LCRO 109/2010

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Otago Standards Committee
BETWEEN	**Mr NAIRN** of Dunedin Applicant
AND	**Mr PEEBLES** of Dunedin Respondent

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

DECISION

[1] The New Zealand Law Society received and investigated a complaint made by Mr Nairn (the Applicant) against Mr Peebles (the Practitioner) and decided, pursuant to Section 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) to take no further action. This section confers a discretion on a Standards Committee to take no further action on a complaint if it appears that further action is unnecessary or inappropriate.

[2] The Applicant sought a review because he considered that the Standards Committee had based its decision on a mistake of fact. He did not agree with the outcome, as he felt keenly that the Practitioner was responsible for the costs arising from a delayed settlement in respect of the sale of his property. A Review Hearing took place on 26 November 2010, and was attended by both parties.

Background

[3] The Practitioner had acted for the Applicant and his wife in the sale of a rental property they owned. The Sale and Purchase Agreement had been prepared by a Real Estate Agent (REA) and was signed by the time it reached the Practitioner. The contract included two Certificates of Title, one comprising only nine square metres of the land which was defective insofar as it had not been transferred into the names of the Applicant and his wife when they purchased the property. At the time of selling the property this was known to the Applicant who had earlier obtained a legal opinion (from another law firm) concerning the matter. The Applicant explained that when negotiating the sale the purchasers had agreed to buy the property on an 'as is' basis, that is to say, to assume responsibility for any remedial action in relation to the title. However, this was not recorded in the Sale and Purchase Agreement, and therefore the contract that arrived on the desk of the Practitioner gave no indication that one of the two Certificates of Title mentioned in the contract was defective, or that the purchasers had agreed to accept the title with the defect.

[4] The contract was conditional upon the vendor undertaking a due diligence enquiry, a condition that was to be fulfilled by 6 July 2009. The purchaser made two requests for extensions of time which were granted and the contract become unconditional on 24 July 2009. The settlement date of 31 July remained unchanged.

[5] On 24 July, after being informed that the contract was now unconditional, the Practitioner obtained search copies of the Certificates of Title and discovered that one of the titles was not in the name of the Applicant and his wife. There followed a flurry of activity to address the issue, which involved a number of complicated steps because the registered proprietor, a company, had meanwhile been struck-off. Steps were taken to restore the company to the Companies register so that it could transfer of the title to the vendors. The resulting delays in settlement caused the vendors additional costs, not only in relation to the late settlement but also the costs involved with remedying the problem.

The Complaint

[6] The Applicant complained that the Practitioner had failed to protect his interests and had been negligent. He accepted that the Sale and Purchase Agreement did not specifically include a provision the purchasers accepted the property 'as is', but held the view the Practitioner had been aware of the defective title as early as 23 June, and that the Practitioner had done nothing for the 28 days while waiting for the contract to become unconditional. He held the Practitioner responsible for the additional costs arising from delayed settlement and remedial costs associated with the title. In his

view the Practitioner ought to either have taken earlier steps to sort out the defective title, or arranged a later settlement date when granting the extensions, either option would have allowed greater time to remedy the matter. He also expressed the view that the contract could have been renegotiated.

Practitioner's response to the Standards Committee

[7] The Practitioner's response to the complaint (his letter of 18 November 2009 to the New Zealand Law Society) was that on receiving the Sale and Purchase Agreement he had searched the titles and become aware of the problem, and in a telephone discussion the Applicant had told him that the purchasers had taken responsibility for correcting the problems. The Practitioner added that he advised the Applicant that there was nothing to that effect in the written contract, but they (the Applicant and his wife) had remained adamant that the REA and the purchaser were fully aware that the property was being purchased "as is" in relation to that Certificate of Title. The Practitioner added that only when the contract was declared unconditional (on 24 July) did the purchaser's solicitor raised the question of correcting the defective title. He said that he then immediately sought further instructions from the Applicant in relation to the title, at that time becoming aware of a legal opinion that the Applicant had obtained at an earlier date in relation to the matter.

[8] The Practitioner said he then took immediate steps to implement the remedial proposal as outlined in the legal opinion forwarded to him by the Applicant. The Practitioner said that on the basis of the Applicant's advice he had no reason to take any action at an earlier stage.

[9] He added that the Applicant and his wife were unhappy with the arrangements for partial settlement but settlement was finally concluded some two months later when the defective Certificate of Title was able to be transferred to the purchaser's name. Overall, the Practitioner refuted any responsibilities for what had gone wrong, and did not accept that he had been negligent in any way, and expressed surprise to find himself as the alleged cause of the mess.

Applicant's comments on the Practitioner's response

[10] The Applicant disputed the Practitioner's advice to the Standards Committee. He denied that there had been any telephone contact between them about the defective title until 24 July, this being the day the contract became unconditional. He explained that when the contract became unconditional there had been the first (and only) conversation between them concerning the defective title and the purchasers'

agreement to take the title as is. He was concerned that the Committee had erroneously accepted the Practitioner's evidence.

[11] The Applicant nevertheless argued that the Practitioner knew that the title was defective because a letter sent to the Practitioner by the purchaser's lawyer on 23 June had "*highlighted the issue".*

Practitioner's clarification at the review

[12] The review hearing appeared to have assisted the Practitioner's recollection in the matter. After a closer examination of his file he modified his earlier evidence, and now accepted that there had been no telephone discussion with the Applicant at the earlier time, concerning the title or the oral agreement with the purchaser. This accorded with the Applicant's denial throughout that any such conversation had occurred prior to the 24 July.

[13] The Practitioner clarified that he had not in fact searched the certificates of title when the Sale and Purchase Agreement was received by his firm. His recollection was assisted by the search dates shown on the search copies as having been obtained on 24 July. This was the day that the contract was declared unconditional. The Practitioner continued that he then had the telephone discussion with the Applicant (this accords with the Applicant's account) and this is when they had a discussion concerning the title, and when the Practitioner learned of the Applicant's awareness of the title problem, that the Applicant had a legal opinion in his possession concerning the matter, and also when the Applicant informed him of the 'gentleman's agreement' that the purchasers would take over the property 'as is'. The Practitioner said he asked for a copy of the legal opinion to be forwarded, which had been of assistance in formulating appropriate action to remedy the matter, and thereafter he took steps necessary to achieve a transfer of the Certificates of Title to his client's name.

[14] The Practitioner thus confirmed that he knew nothing of the defective title until the 24 July 2009, when he received advice from the purchaser's solicitors that the contract was unconditional (including a reference to the defective title), and that his search of the titles on that day disclosed the problem to him. He explained, with reference to his file, why the action taken could not have been done any sooner, and that the remedial action had been done as quickly as time could have permitted.

[15] The Practitioner denied that the 23 June letter he received from the purchaser's lawyer had mentioned the defective title, or that it could have alerted him to the problem.

Considerations

[16] The Applicant and his wife knew that one of the titles was defective when they went to sell the property. They had already obtained a legal opinion about the problem, which included various options for remedying the matter. The Applicant had understood that when selling the house the purchaser would take responsibility for the defective title and accept it on an "as is" basis, but this was not included in the Sale and Purchase Agreement. They may not have been aware of this, but it is clear they left the contract with Practitioner to finalise.

[17] There is nothing on the face of the contract that could have alerted the Practitioner to either the defective title, or the arrangement (with the purchasers) to which the Applicant refers. The evidence clearly shows that the search of the titles was done on 24 July, after the contract became unconditional. I accept from the evidence of both parties (as clarified by the Practitioner) that there was no discussion between them about either the title defect or the purchasers' agreement to take that title before that date. The evidence shows that the search of the titles done on 24 July led to a telephone conversation when the Applicant told the Practitioner that the purchasers had agreed to buy the property 'as is'. On this day the Practitioner also became aware of the legal opinion obtained by the Applicant and asked for a copy to be sent to him.

Practitioner's knowledge

[18] The question of the Practitioner's knowledge is material to this complaint. If he knew (or ought to have known) at an earlier date about the title problem it would have been reasonable to have expected him to protect his client's interests by taking remedial action in remedy the matter and in relation to protecting the client's position.

[19] In the Applicant's view the 23rd June letter (from the purchasers' lawyer) had "highlighted" the problem surrounding the certificate of title and that there was enough time for the Practitioner to have taken remedial steps much earlier. The letter was quite short and I set it out in full because it is significant to the Applicant's case.

> *Re:* [Property Details]
>
> *We refer to the above matter.*
>
> *We note that it is subject to due diligence and LIM conditions to be confirmed on or before Monday, 13 July 2009.*

> *In terms of the due diligence condition, we would be grateful if you could forward to us a copy of any at all correspondence relating to the leases for the property held by your clients.*
>
> *Please also forward to us any at all correspondence held by you in relation to acquisition of the title (Title details included) from* [AB] *Ltd.*
>
> *We look forward to hearing from you regarding the above.*

[20] The Practitioner sent a copy of this letter to the Applicant. This had resulted in telephone contact between the parties, with the Applicant providing the Practitioner with all information relating to the leases for the property to be sold which the Practitioner sent on to the purchaser's lawyer. The parties agree that there was no communication on the part of either of them in respect of the request for "*correspondence held by you in relation to acquisition of the title (Title details included) from* [AB] *Ltd."*

[21] The Applicant holds the view that the information in this letter "*highlighted the issue*"; he noted that the Practitioner had failed to respond to the purchaser's solicitor on this issue. The Practitioner denies that this letter could have alerted him to the title problem. Having heard from the Practitioner I accept that he was not in fact aware of the problem, and I have no doubt that had he been so aware, he would have taken steps promptly to address the matter. It is reasonable to reach such a conclusion from the file which records the otherwise entirely correct steps taken by the and also records the very prompt actions taken by the Practitioner at that time to address the matter.

[22] The question that remains is whether the Practitioner ought to have known about the title problem from the 23 June letter sent to him by the Purchaser's solicitor, as is claimed by the Applicant. It is clear that the letter was written with reference to the '*Due Diligence*" provision in the sale contract. The due diligence clause is stated in the following terms:

> This Agreement is conditional upon the purchaser carrying out a due diligence investigation of the property including (but not limited to) an investigation of the following:
>
> 1. The Certificate of Title;
> 2. any leases or other rights to occupy grounds in respect of the property;
> 3. the Planning and Resource Management requirements and constraints affecting the property, including zone, reticulation of services and roading, etc.

[23] It may be argued that the enquiry about the identified title ought to have raised a question in the Practitioner's mind. In any event, he forwarded the letter to the

Applicant for response, obtained requested information from the Applicant which he then passed on to the purchaser's solicitors. There is no mention about information about the acquisition of the title.

[24] I have carefully considered all of the above information. It seems to me that since the Applicant asserts that the 23 June letter "*highlighted the issue"* of the defective title – a matter that he (but not the Practitioner) had actual knowledge about – then it is surprising that he did not explain to the Practitioner *at the time he received the copy of the 23 June letter*, what had been agreed with the purchasers concerning the title. Moreover, included in the request was *"....all correspondence held by you in relation to acquisition of the title (Title details included) from [AB] Ltd*". The Applicant ought to have mentioned that he had a legal opinion concerning this very matter, but he remained silent. The Practitioner appears to have assumed no information was available. In these circumstances I do not consider the Practitioner was negligent in not pressing the Applicant for a response.

[25] In light of the Applicant's view that the request for information "highlighted" the title being defective, it is also surprising that he did not then explain to the Practitioner what the arrangement was with the purchaser) which he described as a "gentlemen's agreement") that they would assume responsibility for that defect. In any event, I do not agree that the information request contained in the 23 June letter "*highlighted the issue"* of a defective title as clearly it was an enquiry for information in relation to acquisition of the named title, the significance of which was known to the Applicant who also held information about it that he did not disclose.

[26] I am unable to conclude that the Practitioner was negligent in failing to have interpreted this letter as indicating a defect in title. This leads to the further conclusion that he could not have been negligent in failing to respond to, or remedy, a matter, of which he was unaware. I have also considered whether the Practitioner was negligent in having deferred searching the titles until the contact became unconditional, noting that this would have disclosed the problem. The Practitioner explained that he generally deferred obtaining a search copy of a Certificate of Title until a sale contract became unconditional because clients often were unhappy about being charged for a search copy if a contract did not proceed. This is not uncommon among conveyancing lawyers and I do not consider the Practitioner was negligent in failing to have done an earlier search. In general circumstances the 6 days available between the contact becoming unconditional and settlement would have been sufficient to complete documents for the transfer.

[27] As a result the title issue did not come to the Practitioner's attention until 24 July, too late to re-negotiate a settlement date. The Practitioner took immediate remedial steps and it is fair to say that he was able to achieve a remedy within a remarkably short period of time. On the basis of all of the evidence I find that the Practitioner was unaware of the defect at any time prior to 24 July.

[28] This is an outcome that the Applicant is unlikely to readily accept. It is not surprising that he feels aggrieved, having suffered considerable stress from the circumstances in which he found himself at that time, which has cost him very dearly in emotional terms. However, the problem cannot be laid at the door of the Practitioner, since it existed well before the matter came to the Practitioner's attention. The fact that the Applicant left the matter fully in the hands of the Practitioner, plus the fact that the Practitioner remained completely unaware of the arrangements that the vendors thought they had made, together conspired to create a set of circumstances which gave rise to these problems.

[29] I am required to consider the Practitioner's conduct in the context of a disciplinary forum. The fact that a problem arose is not alone sufficient to lead to an adverse finding against a practitioner. There needs to be, in addition, some wrongdoing on the part of the Practitioner, which I have not found.

Costs

[30] I noted at the start that the Applicant sought the review because he saw the Standards Committee had relied on erroneous information provided by the Practitioner. It is clear that the Practitioner did not undertake a thorough investigation of his file before answering the complaint to the New Zealand Law Society. I therefore accept that there was an error made by the Standards Committee and that this arose from incorrect information provided by the Practitioner. There is no basis for concluding intentional misleading. However, it is very important that lawyers participate diligently in enquiries made by Standards Committee on complaints that are made. While the error in this case is not material to the outcome (that is to say, it does not alter my conclusions which are based on the evidence that I have considered) I accept that the review application was properly made, and that the Practitioner's incorrect information caused, or at least contributed to, the Applicant having sought the review.

[31] These circumstances are relevant to considering whether it is appropriate that the Practitioner contribute to the costs of the review. The Costs Guidelines of this office state that a costs order may be made against a Practitioner even where no adverse

finding is made. Such an order may be made where the Legal Complaints Review Officer considers *"the proceedings were justified and it is just to do so."* A costs order against a lawyer signals that the lawyer's conduct was open to criticism, and while I make no such finding on the substantive complaint, I propose to make a costs order that reflects my concern that the Practitioner failed to provide an accurate response to the Standards Committee. I consider it appropriate that the Practitioner contribute the sum of $500 towards the cost of the review.

Decision

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

Order

Pursuant to section 201 of the Act the Practitioner is ordered to pay $500 towards the costs of this review. This sum is to be paid within 30 days of this decision to the New Zealand Law Society.

DATED this 14th day of December 2010

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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:

Mr Nairn as the Applicant
Mr Peebles as the Respondent
The Otago Standards Committee
The New Zealand Law Society