LCRO 271/2013

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

DECISION

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

Introduction

[1] Mr [JK] has applied for a review of a decision by the [XX] Standards Committee [X] to take no further action in respect of his complaint concerning the conduct of Mr [SY].

Background

[2] Mr [JK's] complaint followed the conclusion of District Court proceedings by the [Bank] to recover loans made to two companies, [Company One] [(Co 1)] and [Company Two] [(Co 2)]. The defendants in the proceedings were Mr [JK], [MN] and [PQ].

[3] Mr [SY] acted for the [BANK] up until October 2010. He did not represent them in the pre-trial preparation or when the proceedings were tried in November 2010.

The [BANK] loans

[4] Mr [JK] is a barrister. By 2007 he had established several business ventures with Mr [MN] and [RS], an accountant. Mr [MN] operated business ventures by various companies which traded through the [XX group].

[5] In July 2007 [XXG] Limited (XXG) was incorporated to control or develop other companies within the [XXG]. Mr [MN], Mr [JK] and Mr [RS] were shareholders and directors of [XXG].

[6] Mr [MN] was then also working for [Business 1] a patent attorney, in a business development role. He was assisting Mr [Business] to develop patents and expand or market companies which Mr [Business] owned, including [CO 1] and [CO 2].

[7] During 2007 Mr [MN] was negotiating with Mr [Business] to acquire some of his companies. Mr [JK] was aware of Mr [MN]'s association with Mr [Business] and the proposal to acquire or develop the companies.

[8] Mr [MN] and the [XXG] companies were [BANK] customers. Based on a proposal provided by Mr [MN] the [BANK] had indicated a willingness to lend funds to enable Mr [MN] or [XXG] to buy or develop [CO 1] and [CO 2]. Mr [JK] was not directly involved in the funding discussions with the [BANK].

[9] On 6 February 2008 Mr [MN], Mr [JK] and [PQ], who was [XXG's] company secretary met with [BANK] representatives. During that meeting Mr [MN] discussed the funding proposal and, together with Mr [JK] and Ms [PQ], signed two [BANK] forms relating to [CO 1] and [CO 2]. The forms were a non-personal customer supplement which contained personal details and identification, and an account operating authority which recorded the type of account required, the number of authorised signatories to that account, their names and specimen signatures.

[10] The operating authorities were required before [BANK] accounts could be opened for the two companies. Mr [MN] and Mr [JK] signed them anticipating that they would each become directors and would be involved in the control and operation of [CO 1] and [CO 2].

[11] The [BANK] required loan and guarantee documents to be completed as part of the companies' funding arrangements. Before those documents were prepared Mr [MN] telephoned the [BANK] and asked for an urgent advance and for credit card authorisation. The stated purposes were to enable [CO 1] to buy three vehicles and to fund an overseas business trip.

[12] On 27 February 2008 the [BANK] advanced $70,000 to [CO 1] and activated credit cards for use by Mr [MN], Ms [PQ] and [DP]. In March 2008 the [BANK] also approved a credit line and credit card guarantee limit for [CO 1] and honoured cheques drawn on [CO 1]'s account.

[13] The [BANK] already had a guarantee from Mr [MN] and charges over various [XXG] companies. But the [BANK] advances to [CO 1] or [CO 2] occurred before those companies or other individuals had provided any loan documents or security.

[14] On 11 April 2008 the [BANK] sent Mr [MN] and Ms [PQ] a written offer to provide overdraft and business Visa facilities to [CO 1] and [CO 2]. The offer was subject to the [BANK] receiving executed securities, including personal guarantees from Mr [MN] and Mr [JK]. Subsequently, the [BANK] sent the loan and security documents to [XXG's] solicitors, [Law Firm].

[15] On 14 April 2008 [XXG's] directors, including Mr [JK] and Mr [MN] met and discussed the proposed acquisition of [CO 1] and [CO 2]. At that meeting Mr [MN] is said not to have disclosed that the [BANK] had already advanced funds and issued credit cards for both companies.

[16] In May 2008 the [BANK] approved a credit line and credit card guarantee limit for [Co 2]. In the same month [Law Firm] advised Mr [JK] to obtain independent legal advice. After receiving advice Mr [JK] declined to sign the [BANK] security documents.

[17] Mr [JK] was appointed a director of [CO 2] in June 2008 but he was never appointed a director of [CO 1]. Nor was he issued shares in either company.

[18] Although Mr [MN] was in frequent contact with Mr [Business] during this period the proposed acquisition of the companies did not proceed. From May 2008 onwards the [BANK] pressed Mr [MN] to return the executed loan documents and guarantees. The [BANK] was never in direct contact with Mr [JK] over this period.

[19] It appears that Mr [MN] may have signed the loan documents and the guarantee but these were never returned to the [BANK]. After receiving repeated excuses from Mr [MN] the [BANK]'s patience was exhausted by August 2008. It ceased providing funds or credit card facilities and took steps to recover the outstanding funds.

[20] Mr [JK] resigned as a [CO 2] director on 3 October 2008 and [CO 2] was struck off the companies register in October 2008. [XXG] was placed into liquidation in December 2008 and [CO 2] was removed from the companies register in December

2009. Mr [MN] was declared bankrupt in February 2010. The [BANK] was apparently unable to recover the advances to [CO 1] and [CO 2] from Mr [MN] or his other business interests.

The proceedings

[21] In March 2009 the [BANK] issued District Court proceedings against Mr [MN], Mr [JK] and Ms [PQ]. The statement of claim was drafted by Mr [SY] and alleged that Mr [MN], Mr [JK] and Ms [PQ] were each liable as they had no authority from [CO 1] or [CO 2] before they signed the account authorities, or when the funds were advanced to those companies. It also alleged that Mr [MN] and Ms [PQ] were separately liable for issuing or signing cheques drawn on [CO 1]'s account.

[22] The claim pleaded a cause of action in deceit against all three defendants. The basis of the deceit claim was that, by signing the account authorities in February 2008 they each falsely represented that they were authorised to open and operate accounts on behalf of [CO 1] and [CO 2] when in fact they had no such authority.

[23] In May 2009 Mr [MN] and Mr [JK] filed a joint defence denying all of the claims. Subsequently Mr [JK] instructed Mr [L1] a solicitor, and Mr [L2] QC, who appeared on his behalf at a judicial settlement conference on 22 September 2009. The correspondence suggests that due to Mr [JK's] objection to the cause of action in deceit, it was not addressed and that the conference did not achieve a resolution of the proceedings.

[24] During April 2010 Mr [L1] and Mr [L2] QC corresponded with Mr [SY] concerning the merits of the claim against Mr [JK], focussing on the deceit claim. Mr [SY] responded to the points raised in this correspondence and declined to withdraw that claim. The last step in the correspondence was Mr [L2] QC's 3 May email advising that he would take instructions on Mr [SY] email dated 28 April 2010.

[25] It also appears that a trial scheduled to begin in May 2010 was vacated, possibly due to Mr [MN]'s bankruptcy. In October 2010 the [BANK] instructed [VW] to take over conduct of its claim. By then Mr [YZ] QC was representing Mr [JK] as Mr [L2] QC had been appointed to the High Court bench. After Mr [VW] had reviewed the file he informed Mr [YZ] QC that the cause of action in deceit would not be pursued against Mr [JK] at trial.

[26] The claim against Mr [JK] and Ms [PQ] was tried before DCJ [Hammer] on [Days X and X Month 2010. Following cross-examination of [Witness X], the [BANK]'s principal witness, the [BANK] agreed to settle by withdrawing its claim against Mr [JK] and Ms [PQ] and paying some of their costs. A notice of discontinuance was filed on [Day Month] 2010.

The complaint and the Standards Committee decision

[27] Mr [JK] lodged a complaint with the New Zealand Law Society Complaints Service on 20 July 2012 which was amplified in subsequent correspondence. The substance of Mr [JK's] complaint was that:

(a) Mr [SY] drafted and filed the statement of claim which alleged that Mr [JK] had engaged in false and misleading conduct and pleaded the cause of action and based in deceit and false representation.

(b) A cause of action based in deceit is the most serious allegation that can be pleaded in a civil claim. Strict protocols have to be followed before pleading a claim in deceit and Mr [SY] was well aware of the proof and evidence that was required.

(c) Mr [JK] had denied the allegations of deceit and fraudulent behaviour and Mr [SY] ignored advice from Mr [JK's] legal advisors during the proceedings that the deceit allegation against Mr [JK] was without substance.

(d) Prior to the September 2009 judicial settlement conference Mr [SY] told Mr [RS] of his views regarding the extent of Mr [JK's] conduct. Those views did not support or fulfil the legal and evidential requirements for a cause of action based in deceit.

(e) Mr [SY] persisted with the claim in deceit at the judicial settlement conference and subsequently, until the [BANK] appointed Mr [VW] in October 2010. Shortly after his appointment Mr [VW] effectively withdrew the cause of action in deceit.

(f) Mr [SY] conduct breached rules 13.8, 13.8.1 and 13.8.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

(g) A retired High Court Judge should be appointed to investigate the complaint.

[28] Mr [SY] responded to the complaint through his counsel, [L3] QC, in correspondence beginning with Mr [L3's] letter dated 9 November 2012. Mr [SY's] response may be summarised as follows:

(a) The March 2009 statement of claim alleged that Mr [JK] completed an account operating authority and that, by so doing, he had represented that he was authorised by [CO 2] and by [CO 1] to open and operate accounts on their behalf.

(b) Before the proceedings Mr [SY] had reviewed the [BANK]'s files and interviewed employees who had dealt with Mr [MN], [XXG] and other parties at relevant times during 2008 and 2009.

(c) Mr [SY] also spoke to the solicitors representing Mr [Business] and the companies and to the directors of the companies. They told Mr [SY] that Mr [JK] was never authorised to open bank accounts or borrow money on behalf of the companies.

(d) The documents and the information provided by [BANK] staff and the companies' directors established sufficient grounds to support a claim in deceit. Mr [SY] had taken appropriate steps to ensure that grounds existed for making the allegation and to ensure that the allegation was accurate. He had complied with the requirement in rules 13.8, 13.8.1 and 13.8.2.

(e) During the merits discussions with Mr [JK's] counsel Mr [SY] had explained in his 28 April 2010 email to Mr [L2] QC the content and significance of the account operating authorities which Mr [JK] had signed. That was a sufficient response to the earlier criticism of the deceit claim and Mr [L2] QC had not responded in any detail.

(f) Mr [VW] sent a letter dated 30 May 2013 to the Committee. This recorded that he had been asked to act because Mr [SY] had been subjected to harassment, through anonymous notes and letters which the [BANK] linked with the litigation involving [CO 1] and [CO 2].

(g) Mr [VW's] letter said that he elected to withdraw the cause of action in deceit against Mr [JK] because he was happy with the main cause of action pleaded against him and the other defendants.

(h) Mr [VW's] letter also said that the decision to settle was because the evidence at trial was that most of the indebtedness had occurred through the use of Visa credit cards. Only Mr [MN] had signed the credit card application and the credit cards had only been used by Mr [MN] and Ms [PQ]. Due to Mr [MN]'s bankruptcy and Ms [PQ's] lack of resources, Mr [VW] concluded that any judgement relating to the credit card debts may not be satisfied.

(i) The settlement of the [BANK]'s claim involved a range of legal and practical considerations. No conclusion can be drawn as to the strength of those claims from the fact that the proceedings were settled.

[29] The [XX] Standards Committee [X] delivered its decision on 16 August 2013.

[30] The Committee determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) that no further action on the complaint was necessary or appropriate. In reaching that decision the Committee determined that:

(a) On the materials before it Mr [SY]:

(i) Had taken sufficient steps to ensure that reasonable grounds for making the allegations in deceit existed.

(ii) Mr [SY] could be considered to have a good cause to include the cause of action in deceit.

(b) Rule 13.8.2 was not relevant to the complaint, as Mr [JK] was in fact involved in the proceedings.

(c) It was not necessary to appoint a retired High Court Judge as an investigator.

Application for review

[31] Mr [JK] filed an application for review on 16 September 2013. No specific outcome is sought and the grounds on which the application is based are set out in Mr [JK's] letter dated 21 September 2013. Those grounds have been amplified in

subsequent correspondence in which Mr [JK] comments on Mr [SY's] response to the application and also refers to material included with the initial complaint.

[32] Mr [JK's] submissions may be summarised as follows:

(a) Mr [SY's] response to the complaint only addressed the actions he took when drafting the statement of claim. Mr [JK] says that deceit could never properly be alleged at any stage of the proceedings because there has to be probative evidence of actual fraud, not a mere suspicion of fraud to permit an allegation of deceit to be properly pleaded.

(b) As the proceedings continued it became apparent that there was no evidence to allege fraud. In particular:

(i) Before Mr [SY] issued the proceedings, he was aware that the content of [BANK]'s April 2008 loan documents was false, because before those documents were sent the [BANK] had advanced Mr [MN] and [XXG] $200,000 without security.

(ii) In September 2009 Mr [SY] advised Mr [RS], in terms that deceit was not an issue regarding Mr [JK's] actions, yet he maintained and repeated the allegations of deceit at the June 2009 settlement conference, knowing they were false and continued to do so up until he was replaced as the [BANK]'s counsel in October 2010.

(c) The Committee's finding that Mr [SY] had grounds to make allegations of deceit and false representation is in direct conflict with accepted New Zealand law, based on the approach set out in appellate decisions.

(d) The Committee appears not to have considered the documents supplied to it, and instead to have focused solely on whether Mr [SY] had the grounds to plead the statement of claim at the outset of the proceedings.

(e) Mr [SY's] actions in maintaining the deceit claim at and after the September 2009 settlement conference, despite his admission to Mr [RS] constitutes an attempt to pervert the course of justice and the Committee has not made any inquiries on that issue.

(f) The request that a retired High Court Judge investigate the claim was justified because:

(i) The complaint was made against Mr [SY], a senior partner in a well-known law firm.

(ii) The nature of the complaint and the background proceedings was complex and involved a large number of documents as well as a number of senior practitioners whose evidence should have been obtained.

(iii) Mr [SY's] response impliedly criticised Mr [L2] QC for his failure to respond to Mr [SY's] April 2010 email and Mr [L2] has since been elevated to the High Court bench.

(g) Mr [VW's] explanation for his decision not to pursue the deceit claim in and the decision to settle two days into the trial does not explain with sufficient clarity why the [BANK] took those steps and at such a late stage.

(h) Mr [SY's] reliance on the response in his 28 April 2010 email to Mr [L2] QC shows that Mr [SY] was unwilling to accept any explanation in conflict with his own reviews regarding the merits of the claim against Mr [JK] and including the deceit claim. The content of that email was discredited by [Witness X's] answers in cross-examination.

(i) The persons criticised directly or impliedly during the complaint or by the Committee's decision have not been given the chance to respond.

[33] Mr [L3] QC responded on Mr [SY's] behalf to Mr [JK's] application in a letter dated 12 December 2013 which was also amplified by subsequent correspondence to the LCRO.

[34] Mr [L3] QC submits that the Standards Committee is correct and that there is nothing for the LCRO properly to consider. In support of this submission Mr [SY] says that:

(a) If, as appears to be the case, Mr [JK] wished to introduce evidence from other parties involved in the proceedings, including Justice [L2], Mr [YZ] QC or any of the other practitioners involved in those proceedings he was able to do so as part of his complaint.

(b) Whether Mr [SY] breached any relevant rule was answered by the Committee's consideration of the steps which Mr [SY] took before and

during the proceedings to satisfy himself that the allegations and in particular the cause of action in deceit were properly made.

(c) The Committee provided Mr [JK] with the opportunity to amplify his complaint and Mr [JK] did so before the Committee issued its decision. As a result, Mr [JK's] submission that the Committee only considered the grounds which existed before the cause of action in deceit was first pleaded is incorrect.

Nature and Scope of Review

[35] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[1]

> … 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.

[36] More recently, the High Court has described a review by this Office in the following way:[2]

> 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.

[37] 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:

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[1] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].
[2] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

(a) Consider all of the available material afresh, including the Committee's decision; and

(b) Provide an independent opinion based on those materials.

Review on the papers

[38] In an email and a letter respectively dated 14 and 19 May 2014 Mr [JK] and Mr [SY] agreed to the review being dealt with on the papers. This review has been undertaken on the papers pursuant to s 206(2) of the Act. The on the papers hearing process allows a Review Officer to conduct the review on the basis of all the information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

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

Analysis

[40] Mr [JK's] application is detailed and is supported by a comprehensive analysis of appellate cases which have considered the factual and legal basis for a cause of action in deceit, and the circumstances in which such a claim can succeed. Mr [JK] criticises the Committee for not conducting a proper and effective investigation and says that, had the Committee done so, it would have upheld his complaint against Mr [SY].

[41] It is common ground that:

(a) Mr [JK] was aware that Mr [MN] was negotiating with Mr [Business] to purchase [CO 1] and [CO 2] but by February 2008 those negotiations had not reached the stage where Mr [MN] had control of those companies or could act on their behalf.

(b) Mr [JK] signed the non-personal customer supplement and account operating authoring authority forms for [CO 1] and [CO 2] before the [BANK] advanced any funds to either of those companies.

(c) Mr [JK] was neither a director nor shareholder in either company when he signed the [BANK] forms. He was not appointed as a director of [CO 2] until June 2008 and had no connection with [CO 1].

(d) After the [BANK] opened accounts for the two companies it advanced substantial funds and issued credit cards without ever obtaining executed security documents or guarantees for that lending.

(e) Mr [JK] was never informed or made aware that the [BANK] had advanced funds and issued credit cards to the two companies until the [BANK] took steps to recover those funds.

(f) Mr [JK] never signed any of the [BANK] security documents and received no personal benefit from that lending.

[42] The explanation appears to be that Mr [MN] misled the [BANK] into advancing the funds and that he kept this information from Mr [JK]. The [BANK] was persuaded to advance funds and authorise the use of credit cards without first obtaining executed security documents or guarantees. After Mr [MN]'s attempts to acquire the two companies failed the [BANK] had no effective security to enforce when it decided to take steps to recover the advances. Its deceit claim was based on the two documents which Mr [MN], Mr [JK] and Ms [PQ] signed in February 2008.

[43] The application must be considered against this background. Mr [JK] says that Mr [SY] breached rule 13.8 because initially there were no sufficient grounds to plead a claim based on deceit, and as the proceedings continued and Mr [JK's] legal representatives articulated his criticism of the deceit claim there was no justification for persevering with that claim.

[44] I accept that, as the [BANK]'s counsel, Mr [SY] was obliged to ensure that there were sufficient grounds for its pleaded claim. I also accept that an allegation of deceit is tantamount to fraud and falls within the term *"reprehensible conduct"* in rule 13.8.1, which places a specific onus on any practitioner who pleads a cause of action in deceit to ensure that reasonable grounds exist to make such an allegation.

[45] Before the [BANK] proceedings were commenced Mr [SY] had interviewed the [BANK] staff, Mr [Business] and other people involved with the two companies during 2008 as well as the companies' solicitors. The outcome of those interviews was that Mr [JK] was never authorised by the companies to sign the [BANK] forms in February 2008.

[46] This information called into question the statements made in those forms that Mr [JK] was an authorised signatory on behalf of the companies and that he had authority to sign cheques and other documents on the companies' behalf. Consequently, I consider that Mr [SY] satisfied the obligation under rule 13.8.1 to take reasonable steps before pleading a cause of action in deceit against Mr [JK] when the proceedings were issued in March 2009.

[47] Mr [JK] criticises Mr [SY] for persisting with the deceit claim at a settlement conference in September 2009. The correspondence does not record that by the time of this conference Mr [JK] or his legal representatives had articulated their criticism of the deceit claim in correspondence with Mr [SY]. However, Mr [JK] relies on a conversation between Mr [SY] and Mr [RS] at around this time, during which Mr [SY] is alleged to have conceded that Mr [JK's] involvement in the events leading to the advances to the two companies may have fallen short of the threshold required to plead a deceit claim.

[48] Mr [SY] has not denied speaking with Mr [RS] but denies that he made any such concession. Mr [JK's] response was to say that the Committee should have taken steps to obtain evidence from Mr [RS].

[49] I do not consider that Mr [JK]'s submission on this point is correct. There is an onus on a party involved in either a complaint to the Committee or an application to the LCRO to produce evidence. Mr [JK] had the opportunity to obtain a statement from Mr [RS] supporting Mr [JK's] version of the conversation but has not done so. In the absence of any independent evidence from Mr [RS] as to his conversation with Mr [SY], and taking into account Mr [SY's] denial, I am unable to accept that Mr [SY] made the concession as alleged by Mr [JK].

[50] The criticism of the deceit claim appears to have intensified in mid 2010 and was articulated in correspondence to Mr [SY] from Mr [L1] and Mr [L2] QC from April 2010 onwards. That correspondence appears to have begun in April 2010 and consisted mainly of emails between Mr [L2] QC and Mr [SY]. It discussed and analysed the events and documents which Mr [JK] relied on to demonstrate that Mr [MN] was authorised to act on behalf of the two companies and that Mr [JK] was entitled to sign the [BANK] forms in February 2008.

[51] Mr [SY], for the [BANK] challenged Mr [JK's] actions and reliance on specific documents. The last step in this correspondence was Mr [L2] QC's brief email dated 3 May 2010 which indicated that he would obtain Mr [JK's] views on Mr [SY's] detailed criticism of Mr [JK's] position.

[52] Although Mr [JK] through his legal representatives had more fully articulated his criticism of the deceit claim he had not addressed or disposed Mr [SY's] justification for maintaining that claim. If, as appears to have been the case, Mr [SY] received no substantive response to his 28 April 2010 email I consider that he was entitled to conclude that, although his stated grounds for pleading deceit had been challenged, they had not been shown to have been incorrect or demonstrably wrong and that it was reasonable to maintain the deceit claim. I do not consider that Mr [SY's] election to persist with the allegation in deceit at this stage was in breach of rule 13.8.1 or 13.8.2.

[53] The final stage in which Mr [JK's] complaint must be considered is the period from mid 2010 up until the conclusion of the trial in November 2010. This period included the second amendment to the [BANK]'s pleaded claim which repeated the cause of action in deceit, Mr [VW's] appointment as [BANK]'s counsel and the conduct of the trial. It appears to me that this is the period where, at face value, Mr [JK's] complaint appears to have some justification.

[54] By then Mr [SY] was well aware of Mr [JK's] response and attitude to the deceit claim. Despite this the deceit claim was included in the [BANK]'s amended statement of claim served in October 2008. But once Mr [VW] was appointed and had reviewed the evidence he concluded that the [BANK] did not need to pursue the deceit claim. A review of the transcript of evidence from the trial shows that the answers given by [Witness X] in cross-examination undermined the grounds relied on for the deceit claim.

[55] It is not disputed that an allegation of deceit is similar to an allegation of fraud and requires specific and sufficient factual and legal foundation before it can be properly pleaded. I accept that the inclusion of this cause of action in the [BANK]'s claim irritated, if not incensed, Mr [JK] and that he objected to it from the start. However, the obligation placed on a practitioner pleading deceit under rules 13.8 and 13.8.1 is to ensure that reasonable grounds exist for such an allegation and that it is accurate, and such an allegation is necessary for the conduct of litigation. In my opinion that obligation does not amount to being satisfied that such an allegation will succeed.

[56] For the following reasons I do not consider that in pleading and persisting with this cause of action in deceit up until he was replaced as [BANK]'s counsel by Mr [VW], Mr [SY] breached rules 13.8 and 13.8.1:

(a) Up until Mr [VW's] appointment as [BANK]'s counsel, there is no evidence to suggest that Mr [JK's] reaction and analysis of the deceit

claim had progressed significantly beyond the April 2010 email correspondence between his counsel and Mr [SY]. In that case, Mr [SY] was entitled to maintain the view that the deceit claim was justified.

(b) [Witness X's] answers in cross-examination effectively undermined the deceit claim. But that event occurred well after Mr [SY] had ceased to act for the [BANK]. There is no evidence or information to suggest that, when he was representing the [BANK], Mr [SY] was aware or should have foreseen that [Witness X's] evidence would be unable to support the deceit claim.

(c) In some respects Mr [VW's] letter is unsatisfactory. It does not say when exactly he began to act for the [BANK] in the proceedings. His explanation for the bank's decision not to prosecute the deceit claim at trial appears strained. The explanation for the decision to settle also appears to gloss over the fact that the conclusion prompting that decision could have been properly made at an earlier stage in the proceedings.

(d) However, those events, namely the late decision not to proceed with the deceit claim and the subsequent settlement, do not of themselves, or when combined with the other information that was available to Mr [SY] when he represented the [BANK], are not sufficient to demonstrate that the allegation of deceit was bound to fail or was improperly pleaded and maintained.

[57] The review application contains no good reason to take a different view from the Committee, and I am unable to identify any other reason to reach a different conclusion. The Committee's decision is therefore confirmed**.**

Decision

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

DATED this 9th day of September 2016

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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:

[JK] as the Applicant
[L4] as the Representative of the Applicant
[SY] as the Respondent
[L3] QC as the Representative of the Respondent
[XXX] as a related person as per section 213
[XX] Standards Committee [X]
New Zealand Law Society