liquidation proceedings and the aim is to defer those proceedings to enable settlement discussions.

[123] This does not appear to be seriously challenged by Mr GT. In his counsel's letter to the Complaints Service dated 24 January 2020, the following is said:<sup>20</sup>

[Miss] FV was also well aware of the consequences of the liquidation proceedings and that, if a further extension was not granted, [IRD] could move to liquidate the company. This is precisely the reason why Mr GT was instructed by [Miss] FV to try to delay the liquidation proceedings. Mr GT was not asked to provide any formal advice on the consequences of a liquidation proceeding.

[124] I do not read the above as Mr GT saying he did not have a discussion of the type referred to by me, with Ms FV. For Mr GT to conclude that "Miss FV was also well aware of the consequences of the liquidation proceedings" implies, if not expressly records, that there was a discussion between the two of them of that nature. How else would Mr GT know that Miss FV was "well aware of the consequences".

[125] I surmise that the reference by Mr GT to "formal advice on the consequences of a liquidation proceeding" is a reference to a more detailed explanation of how a liquidation, once the order has been made, progresses and is managed, including how someone in Miss FV's position might be involved.

[126] I am satisfied that advice of a more general nature about the consequences of liquidation was given to her by Mr GT.

[127] This may have taken the form of Miss FV outlining her understanding, with Mr GT either confirming or correcting that understanding; or it may have been a discussion driven by Mr GT. The format is unimportant. I am satisfied that the substance of what took place involved Mr GT giving that advice.

[128] It was less than ideal for Mr GT not to have noted this advice on either a file note, or an email to Miss FV (or both). Had he done so, it would have put this issue to rest much more easily and indeed it may not even have been the subject of inquiry by the Committee.

[129] Nevertheless, I do not consider that any conduct issues arise in relation to Mr GT's failure to record the fact that this advice had been given.

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<sup>20</sup> At [34].

*Communications and negotiations with IRD*

[130] Issues (ii) and (iii) are somewhat interlinked.

[131] Even allowing for my conclusion that Mr GT's retainer reasonably included an expectation by Miss FV that necessary court appearances would be made, I am satisfied that in relation to Mr GT's communications and negotiations with IRD, his conduct was both competent and timely.

[132] I have carefully read through all of the correspondence relating to this retainer, that was provided to both the Complaints Service and is part of this review.

[133] I do not intend to undertake an exhaustive analysis of all of that correspondence. A clear picture emerges from it.

[134] First, I do not accept Miss FV's criticism that Mr GT failed to negotiate an arrangement with IRD. As outlined by me earlier, the only basis for a negotiation with IRD was to submit a payment proposal backed with the substance of available funds in a realistic plan.

[135] Funds were not available before [redacted] 2018. At best, on 21 February 2018 [Insurance Company B] (and EQC, it would seem) agreed to accept Miss FV's claim in relation to her home.<sup>21</sup> No dollar amount was indicated in [Insurance Company B]'s email and nor was there any meaningful time limit. Indeed, it was clear that there were further administrative processes to be completed.

[136] This was conveyed to IRD, and indeed this was all that could be conveyed to IRD, but it was clearly insufficient to avoid liquidation.

[137] Mr GT's retainer did not include negotiating with EQC and [Insurance Company B] as to a figure and payment date for the insurance pay-out. His emails to Miss FV throughout the retainer make that tolerably clear.

[138] On 23 January 2018, in his email to Miss FV confirming that the liquidation proceedings would be adjourned, he said "you now need to get an indication as to when the funds are available" and "... you need to get things going".

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<sup>21</sup> Email from [Insurance Company B] to Miss FV (21 February 2018, 9:31 am).



[139] In an email he sent to Miss FV on 5 February 2018, Mr GT asked “how are things progressing with EQC in relation to satisfying the debt to IRD?” I note that this email was initiated by Mr GT, and not sent in response to one from Miss FV.

[140] Subsequent email correspondence confirms my view that Mr GT was not instructed in relation to the negotiations with EQC and/or [Insurance Company B].

[141] In that event, as I have indicated above, it could not reasonably be expected that he could negotiate any payment arrangement or other settlement with IRD, in the absence of a dollar amount and a payment plan.

[142] Miss FV complains that Mr GT avoided dealing directly with IRD. She appears to be referring to an internal email sent to Mr GT by his secretary on [redacted] 2018, in which Mr GT’s secretary said “X from [IRD] telephoned. She has not heard from you after sending an email last Thursday.”

[143] The “email last Thursday” appears to be one sent by IRD to Mr GT on [redacted] 2018, in which he is asked to confirm an issue as to a payment by EQC to Miss FV’s bank account.

[144] Mr GT almost immediately forwarded that email to Miss FV with a request for instructions, although Miss FV was unable to advance the matter. It appears that Mr GT did not provide any formal response to IRD’s [redacted] 2018 email.

[145] I do not regard that as evidence of Mr GT “[choosing] not to reply to IRD’s phone calls and emails” as Miss FV asserts in her review application.

[146] Moreover, whatever response Mr GT might have made to IRD’s [redacted] 2018 email, the fact remains that no payment proposal was able to be put to IRD, and that as a consequence it proceeded with the liquidation proceedings on [redacted] 2018.

## **Conclusions**

[147] I am required to independently assess the material that was before the Committee and which is before me, as well as the Committee’s determination, and form my own conclusions as to whether there are issues raised by Miss FV’s complaint and review application, which call for a disciplinary response to Mr GT’s conduct.

[148] Whilst there are aspects of this retainer which Mr GT could have managed more thoroughly, such as the detail of his letter of engagement, and explicitly recording advice

given, I am not satisfied that his conduct throughout this relatively brief retainer (less than two months) gives cause for any professional or ethical concerns.

[149] There was, if I may again observe, an inevitability about the outcome of IRD's liquidation proceedings. In simple terms, avoiding liquidation was only ever going to be possible upon the production of a realistic payment plan, the building block for which was to be the insurance pay-out.

[150] With liquidation proceedings having been issued in November 2017, and with no dollar amount or plan able to be advanced by early [redacted] 2018, it is unsurprising that IRD elected to press on with liquidation.

[151] In my view, nothing Mr GT did, or did not, do has contributed to this.

### **Decision**

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

### **Anonymised publication**

[153] Pursuant to s 206(4) of the Act, this decision is to be made available to the public with the names and identifying details of the parties removed.

**DATED** this 23<sup>rd</sup> day of July 2021

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**R Hesketh**  
**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:

Ms FV as the Applicant  
Mr GT as the Respondent  
Ms IP/Ms HS as counsel for the Respondent  
Mr KM as a Related Person  
[Area] Standards Committee [X]  
New Zealand Law Society