LCRO 86/2015

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of a Standards Committee
BETWEEN	**LH** Applicant
AND	**NT** Respondent

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

Introduction

[1] Mr LH has applied for a review of the determination by a Standards Committee to take no further action in respect of his complaints about Mr NT's fees and the advice provided by Mr NT in relation to litigation concerning the home owned by Mr LH and his wife, which they discovered had weathertightness issues.

Background

[2] The facts of the matter are somewhat complex and although they are set out in the decision of the Standards Committee, it is necessary to outline them here.

[3] Mr and Mrs LH purchased the property in 2003. A few years later, they discovered that the property was not weathertight and in early 2011 they brought a claim under the Weathertight Homes Resolution Services Act 2006. As part of that process, Mr and Mrs LH applied for an assessor's report in which the assessor advised they had a viable claim.

[4] Mr and Mrs LH instructed [Law Firm A] to act for them and proceedings were drafted. Before the proceedings were issued Mr and Mrs LH engaged Mr NT (in April 2013) to act for them. On Mr NT's advice, Mr and Mrs LH commenced adjudication proceedings in the Weathertight Homes Tribunal in June 2013.

[5] At the first procedural conference in July 2013 Mr NT was directed to file an amended statement of claim to address the issue of a possible time bar to the claim, and an application by the developers and builders of the property (Mr MD and Ms QV) to be removed as parties to the adjudication.

[6] The Building Act 2004 provides that civil proceedings relating to building work may not be brought more than 10 years after the work has been done. The relevant date for Mr and Mrs LH's claim was 17 January 2001, being the date 10 years prior to the date on which they had applied for the assessor's report. Consequently, Mr and Mrs LH were only able to bring an action in respect of 'building work' that had been completed after 17 January 2001.

[7] Mr NT therefore sought an opinion from a firm of building surveyors as to what work had been completed after that date. The surveyors advised it was unclear what, if any, building work had been completed after that date (although it was clear that the final inspection of the building work and the issue of the code compliance certificate occurred after this date) and that the claim against Mr MD and Ms QV was tenuous.

[8] Mr NT advised Mr LH that the limitation issue was "insoluble and unsolvable". Nonetheless, Mr LH wished to oppose the application by Mr MD and Ms QV. Mr NT advised Mr and Mrs LH to oppose Mr MD and Ms QV's application to be removed from the proceeding in their role as developers, but not to oppose Mr MD's application to be removed in his role as builder of the property.

[9] On 23 September 2013 the Weathertight Homes Tribunal (WHT) issued an order removing Mr MD and Ms QV as parties to the proceeding on the basis that there was no tenable claim against them. On instructions from Mr and Mrs LH, Mr NT lodged an appeal against that order in the High Court. Due to the novelty of the grounds of appeal, and there being no right of appeal from the High Court, the Court transferred the proceedings to the Court of Appeal.

[10] Mr LH subsequently obtained a second opinion from another firm of building surveyors. Mr NT believed that the second opinion was not helpful and he and Mr LH disagreed over the extent to which this further opinion assisted Mr LH's legal argument. Mr LH then obtained advice from Mr NW of [Law Firm B], who had a different view of

the case to that of Mr NT. Mr LH terminated Mr NT's retainer in July 2014 and engaged Mr NW.

[11] Mr NW filed submissions in the Court of Appeal in July 2014. Mr MD and Ms QV did not oppose the appeal and ultimately the appeal succeeded without the need for a hearing.

[12] Around October 2014 Mr LH complained to Mr NT about his fees. Mr NT believed his fees were fair and reasonable and Mr LH then filed a complaint with the Lawyers Complaints Service. Mr LH complained that Mr NT's fees were unreasonable and that he had failed to properly represent Mr LH's interests.

The Standards Committee determination

[13] The Standards Committee determined to take no further action on Mr LH's complaints on the grounds that there was no evidence Mr NT had acted in an incompetent manner and that Mr NT's fees were fair and reasonable.

[14] Mr LH continues to hold the view that Mr NT's advice was incompetent and that consequently incurred unnecessary legal, professional and Court fees.

Review

Allegation of incorrect advice and negligence

[15] Allegations of negligence fall to be determined by the courts. Instead of pursuing a claim of negligence through the court, Mr LH complained to the Lawyers Complaints Service. The Standards Committee, and now this Office on review, must consider whether or not Mr NT has met the professional standards required of him by the Lawyers and Conveyancers Act 2006 and the Conduct and Client Care Rules.[1]

[16] "Unsatisfactory conduct" is defined in s12(a) of the Lawyers and Conveyancers Act as being conduct which "falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonable competent lawyer." Rule 3 of the Conduct and Client Care Rules requires a lawyer to "act competently".

[1] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[17] The only reference to "negligence" in the Lawyers and Conveyancers Act is in s 241, which refers to "negligence or incompetence ...of such a degree or so frequent as to reflect on [a lawyer's] fitness to practice."

[18] The complaints and disciplinary regime established under Part 7 of the Lawyers and Conveyancers Act must not be regarded as being a substitute for an action in negligence, and it must be emphasised that "unsatisfactory conduct" as defined in the Act and "negligence," are not interchangeable terms. In an (as yet) unpublished decision I made the following comments:[2]

> The tort of negligence has been developed by the courts over centuries and it is only necessary to pay a cursory glance to any text book on the law of negligence to realise that it does not follow as a simple fact, that if a lawyer's conduct is adjudged to be unsatisfactory conduct in terms of the Lawyers and Conveyancers Act, then he or she is ipso facto negligent. Similarly, the reverse also applies.
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> I refer for example to *The Law of Torts in New Zealand* where the author states:[3]
>
> > This broad notion of carelessness is undoubtedly an integral part of negligence as a foundation for legal liability, but other elements are also involved. If one or more of those elements is lacking then an action will fail, even though the defendant may have been careless, even grossly so, in a popular sense.
>
> It is misleading to suggest that the principles of negligence are the touchstones for a finding of unsatisfactory conduct …

[19] The success or otherwise of Mr and Mrs LH's claim rested upon the need to establish that work on the building had been carried out after 17 January 2001. Mr NT recognised this and sought the opinion of a reputable building surveying company, [Company C], on this point. The surveyor's opinion was that there was no evidence that any building work was actually undertaken after this date. As such, Mr NT advised Mr LH that that there was no 'in time' building work to enable a viable claim against Mr MD as the builder of the property.

[20] Mr LH sought an opinion from another surveyor. On page three of his report of 20 December 2013, that surveyor advised Mr LH that:

> It is not possible for me to confirm that building work carried out between June 2000 and the 18th of January 2001 was not complete, and that building work continued after that date.

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[2] LCRO 249/2012 at [33] – [35].
[3] Stephen Todd (ed), *The Law of Torts in New Zealand* (6th ed, Thomson Reuters, Wellington, 2013) at [5.1].

[21] The surveyor reiterated this point to Mr LH by email on 6 January 2014, saying that "I cannot confirm that any building work was within time."

[22] Mr LH continued to believe that he had an arguable case on the basis that the producer statements issued within the 10 year time limit constituted 'building work' for the purpose of the Building Act 2004. Mr NT explained to Mr LH that although the producer statements could constitute 'building work', Mr LH did not have an arguable case that these had been negligently issued for the following reasons:

(a) The limitation period of six years to file a claim for negligent misstatement.

(b) There was insufficient legal proximity between Mr LH and Mr MD, because Mr MD did not assume any responsibility towards Mr LH (as a subsequent purchaser) when he issued the statements; and

(c) Mr LH did not rely on the statements when he purchased the property, so he could not claim to have been induced by them.

[23] Despite the expert opinions of the surveyors, Mr LH continued to believe that he had a strong case against Mr MD. On 23 September 2013 the WHT was unpersuaded by this argument and removed Mr MD and Ms QV from the proceeding. Mr NT appealed the WHT's decision to the High Court.

[24] Mr NT suggested they should obtain a second opinion on the matter. Mr LH agreed and an opinion was sought from Mr YN. Mr YN's view was that Mr NT's submission (that the developer of a property owed a non-delegable duty of care to subsequent owners of a property for the inspections carried out by a private certifier) was "an ambitious argument."[4] He suggested ways for Mr NT to develop his submission, and Mr NT incorporated Mr YN's suggestions into his submissions. Mr NT advises that Mr YN did not render an account for this opinion.

[25] Due to the novelty of the 'non-delegable' argument, and there being no right of appeal of a WHT matter from the High Court, the High Court (somewhat unexpectedly) decided to refer the matter to the Court of Appeal. This transfer of jurisdiction suggests there was a degree of complexity around the matter.

[26] Mr LH then sought advice from another lawyer, Mr NW of [Law Firm B]. Mr NW had a different view of the case from Mr NT. Mr LH saw this difference of opinion

[4] Email YN to NT (11 February 2014).

as evidence that Mr NT's advice was not only wrong, but incompetent. Mr LH failed to appreciate that a difference of opinion between lawyers is not only possible, but reasonable and common – every civil law matter that reaches a hearing in Court has done so because the lawyers on both sides believe that their argument is the better one.

[27] Mr NT prepared submissions for the High Court but at that stage Mr LH withdrew his instructions and instructed Mr NW. As noted above, the appeal succeeded due to the fact that the respondents made the decision not to oppose it.

[28] I have referred briefly to the work undertaken by Mr NT and the development by him of the legal argument which was not opposed by Mr MD and Ms QV. It cannot be said that the regulated services provided by Mr NT fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

Mr NT's fees

[29] Mr NT rendered 13 bills of costs on a monthly basis to Mr and Mrs LH during the period of his instructions. The invoices total $44,357.61 (inclusive of disbursements and GST). It is relevant to note that Mr LH did not complain about the level of Mr NT's fees when the invoices were rendered. In addition, when Mr NT raised concerns in October 2013 about the unpaid fees, Mr LH apologised and committed to paying the outstanding amount within the month.[5]

[30] I also note that Mr NT delivered his files to Mr NW against Mr NW's undertaking that Mr NT's fees would be paid in priority to his own. This was not a commitment to paying Mr NT's fees, and Mr NT therefore compromised his position so that Mr and Mrs LH (and Mr NW) were not prejudiced in continuing with the appeal. This is not a criticism of Mr NW, and he presumably had some discussion with Mr LH before giving the limited undertaking he did. Mr NT would quite justifiably be entitled to be somewhat dismayed and offended by the apparent betrayal of his goodwill.

[31] Mr LH paid $20,223.89 but argued that he "should not be expected to bear the burden of [Mr NT's] litigation choice."[6] In essence, Mr LH complains that the litigation strategy adopted by Mr NT was inappropriate and that the costs of that strategy should not be borne by him.

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[5] Email LH to NT (6 October 2013).
[6] Email LH to NZW (10 October 2014).

[32] The limitation issue was quite obviously far from straightforward and there were divergent opinions on it. Mr NT's view was clearly one which was reasonable to take.

[33] The Committee took particular note of the following "reasonable fee factors" set out in Rule 9.1 of the Conduct and Client Care Rules, in determining that Mr NT's fees were fair and reasonable:

> (a) time and labour expended
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> (b) skill, specialised knowledge and responsibility …:
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> …
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> (f) complexity … and … novelty …:
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> …
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> (m) … market [forces].

[34] It is clear that Mr LH was a client who contacted Mr NT on a very frequent basis – each of those contacts required a response from Mr NT. Mr NT advised Mr LH that him responding in this manner was incurring further fees.

[35] The argument of a non-delegable duty of care owed by Mr MD to Mr LH was a novel one, with no clear supporting case law being available. It is therefore foreseeable and reasonable that Mr NT would have needed to do a greater amount of legal research and preparation than he would otherwise have done in respect of a straightforward matter. Mr NT prepared not only for the High Court hearing but also for the matter to be heard by the Court of Appeal.

[36] Far from making any adjustments upwards to the value of his time as the relevant factors would permit, Mr NT discounted his fees from the value of his time by $9,853.

Conclusion

[37] In conclusion, I come to the same view as the Standards Committee, that Mr NT's fees were fair and reasonable.

Decision

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

DATED this 20th day of April 2016

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O W J Vaughan
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 LH as the Applicant
Mr NT as the Respondent
Mr BS as a Related Person
The Standards Committee
The New Zealand Law Society