LCRO 185/2018

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

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

DECISION

Introduction

[1] In November 2017, Mr GT lodged complaints against Mr NE which related to events in 2006.

[2] The [Area] Standards Committee [X] (the Committee) determined to take no further action with regard to Mr GT's complaints.

[3] Mr GT has applied for a review of that determination.

[4] Mr GT's correspondence to both the Lawyers Complaints Service and this Office is lengthy, repetitive, accusatory and abusive, with limited factual content. The review has consumed far more of Mr NE's time, and the time of this Office, than is warranted.

Background

[5] Mr GT was a director of [Company 1] (the Company). He refers to the Company as "his company".

[6] The Company's business was as a wholesaler of jewellery. To fund stock purchases, Mr GT relied on borrowings from finance companies, [Company 2] being one of them.

[7] In 2006, [Company 2] declined to provide funding to the Company to enable it to purchase stock. This had a "flow on" effect on the Company's sales.

[8] The Company defaulted in payments due to [Company 2], which then made demand for the balance due to it. The Company did not pay the amount demanded, and the finance company appointed receivers on 15 November 2006.[1]

[9] Mr RO is a barrister who had acted for the Company and Mr GT. He referred Mr GT to Mr NE to advise and assist him on matters involving [Company 2].

[10] Mr GT did not accept that the Company should have been placed into receivership and sought to blame other parties, which subsequently included Mr NE.

Mr GT's complaints

[11] Mr GT seemed to regard the complaints process as a means of accessing [Company 3] professional indemnity insurance "without damage to Mr NE's professional and personal integrity".[2]

[12] Mr GT misunderstands the nature of the complaints process. It is not a substitute for a claim in negligence, which must be pursued through the courts.

[13] A complaint about a lawyer necessarily includes allegations that a lawyer has failed to meet his or her professional obligations, which, if proven, will result in a finding of unsatisfactory conduct imposed by either the Standards Committee or this Office, or result in charges being laid against the lawyer before the Lawyers and Conveyancers Disciplinary Tribunal. An adverse finding is noted on a lawyer's professional record and necessarily damages his or her professional and personal "integrity".

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[1] The finance company made demand and appointed receivers on the same day.
[2] Mr NE is a consultant to [Company 3].

[14] Mr GT's complaints were many and varied, and difficult to comprehend. In a 21 page "affidavit" filed with his complaint, Mr GT refers to:[3]

- a declaration of insolvency made by Mr NE;
- allegations relating to a GST payment and refund;
- employment related payments;
- defamation;
- "Illegal" advice relating to payment of funds from the sale of Mr GT's house;
- an overpayment of funds;
- Mr NE declining to pursue the receivers about a debt of $691,255 (Mr GT alleges misappropriation by the receivers); and
- failing to place a "caveat" on the Company's stock.

[15] Subsequently, Mr GT changed his complaint to focus "on one single issue, the serious professional misconduct".

[16] The Committee identified three issues arising out of Mr GT's extensive correspondence:[4]

- did Mr NE fail to carry out a request to place a caveat on the Company's stock to secure it before the receivers could auction it?
- did Mr NE make a false declaration of insolvency based on the claim that the Company owed [Company 2] $1.48 million? Did Mr NE refuse to retract that declaration?
- did Mr NE refuse to accept or acknowledge a payment of $1.3 million to [Company 2] by Mr GT that would have made the declaration by Mr NE as to the solvency of the Company incorrect.[5]

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[3] The "affidavit" does not contain sworn evidence but is a rambling and repetitive document in which Mr GT repeats the various allegations about Mr NE.
[4] Standards Committee determination, 21 August 2018 at [5].
[5] The Committee used the term "false", while Mr GT says "flawed". In his response to the complaint, Mr NE also uses the term "false", which is the essence of Mr GT's allegations.

[17] Mr GT subsequently advised the Complaints Service that a lawyer assisting him had commented:

> They [the Committee] have encapsulated your complaint nicely, there may be other issues but those would be secondary and would only muddy the water …

Mr NE's response

[18] In his 4 May 2018 response to the complaint, Mr NE addressed the three issues identified by the Complaints Service and some "key related matters". Unsurprisingly, Mr NE commented on the difficulty of responding to the complaints which arose out of events that had occurred some 10 years previously.

[19] He confirmed that Mr GT was referred to him by Mr RO in August 2006. He advised that the Company had borrowings from [Company 2] and [Company 4], and that Mr GT had personally guaranteed the Company's borrowing. Mr NE regarded both the Company and Mr GT as his clients.

[20] He advised that the Company had not paid any interest to [Company 2] for some months and that the finance company was paying the Company's legal fees incurred in relation to a dispute with [Company 4].[6]

[21] Notwithstanding communications between Mr NE and [Company 2], the finance company made demand on the Company on 15 November 2006 and appointed a receiver on the same day.

[22] [Company 2] itself later went into receivership in August 2007.

[23] Mr NE recalls Mr GT approaching him sometime in March or April 2007 about the manner in which the Company's stock was being stored by the finance company. Mr NE says:

> I would have said to him something along the lines of what a receiver's duty was when selling assets, that they had taken the responsible approach of obtaining an expert valuation and were experienced receivers and that I would be surprised if they had not taken expert advice as to the method of sale.

[24] He responded specifically to the three issues identified by the Committee.

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[6] The dispute centred on whether interest was payable to [Company 4] as a result of possible breaches of the Credit Contracts Act.

Declaration of insolvency

[25] In his response Mr NE does not refer to making a "declaration". He advised that he had "more than 25 years' experience of advising directors, liquidators and receivers" and had formed the view that the Company was insolvent. Mr NE provided the figures he relied on to form that view. His response was detailed.

The $1.3m payment

[26] Mr NE believes that the first time he was made aware of Mr GT's "view" that he had repaid $1.3m of the debt owed to [Company 2] (which Mr NE says was $1.48m) was in August 2008, some months after the Company was placed into receivership.

Caveat against the stock

[27] Mr NE cannot recall any request from Mr GT to place a caveat over the stock. He advises that he had no file notes relating to the matter but accepts that Mr GT may have made the request.

[28] He says that:

> … the advice he would have given Mr GT was that it was not possible to place a caveat on the stock and that the only way to prevent the receivers selling by auction would be an application to the court for an injunction or perhaps a freezing order.

Other issues

[29] In his letter of response to Mr GT's complaints, Mr NE addressed several of the other matters raised by Mr GT.[7] The Committee did not refer to these in its determination and they do not need to be commented on in this review other than to note that they involve, in the main, matters that should be referred to other bodies.[8]

[30] They are adequately addressed in Mr NE's response.

The Standards Committee determination

[31] The Committee noted the submissions and the arguments from both parties on each issue identified and addressed all three issues together.

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[7] See [14] above.
[8] For example, allegations relating to GST payments should be referred to the Inland Revenue Department.

[32] It initially noted that much of the conduct complained about occurred prior to 1 August 2008 and, having considered all of the material provided by the parties the Committee, determined that none of the pre-1 August 2008 conduct met the threshold required to make an adverse finding against Mr NE.[9] In reaching this determination, the Committee commented on the standard of evidence required and that the evidence provided by Mr GT did not prove his allegations. Those comments are endorsed on review.

[33] The Committee's observation that the length of time between the conduct complained of and the complaint was also a factor to be taken into account, is also endorsed on review.

Application for review

[34] The outcome sought on review by Mr GT is for the matter to be referred to the Lawyers and Conveyancers Disciplinary Tribunal, which "has the power to order Mr NE to finally face up to his failed professional responsibilities". This is somewhat at odds with earlier statements by Mr GT that he did not want to damage Mr NE's "professional or personal integrity".

[35] Mr GT also indicated in his application for review that it would likely be withdrawn. This comment is somewhat puzzling, as the volume of material submitted by Mr GT in conjunction with this review is significant. As noted above, much of Mr GT's correspondence is rambling and repetitive. It also suffers from the same defect as identified by the Committee referred to in [32] above.

[36] Mr GT repeats his allegations that "Mr NE [had] turned him into a penniless pauper" and was "shocked that the Committee was not in a position to make a decision".

Hearing

[37] A hearing took place in Auckland on 31 May 2019. The hearing was conducted by Mr Vaughan acting as a delegate duly appointed by the Legal Complaints Review Officer (LCRO) pursuant to cl 6 of sch 3 of the Lawyers and Conveyancers Act 2006 (the Act). The LCRO has delegated Mr Vaughan to report to me and the final determination of this review as set out in this decision is made following a full consideration of all matters by me after receipt of Mr Vaughan report and discussion.

[9] The significance of this is addressed in some detail later in this decision.

[38] Mr GT stated that his objective in making the complaint against Mr NE was to have Mr NE approach his insurers to make a payment to Mr GT. He reiterated his advice that he didn't want Mr NE struck off or punished — he wanted compensation. This is an abuse of process.

[39] The Notice of Hearing, sent to the parties on 6 May 2019, requested Mr GT to focus on the reasons why he considered the Committee decision to be wrong. At the hearing Mr GT commenced reading from a 12-page statement already provided to the Review Officer. The Review Officer stopped Mr GT from continuing to read his statement, as it was not necessary and followed the same format as much, if not all of Mr GT's correspondence (see [53] below).

Conduct prior to 1 August 2008

[40] The relevance and implications of the fact that the conduct complained about occurred prior to 1 August 2008 were discussed in an earlier decision of this Office.[10] In that decision, the Review Officer said:

> [8] his review concerns conduct which occurred prior to 1 August 2008 and as such the applicable rules are those in force at that time. In particular, s 352 of the Lawyers and Conveyancers Act 2006 states that penalties may only be imposed in respect of conduct which could have been imposed for that conduct at the time the conduct occurred. The relevant standards are set out in ss 106 and 112 of the Law Practitioners Act 1982. Those sections provide that disciplinary sanction may be imposed where a practitioner is found guilty of misconduct in his professional capacity, or conduct unbecoming a barrister or a solicitor (the provisions relating to negligence and to criminal convictions are not relevant here). Further guidance can be obtained from the Rules of Professional Conduct for Barristers and Solicitors which were the applicable rules at the time in question.
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> [9] The threshold for disciplinary intervention under the Law Practitioners Act 1982 is therefore relatively high. Misconduct is generally considered to be conduct:
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> > of sufficient gravity to be termed 'reprehensible' (or 'inexcusable', 'disgraceful' or 'deplorable' or 'dishonourable') or if the default can be said to arise from negligence such negligence must be either reprehensible or be of such a degree or so frequent as to reflect on his fitness to practise.
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> (*Atkinson v Auckland District Law Society* NZLPDT, 15 August 1990; *Complaints Committee No 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105). Conduct unbecoming is perhaps a slightly lower threshold. The test will be whether the conduct is acceptable according to the standards of "competent, ethical, and responsible practitioners" (*B v Medical Council* [2005] 3 NZLR 810 per Elias J at p 811).

[10] *AB v CD* LCRO 38/2009 (28 April 2009).

Review

Overview

[41] Mr GT considers that the Committee "was not in a position to make a decision". He continues: "The decision is inconclusive, not credible, unprofessional, disrespectful and offending".

[42] The Committee did reach a decision — it determined that Mr NE had not breached any professional standards.

[43] In fact, it is difficult to establish what professional standards Mr NE stands accused of contravening. Mr GT "blames" Mr NE for his losses. As noted, it seems Mr GT thinks making a complaint against Mr NE will somehow bring the firm's insurers into the mix and provide a payment to Mr GT. If that was Mr GT's motive for the complaint, and now this review, he is mistaken. A professional standards complaint, and indeed proven breaches, is no substitute for an action in negligence. In *AY v CL* the LCRO said:[11]

> It must be recognised from the outset that allegations of negligence should primarily be argued before the Court …

[44] In *Complaints Committee of the Canterbury District Law Society v W* the High Court considered that for negligence to reach the disciplinary threshold it must be:[12]

> of a degree that tends to affect the good reputation and standing of the legal profession generally in the eyes of reasonable and responsible members of the public. Members of the public would regard the actions as below the standards required of a law practitioner, and to be accepted as such by responsible members of the profession. It is behaviour or actions which, if known by the public generally, would lead them to think or conclude that the law profession should not condone it, or find it to be acceptable. Acceptance by the profession that such negligence is acceptable would tend to lower the standard and reputation of the profession in the eyes of the general public.

[45] In that judgment the Court was referring to the standard applicable to this complaint, because it relates to conduct prior to 1 August 2008.

Failure to place caveat on stock

[46] It is somewhat misleading to refer to a process whereby a "caveat" could have been placed over the stock. That implies a simple process similar to lodging a caveat against a title to real estate. The process required to "freeze" the stock in the hands of

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[11] *AY v CL* LCRO 154/2012 (22 April 2013) at [14].
[12] *Complaints Committee of the Canterbury District Law Society v W* [2009] 1 NZLR 514 (HC) at [91].

the receivers would have involved an application to the court and evidence being provided that the applicants could dispose of the stock (and would dispose of the stock) on more favourable terms than could be achieved by the receivers.

[47] Mr GT's complaint has varied between Mr NE "failing" to place a caveat against the stock, which necessarily means that Mr NE failed to follow instructions to do so, and Mr NE failing to advise Mr GT of the options to achieve his objective.

[48] Mr NE says he does not remember being instructed by Mr GT to take this action. During the course of this review, the Review Officer wrote to Mr GT, and observed that instructions to secure the stock "and advice in return are not such as would have been given and responded to informally and verbally" and that it would be expected that the instructions and return advice "would have generated significant correspondence".

[49] The Review Officer noted that he could not see any such correspondence and asked Mr GT to provide evidence of his instructions. He did not provide anything in return, other than to repeat his allegations.

[50] His response was indicative of the manner in which Mr GT has pursued his complaints and this review throughout, in that he repeats his version of events many times, and seemingly considers that this constitutes the evidence required to establish his complaints. It does not.

The payment of $1.3m

[51] Mr GT complains that Mr NE would not acknowledge Mr GT had paid the sum of $1.3m to [Company 2]. He provided no evidence of the payment and so it is uncertain when he alleges the payment was made. Mr NE notes in his response to the complaint, that in a letter to [Company 2] Mr GT seemed to suggest that the payment was made over a period of time. Mr GT says:[13] "While I dealt with you (I repaid $1.3m plus $248,000)".

[52] It is difficult to ascertain what professional standards Mr NE can be accused of breaching and what difference it would have made. Presumably, Mr GT considers that if Mr NE acknowledged he had paid the sum of $1.3m on account of the Company's debts, there would have been grounds to challenge the receivership.

[53] If Mr GT had immediately provided irrefutable evidence that the amount claimed by [Company 2] was wrong, Mr NE would not have been able to deny the payment and

[13] Mr GT's letter to [Company 2] is dated 12 January 2006. The letter is clearly sent after the company had been placed into receivership and so the year 2006 is incorrect.

he would have had no reason to. Mr GT proceeds on the basis that all he has to do is to repeat something may times and that this constitutes the evidence necessary to prove his assertions.

[54] The complaint against Mr NE is that "he refused to discuss the new evidence, [Mr GT's] repayment of $1.3m".

[55] Mr NE says that "the first he learned of Mr GT's view that he had repaid $1.3m of the $1.48m claimed by [Company 2] was in August 2008". If that is not correct he is nevertheless "sure that it would have been many months after the Company was placed in receivership".

[56] Mr NE says that if Mr GT had:

> … advised Mr RO or [him] that there was at least a $1.3m discrepancy in the amount being claimed and provided his accountant and us with the documents to support that position, [their] advice and actions would have been entirely different.

[57] If the amount claimed by [Company 2] had been overstated by $1.3m, that would have been the most compelling matter for Mr GT to have taken up with the finance company. In his letter (wrongly) dated 12 January 2006 to [Company 2], Mr GT does not assert that the amount claimed by the finance company as being due was wrong. That would surely have been a fact that he would have taken up immediately when demand for payment was made in November 2006.

[58] There is no evidence that Mr GT challenged the amount demanded. Mr NE's statement that his advice would have been different if the amount demanded by [Company 2] was overstated by that amount is accepted.

False declaration

[59] Mr GT alleges that "Mr NE declared that my company [Company 1] was insolvent". No formal declaration made by Mr NE has been provided to the Committee or on review, and it is assumed that what Mr GT means is that Mr NE had formed the view that the Company was insolvent and proceeded on that basis.

[60] In his response to the complaint, Mr NE provided the figures that formed the basis for his opinion. It is not proposed to consider these in any depth in this review. All that is necessary is for there to be evidence that there were reasonable grounds for Mr NE to form the view that he did. There is no basis for an adverse disciplinary finding to be made against Mr NE and even if Mr NE's opinion proved to be incorrect, that is still not necessarily a matter for the disciplinary process to become involved with.

Decision

[61] Having considered all of the material provided to the Committee and on review, I reach the same decision as the Committee, namely, to take no further action on Mr GT's complaints.

[62] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Committee is confirmed.

Comment

[63] It is surprising and puzzling that Mr GT has complained about conduct which occurred some nine years previously. It is also noted that Mr GT entered into a business relationship with Mr NE's family interests in 2012 and it is surprising that Mr GT should have entered into such a relationship if he had concerns about the quality of the advice received from Mr NE. This again raises the question as to Mr GT's motivation for making this complaint.

[64] Although the Committee's determination, and this decision, have been decided with reference to the fact that the conduct complained of occurred prior to 1 August 2008, the facts relating to each issue as discussed above would likely lead to the same conclusion if the events had occurred after that date and were considered in the context of the current legislation.

Costs

[65] Section 210 of the Lawyers and Conveyancers Act 2006 provides that:

> the Legal Complaints Review Officer may, after conducting a review under this Act, make such order as to the payment of costs and expenses as the Legal Complaints Review Officer thinks fit.

[66] This Office does not often make orders for payment of costs against a lay applicant. However, the motivation for Mr GT's application for review is suspect and even in his application for review Mr GT indicated that "the case may be withdrawn".

[67] During the course of the review Mr GT was invited on two occasions to withdraw his application. He nevertheless insisted that it proceed and provided voluminous correspondence which has been referred to in this decision as rambling and repetitive. The grounds for engaging the disciplinary process are difficult if impossible to identify.

[68] In the circumstances, pursuant to s 210(1) of the Act, Mr GT is ordered to pay the sum of $900 towards the costs of this review.

[69] Pursuant to s 215 of the Lawyers and Conveyancers Act 2006, the order for costs made on review may be enforced in the civil jurisdiction of the District Court.

[70] If Mr NE wishes to pursue an order for costs against Mr GT, he is invited to provide submissions in support of such an application by no later than 7 August 2019. These will be provided to Mr GT for any response that he wishes to make following receipt of which a decision will be made.

DATED this 16th day of July 2019

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D Thresher
Legal Complaints Review Officer

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

Mr GT as the Applicant
Mr NE as the Respondent
Ms WD as the Representative for the Respondent
[Area] Standards Committee [X]
New Zealand Law Society