LCRO 84/2011

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Auckland Standards Committee 4
BETWEEN	**JI and JJ** Of North Island Applicant
AND	**RR** of Auckland Respondent

DECISION

[1] JI and JJ (the Applicants) sought a review of a decision by the Standards Committee declining to uphold their complaint against RR (the Practitioner). They consulted the Practitioner in relation to their purchase of a franchise business some years previously, concerned about misrepresentation when they purchased the franchise.

[2] The Practitioner provided an opinion to the extent of their civil case, but informed them that if they wished to pursue any criminal action, they should seek an opinion from a criminal barrister, and moreover they (the Practitioner's firm) did not do litigation.

[3] The Practitioner rendered a fee of $1,707,50.00 (including GST and disbursements) which has been fully paid by the Applicants. Thereafter the Applicants lodged a complaint against the Practitioner, contending that they had been misled as to the range or the scope of services he would or could provide.

[4] The Standards Committee issued its decision some months later. The Committee defined "the issue" as:

> The issue for consideration is whether there are special circumstances that would justify the Committee dealing with a complaint regarding a bill of costs that does not exceed $2,000.00 pursuant to regulation 29 of the Lawyers and Conveyancers Act (lawyers: Complaints Service and Standards Committee) Regulations 2008) "the regulations". Was [the Practitioner's] conduct satisfactory.

[5] The Standards Committee discussed the circumstances surrounding the complaints, and concluded that there were no "special circumstances" that would justify the Committee dealing with the bill of costs, and declined to uphold the complaint.

Review Application

[6] The Applicants considered that the Committee had not dealt with the complaint at all. They noted that their complaint was not about the bill of costs as such, and they had no knowledge of the criteria for special circumstances.

[7] The parties have consented to this review being conducted on the papers pursuant to 206 of the Lawyers and Conveyancers Act 2006 which provides for the review being conducted on the basis of information, records, reports or documents made available to the LCRO, and with the parties consent that the review is determined in their absence. The parties have so consented.

Review

[8] The Applicants are correct to say that their complaint was not about the Practitioner's fees as such, and they have paid the fees in full. The Standards Committee erred in dealing with the matter as if the complaint related to a bill of costs below $2,000. The review process provides the opportunity for remedying any errors on the Committee's part, and I proposed to deal with this complaint in the terms made by the Applicants.

[9] The Applicants' complaint is that the Practitioner did not inform them that he does not undertake litigation, and that another fee for another assessment by a litigator would be necessary should they wish to pursue their case through the Courts. They had understood that the Practitioner would provide all of the legal services they needed and they consider it unfair that they should now pay more for a barrister's opinion. They are of the view that the Practitioner should bear at least part of the cost of the litigator's assessment.

[10] The background is that the Applicants purchased a franchise business, and later discovered that the operational and income details provided by the vendor did not match the reality. They considered that there had been misrepresentation, and also questioned whether criminal conduct was involved.

[11] On 1 September 2010 the Applicants had sent the Practitioner an email, opening with; *"your long involvement with franchising and franchise ethics prompts me to contact you. [We] are [...] franchisees within the [...] system. We believe we have a strong case under the Fair Trading Act (or even the Crimes Act) against a former regional franchisee (and others)".* The remainder of the letter gave a brief description of what had happened to date, which noted that their meeting with the Regional Franchisee had resulted in a modest remuneration increase (which assisted their sale of the business), but did not recompense them for income already lost. They requested the Practitioner's assistance.

[12] The following day the Practitioner replied that he had acted for many franchisees who had alleged misrepresentation and the Fair Trading Act was very powerful. The Practitioner noted that they needed clear documentary proof, and to mount a legal attack they needed money, patience, and to be able to handle stress. He added "to allege and prove fraud is much harder." The Practitioner offered to provide an opinion as to whether they had a good case, and provided an estimate of his fees.

[13] On that basis the retainer was established, and after the Applicants sent a fuller explanatory letter to the Practitioner on 11 September 2010, he forwarded to them his terms of engagement. This referred to "a brief description of the legal services which you have requested and which we have agreed to provide", stated to be "receiving the information and assessing your legal position, and writing to you with our legal opinion."

[14] The Practitioner provided an opinion in late September informing them of what civil remedies he thought were available to them. He concluded the opinion with informing them that to pursue litigation was expensive and stressful, and that his firm did not undertake litigation work and could instruct a competent barrister with experience in the relevant area of law. He gave them some indication of the costs of issuing proceedings.

[15] The Applicants wrote to the Practitioner on 10 October expressing their disappointment that the Practitioner had not elaborated on their case under the

Crimes Act. They added that they needed this sort of opinion, explaining that their efforts to contact the police had been ignored. They explained to the Practitioner why they thought they had sufficient circumstantial evidence to establish a crime had been committed. There was some discussion (in their letter) about the financial options open to them, but their letter concluded with informing the Practitioner that damages was not their primary motive for considering legal action, nor did they want to bankrupt themselves pursuing even a successful civil litigation either. The Applicants wrote that a criminal action (against certain identified persons) would be appropriate in their view, even if there wasn't much in the way of potential financial gain for them, a matter that had not been commented on by the Practitioner.

[16] In reply the Practitioner explained that he was a commercial lawyer with over thirty years of experience but was not a litigator, and that the firm did not undertake litigation work which is briefed out to barristers with experience in appropriate areas. The Practitioner added that he could not comment upon whether they had a case under the Crimes Act but should they want that assessment to be made, they could refer their queries to a criminal barrister. He informed the Applicants that he could not provide advice in relation to areas outside of his expertise.

[17] This is what eventually led the Applicants to complain against the Practitioner some short time later. The complaint was that the Practitioner had not told them, when offering to assess their case, and estimating his fee; that he did not undertake litigation; and that should they wish to pursue litigation there would need to be a further assessment by a litigator. They were aggrieved that the Practitioner had not accepted their proposal that he should bear at least part of the cost of any further assessment by a litigator.

[18] The review issue is whether any disciplinary issues arise for the Practitioner in relation to his failure to have informed the Applicants that he was not a litigator, and had no expertise in criminal law. Information was provided about the advertised range of services provided by the Practitioner, which included franchising, commercial and a range of other services, none of which included criminal law or litigation.

[19] The Applicants' expectations of the scope of their retainer appears to have been established early on in their original letter of 1 September 2010 when they informed the Practitioner that they believed they have a "strong case under the Fair Trading Act (or even the Crimes Act) against...". They expressed the view that it

ought to have been clear to the Practitioner that they were expecting advice on whether they had a criminal case against certain individuals.

[20] The Practitioner informed the Standards Committee that the Applicants had contacted him because of his "long involvement with franchising and franchise ethics", and that he had provided an opinion in relation to the remedies under the Fair Trading Act 1986. He wondered why they had paid the final instalment of his bill if they believed they had not been provided with proper legal advice. The Practitioner said that his firm does not undertake litigation and instructs barristers where appropriate, and nowhere on their website or in the overview was litigation mentioned.

[21] The Practitioner added that when he became aware of the Applicants' dissatisfaction he had contacted a barrister and explained the background issues with a view to getting a costing. He had then forwarded to the Applicants a copy of the barrister's written response, which confirmed that the Practitioner had "quite rightly" focused his opinion on the civil legal remedies that could be available under the Fair Trading Act, expressing his (the barristers) own view that this was clearly a civil matter, and not a matter to be pursued through the Criminal Courts. The barrister added that this was not an open and shut case, and involved some complexity.

[22] The Applicants rely to a considerable extent on the Practitioner describing himself as a barrister and solicitor, which they interpreted as including representation in Court if necessary. Their view is that members of the public could not be familiar with every legal equivocation, and that a lawyer who explicitly advertises himself to perform certain services should make clear that he does not provide certain services.

[23] In examining the range of services outlined in the Practitioner's website, it is clear that the scope of services all related to civil matters. Although the Applicants say that they are unfamiliar with the distinctions between differences in the way that legal services are provided, this alone does not give rise to professional conduct issues where a lawyer does not expressly set out the areas of work which are not undertaken. The failure to identify what areas of legal work are excluded cannot, in my view, amount to misleading advertising.

[24] Most lawyers holding practicing certificates in New Zealand are qualified to practice as a barrister and/or solicitor, although in practice areas of specialisation is

common. That a lawyer may be described as a barrister and solicitor does not of itself indicate that the lawyer undertakes ligation work. I can find nothing in the Practitioner website, or any other information he provided to them, that could reasonably have indicated to them that he either undertook litigation work or had expertise in criminal law. It is plain from all of the information that he did neither.

[25] Furthermore, the evidence supports the view that the Applicants approached the Practitioner on the basis of his expertise in franchise law. While they did make a reference to the Crimes Act, this was in the nature of an "aside". In my view their original letter to the Practitioner could not have reasonably indicated to the Practitioner that he was being asked to provide them with an opinion on whether there had been criminal conduct (normally a matter for the police), or to undertake litigation. My view of their correspondence is that the Applicants sought the opinion of a lawyer with expertise in the area of franchise law in relation to their financial loss, and that is what they got.

[26] I also noted that the Applicants had been in contact with the police concerning their views on the criminal elements arising in the matter but the police were unwilling to pursue the matter.

[27] Given the Applicants' lack of knowledge about the way that legal practices are run, and the distinctions between different roles, their complaint is perhaps understandable. However, the issue for the Standards Committee (and this office on review) is whether any part of the Practitioner's conduct raises disciplinary issues. Having examined all of the information, and carefully considered their arguments, I can find no basis for upholding any complaint against the Practitioner.

Decision

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

DATED this 15th day of March 2012

Hanneke Bouchier
Legal Complaints Review Officer

In accordance with s.213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

JI and JJ as the Applicants
RR as the Respondent
The Auckland Standards Committee 4
The New Zealand Law Society