

CONCERNING

An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of the Manawatu Standards Committee

BETWEEN

KV
Of North Island
Applicant

AND

WC
of North Island
Respondent

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

DECISION

[1] WC (the Practitioner) acted for KV (the Applicant) in 2005 in relation to the purchase of a house. The sale and purchase contract included a special condition that the vendor was to put drainage at the rear of the house where excess water was sitting, and provided that the sum of \$1,000.00 could be deducted from settlement should that not be done before settlement. Settlement was scheduled for 30 September 2005.

[2] Subsequently (some years later) the Applicant incurred further expense in dealing with the water problem which included installing a draining system.

[3] In February 2011 the Applicant filed a complaint with the New Zealand Law Society (NZLS) against the Practitioner. She informed the NZLS that only in August 2010 did she realise that she could have had the sum of \$1,000.00 deducted from settlement if the drain had not been put in at the rear of the house. She informed the NZLS that she phoned the Practitioner at the end of August 2010 informing him that this work was incomplete, and that his written response in September 2010 put the

blame on her, contending that he had checked with her after she had moved in (or took the key) that everything was okay.

[4] The Applicant said the Practitioner should have checked before she moved in not after. She said that the public relies on lawyers to check on clauses in sale deals, and she claimed he had not checked until she had moved in. The Applicant said that between 2006 and 2009 she addressed the water problem at the end of her section, and paid to have the matter rectified. She had wanted the Practitioner to pay her back \$1,000.00 but he had refused. She said when she moved in to the house in December 2005 there was no rain and the excess water only showed up in the winter.

[5] The complaint was notified to the Practitioner. He pointed out that the Applicant was aware of the clause in the Sale and Purchase Agreement because she had placed her signature against that clause. He disputed that he had not taken steps to address the matter of drainage with the Applicant prior to her moving in. The Practitioner referred to file notes that were on his file (which he had retrieved from his archives). The two pertinent file notes were dated 28 September 2005, and 30 September 2005.

[6] *The 28 September file note:* This note recorded his meeting with the Applicant on 28 September, two days before the settlement, and noted a specific discussion with her about the extra drainage work and that she “may want to withhold \$1,000.00 for this.” On the second page of that file note the Practitioner had noted two telephone discussions with the vendor’s lawyers about the drainage work, recording advice from the vendor’s lawyers that their client had “put in a gulley for the drainage of excess water”.

[7] *The 30 September file note:* This file note recorded events on the settlement day but prior to settlement. It noted that the Applicant had inspected the property and remained unhappy about the water problem at the back of the land, and her discussions with the builder and the land agent that same morning, and their advice to her. The note recorded that the Applicant had asked the Practitioner to talk with the vendor’s lawyer, and his response that the lawyer would probably repeat the builder’s advice to her (presumably that a drain had been installed), and his advice that settlement should proceed on a without prejudice to her rights under the contract, which would allow her to recover any costs from the builder in the event of a problem. It seems that the Applicant had indicated that she was unlikely to litigate but her preference for going to Fair Go was mentioned, and the note finally recorded the Applicant’s instruction to settle the transaction.

[8] These matters were noted by the Standards Committee in its decision. The Committee accepted that there had been a discussion between the Applicant and the Practitioner prior to settlement, that there was no basis for the \$1,000.00 retention in the light of the vendors advice (conveyed by his lawyer) that the drainage work was done, and that the Practitioner's "without prejudice" settlement protected the Applicant's position in the event that the drainage had not been done, or not been properly done.

[9] In these circumstances the Standards Committee took the view that no further action should be taken because the Committee could find no evidence of unsatisfactory conduct on the part of the Practitioner, and the Applicant had an adequate remedy against the vendor in respect of the drainage work.

Review Application

[10] The Applicant sought a review of the Standards Committee decision. A review hearing was held on 16 November 2011, attended by the Applicant only. The LCRO guidelines set out the usual circumstances in which an Applicant - only hearing will be conducted. In this case it was my initial assessment that the Practitioner had responded fully to the complaint and that his presence was not required at this stage.

[11] The review hearing provided the opportunity for a full discussion with the Applicant on these matters. She submitted that the Practitioner ought to have retained the sum of \$1,000.00 in case the drain that had not been put in, adding that the vendor's lawyers should prove that their client had done the job, and to provide receipts of purchase for the materials relating to the drain. She blamed the Practitioner for not having taken steps to do a thorough check about whether the drain had, or had not, been put in.

[12] She did not believe the content of the file notes that the Practitioner had sent to the Standards Committee, calling them "a load of rubbish", and overall claimed that the Practitioner had not protected her interests. She said that as a member of the public, she looked to the lawyer to protect her interests and he had failed her.

Considerations

[13] The Applicant agreed that she was aware of the retention monies as provided by the purchase contract. She had no prior knowledge of the Practitioner's file notes. The Applicant had also stated, in her review application, that the Practitioner did not like to see her making an enemy with the builder and his lawyers.

[14] The Applicant explained that she has not been well served by lawyers, which she attributes to being [ethnic] and a woman on her own unprotected by a man. She explained that over a number of years she has instructed various lawyers, and on each occasion she has felt dissatisfied with the services she received. She describes her contact with lawyers in terms of being patronised and not taken seriously. Her general comments were not confined to the complaint under consideration in this review, but extended to other matters involving other lawyers.

[15] In relation to the house purchase she complained that cracks have since appeared in the house, and that the report of a structural engineer had concluded that the cracks were related to an inadequate foundation for the house. She described the difficulties she has faced in having the problem rectified, both in contacts with the builder, the engineers, and lawyers who she has approached in regard to the matter.

[16] The Applicant has clearly felt significantly disadvantaged in fighting her battles on her own and has struggled to achieve justice with regard to various matters. In respect of the house in question, she correctly separates the matter of the drainage (the subject of her complaint against the Practitioner) from cracks that she subsequently observed in 2007. However, she explained these matters in terms of a recurring experience with professionals, including lawyers, where she was not taken seriously and found little support from those whose assistance she has sought.

[17] This review deals only with the complaint against the Practitioner in relation to the fact that no retention money was withheld at settlement. The Applicant accepted that the review was confined to this issue.

[18] I put it to the Applicant that there were two issues involved in this review. The first was whether the Practitioner failed in his professional responsibilities towards her, and the second was that if there had been such a failure, whether that failure met the required threshold for an adverse disciplinary finding against him.

[19] I explained that the conduct complained of occurred prior to 1 August 2008 when the new professional standards came into force under the new Lawyers and Conveyancers Act 2006. This meant that the old rules that governed professional standards under the Law Practitioners Act 1982 applied, and (with reference to section 351 of the Lawyers and Conveyancers Act 2006) that the jurisdiction of the NZLS to consider the complaint depended on whether the conduct was capable of leading to disciplinary action being taken against the Practitioner. This was a materially higher

threshold than now exists under the Lawyers and Conveyancers Act. I also explained to her that she had the burden of proving that the Practitioner had in fact failed.

[20] I put it to the Applicant that the file notes were consistent with the usual practice in conveyancing matters; that the Practitioner's reliance on advice of the vendor's lawyer could not amount to a professional failure, and that it was not usually the case that the Practitioner should seek the kind of detailed evidence (for the drain) that she had referred to.

[21] The Practitioner had clearly been aware of her outstanding concerns about the drainage, and for that reason had protected her position by settling on a "without prejudice" basis. This meant that in the event the drainage was not done, or not done properly, the Applicant could then have pursued the matter against the vendor. There is nothing to suggest that the Practitioner would not have assisted her in this matter.

[22] However, the Applicant waited five years before raising the matter again with the Practitioner. She had meanwhile taken no action against the vendor (a developer) but had expended the sum \$18,000.00 to remedy the drain problem. She said that when the drain was installed by her own contractors, they could find no trace of a prior drain having been inserted. I explained to the Applicant that in the circumstances she had a remedy against the vendor because the Practitioner had preserved that right.

[23] The Applicant was unwilling to accept that the Practitioner had taken all proper steps to protect her interests. However, the review issue is whether the Standards Committee was correct in taking the view that it did.

[24] Having considered all of the information on the file, and having heard from the Applicant, it is my view that it was open to the Standards Committee to have decided to take no further action.

[25] Although the Committee concluded that the Practitioner had not failed in his professional obligations to the Applicant (a conclusion I agree with), the correct approach would have been to have declined jurisdiction under section 351 of the Lawyers and Conveyancers Act 2006. The jurisdiction of a Standards Committee arises only in respect of conduct that could have led to disciplinary proceedings against the practitioner under the Law Practitioner Act. The threshold for a disciplinary proceeding requires evidence of negligence or incompetence of such a degree or so frequent as to reflect on his fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute. In my view there is no part of the Practitioner's conduct reached this threshold.

[26] At the hearing I explained to the Applicant the reasons why there was no proper basis for taking a different view from that taken by the Standards Committee.

Decision

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

DATED this 15th day of February 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:

KV as the Applicant
WC as the Respondent
The Manawatu Standards Committee
The New Zealand Law Society