LCRO 109/2011

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of Auckland Standards Committee 3
BETWEEN	**TR** Applicant
AND	**NI** Respondent

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

Introduction

[1] TR has applied for a review of a determination by Auckland Standards Committee 3 in respect of a complaint by him and his wife (although the Standards Committee determination referred to TR only as the complainant) about NI.

[2] The decision of the Standards Committee was to take no further action in respect of the complaint about NI's conduct in pursuing a claim on their behalf against CCI Limited (CCI).

[3] The core of TR and TS's complaint against NI is that they should not have been encouraged or advised to pursue the proceedings against CCI, and would not have done so if they had been properly advised as to the merits of their claim from the outset.

Background

[4] I have set out in the following paragraphs the background facts to TR and TS's complaint in some detail. This is necessary to ensure that the relevant facts which I have taken into account in completing this review are recorded.

[5] TR and TS, through their family trust, were engaged in the development of a property which involved the extension and renovation of an existing house and a subdivision of the site. They then intended to construct a new house on the subdivided site. Property development was the sole activity in which TR and TS were engaged at the time.

[6] To obtain the relevant resource consents from the Council, it was necessary to submit a report from a soil consultant to establish whether or not the site was contaminated by pesticides, as the property was in an area of Henderson where large scale horticultural activity had occurred in the past.

[7] TR and TS engaged CCI to carry out soil sampling and to provide that report. The reports provided by the firm were that there was a level of contamination which would not be accepted by Council, and that remediation was necessary. This would clearly increase the costs of the development project.

[8] TR and TS were concerned at the methodology utilised by the firm in its testing program and had doubts as to the correctness of the recommendations in the reports. They therefore sought a review of the report from another firm of consultants whose opinion was that CCI had been negligent in their methodology and in the advice provided.

[9] In September 2007 TR and TS approached CCJ for advice as to their remedies against CCI. They spoke to TT by phone and then delivered all of the documentation relevant to the matter.

[10] At the same time they engaged in correspondence with CCI who in a letter dated 19 October 2007 rejected the review of their report as incomplete, biased, factually incorrect and false in its conclusions. They stood by their report and recommendations but nevertheless waived a portion of their fee in response to the complaints. In addition, they suggested that one option available to TR and TS was to engage other consultants in connection with the development.

[11] TT referred the matter to NI who reviewed the material and in a file note dated 5 October 2007 stated in the first paragraph "[t]his is a breach of contract and professional negligence claim."

[12] In the same file note, NI identified the likely claims to be for : -

a) Recovery of CCI's fees ($2,382.54)

b) Loss of profits arising from the delay in completion of the development calculated at 9% per day on $500,000.00 for the period from 8 February 2007 to 14 July 2007 ($19,23288); and

c) General damages for the period 5 May 2007 to 11 June 2007 ($7,800.00).

It would seem that these figures had been calculated and provided by TR and TS.

[13] The file note then included a heading: "Do our clients have a claim?" and continued:

> It appears they do. In the in-house Counsel letter dated 14.06.07, they deny all responsibility and the "failure to take in [sic] due care and perform due diligence". Ironically, this is what they failed to do by my two hour review of the paperwork.

[14] He then recorded the proposed strategy in respect of the claim in the following way:

> We will have a meeting with both [TR and TS] next week and set out where we shall head with this claim. I consider the best approach is to draft up a quick Statement of Claim to lodge in the District Court here in [Auckland] and attach that to a letter to in-house counsel. Depending on our clients' views on whether their claim can be elevated to a higher status (and the quantum increased) we should follow this action and attempt to gain a settlement out of this company for between $15,000.00 and $20,000.00. We should also tell them to notify their solicitors in our initial letter.

[15] NI then met with TR and TS on 11 October 2007. He made a comprehensive file note of that meeting which included the following paragraphs:[1]

[1] Throughout this decision all file notes and correspondence have been reproduced as they appear.

1. At first [TT] joined us, he explained the situation and said that he will always be the supervisor in charge, but he will leave it up to me to take instructions and to file a claim for now...

6. Our instructions are that our client is happy to go to Court. They will do so based on principle and to stop [CCI] from being negligent to others in the community. They are rather wealthy and do not need the money and can afford to go to Court.

7. I explained the litigation risks and the pitfalls in going to a hearing and I let them know my recommendation is that we file proceedings, after attaching a draft Statement of Claim to a Calderbank letter seeking a substantial settlement figure otherwise; we will take the matter to Court. Given [CCI] are a worldwide network of offices and have a professional name to protect, it is my prediction that they will likely fold to any pressure we have on them to settle the claim.

8. However, there is always the risk that they won't and will want to bring it to trial...

Damages

13. The major damages to this cause here is the time frame of the development has been delayed substantially. The designers working on the extension now and the plans are two to three months behind. The house just about could have been built by now if the Resource Application was made back in March. The report and recommendations should have taken two weeks and be finished by mid to late March.

14. The fact that the retesting took place meant that this timeframe couldn't be met...

16. [TR] has worked out that they expect $100,000.00 profit from this development and that this six month delay has cost them upwards from $19,000.00 (at 9% per annum).

17. Overall their damages claim will include stress and inconvenience of about $7,500.00 (which I told them was realistic) bringing up to $30,000.00.

Legal Costs

18. I didn't give them a quote and told them I couldn't give them a quote, but I would have thought preparing for a District Court one day trial with three or

> four witnesses would cost in excess of $15,000.00. To bring the matter to the level of attempting to settle it pre proceedings would be about $5,000.00 in itself.

[16] NI then proceeded to draft the Statement of Claim with assistance from TU, a consultant to the firm. On 27 March 2008 the draft proceedings were sent to CCI under cover of a letter advising that TR and TS were "open to a sensible settlement offer from your company to avoid litigation". He advised that he had instructions to file the Statement of Claim should there be no response within 14 days of the letter.

[17] The company responded by letter dated 4 April 2008 and denied liability. The firm's legal counsel also drew NI's attention to the provisions of its contract with TR and TS in which liability was limited to five times fees paid. She also advised that the firm would vigorously defend the matter and would be seeking costs on a solicitor-client basis as well as seeking security for costs. She also advised that she would consider lodging a complaint against NI for prosecuting a frivolous and vexatious suit against the firm.

[18] Following instructions from TR and TS, the Statement of Claim was filed and served. The total amount claimed was $31,706.00 plus interest and costs.

[19] CCI then instructed CCK who on 21 May 2008 responded and referred to the contract between TR and TS and their client, which required the parties to attempt in good faith to settle any dispute by mediation. They also referred to an error in the name of their client in the Statement of Claim and noted that an application to the Court would be required to amend it.

[20] There then followed a series of correspondence between NI, his clients and CCK in which an appropriate mediator was finally agreed upon and a date suggested by CCK for the mediation to take place. This was not suitable to TR and TS because their expert was unavailable on that date. CCI then effectively withdrew from the mediation and advised that it wished to pursue its defence of the proceedings in Court.

[21] On 29 August 2008 CCK filed and served its Statement of Defence which included the following:

- That the parties had entered into a contract for services which had been acknowledged in writing by TR and TS which limited any claim to five times the fees paid, which amounted to $8,240.00; and

- A denial that the losses claimed were recoverable as a matter of law.

[22] The proceedings progressed during the remainder of 2008 including discovery and a judicial conference. On 9 December 2008, NI requested the Court to set the matter down for trial. At the same time, TR indicated that he wished to increase the amounts claimed and provided details of the additional claim on 12 December. These details were discussed at a meeting on 18 December at which NI advised TR and TS that leave of the Court was required to amend the pleadings after the matter had been set down and sought further details from TR and TS. He advised both CCK and the Court that it was intended to amend the claim.

[23] On 4 March 2009, NI received notification from the Court that the matter had been set down for hearing in late June. It was then necessary to file witness statements which were to be provided by TR and TS and their expert. NI proceeded to prepare these.

[24] In late March 2009 NI received notice that CCI had changed counsel to CCL in [the Waikato], who sought the plaintiffs' briefs of evidence. Following receipt of these, CCL wrote on 20 April to NI noting what they considered to be significant weaknesses in TR and TS's case and disputing any grounds for increasing the claim. They noted that no valuation evidence had been provided and disputed causation. They also advised NI that there was no prospect of the Court awarding general damages for undue stress to TR and TS in their capacity as trustees of the trust.

[25] Having raised these issues, CCL advised that their client was prepared to settle the matter for $3,000.00 and recorded that the offer was a Calderbank offer which was open for acceptance until 23 April.

[26] CCL also indicated that they would be opposing any application to amend the pleadings or introduce further evidence.

[27] NI advised TR and TS that the offer should be rejected and advised that the pleadings should be amended and they should proceed to trial unless the offer was increased to $10,000.00 to $15,000.00. In a file note dated 24 April he noted that he "now [needed] to turn the claim into something less speculative and provide evidence of the current valuation." He also however warned TR and TS about the possibility that CCI would appeal even if they were successful and referred to the potential costs

involved in that. By this time TR and TS were becoming concerned as to their exposure to costs referred to by CCL.

[28] NI allowed the deadline for responding to the Calderbank letter pass as part of his strategy and on 28 April received a call from TU, the partner at CCL acting for CCI.

[29] In a reporting letter to TR and TS dated 30 April NI referred to the litigation risks involved in proceeding to trial and recorded some uncertainty about the contractual limitation of liability provisions in the contract with CCI. He suggested a meeting to discuss what TR and TS would be prepared to settle for.

[30] He also agreed with CCL to explore settlement options and to defer the completion of documents required by the Court timetable. A joint memorandum was filed in the Court agreeing amendments to the timetabling to allow for this.

[31] The meeting with TR and TS took place on 19 May. It would appear that by this time TR and TS had become somewhat disillusioned with their prospects of success and the process, and NI recorded comments by his clients that they were "over it" as the "case was not legally sound enough to expose to the Court". He also noted that his clients no longer had "the emotional energy" to continue with the matter and wanted to have the matter settled in the shortest possible time.

[32] NI made a file note dated 21 May recording the details of that meeting. Under the heading of "general damages" he noted as follows:

> Legally they understand that, as a trustee, they are probably not likely to gain any legal damages. They do make the point, however, they are trustees in residence and this is different to a commercial arms length transaction. They have suffered loss with the stress and inconvenience and, as long as they are successful in gaining more than the contractual limitation point/all the contractual limitation point, there should be an argument put forward that they are entitled to general damages.

[33] Following that meeting it was agreed that NI was to prepare a letter of counter offer to be sent to CCL. TU was becoming somewhat impatient at the lack of response from NI and advised that his client was incurring additional costs due to the requirement to complete the briefs of evidence. He advised that the options to settle were reducing because of this. NI agreed that he would get back to TU by 5.00pm on 21 May.

[34] The counter offer was drafted and sent by email to TR and TS at 4.44pm on 21 May with a note from NI that he would like to get the letter out by 5.30pm. The draft letter included the following paragraphs : -

> 3. This letter has a sole purpose. That purpose is to put forward our client's counter proposal to the $3,000.00 offered on 20 April 2009 by [CCI] and the reasons why the counter offer is pitch [*sic*] at the level it is...
>
> 6. Your client was paid $1,629,39.00 ... for its part performed services. The main issue the Judge at trial will need to rule on is to what effect, if any, does a limited liability clause in a contract have on a party to the contract, who breached the contract and/or was negligent in performing its duties under the contract...
>
> 24. It is accepted by our clients that the quantum as pleaded is excessive and that issues as to causation is a trial risk they will assume. It is also accepted that the contractual limitation clause/s provides a sound defence to any claim for legal liability in excess of that limitation...
>
> 25. We have instructions (should the settlement of this matter fail to yield a result) to amend the potentially defective pleadings as to quantum and adduced further evidence to support the amended claim. It is understandable should your clients oppose such action. We will leave that for the Court to decide on an appropriate application to be filed/served and opposed.

[35] Upon receiving this draft TR and TS advised that they wanted to meet with NI the following morning before the letter was sent. Following that meeting, the letter was amended considerably and sent to TU at 10.07am on Friday 22 May. The letter in its final form indicated that TR and TS would agree to settle the matter for the sum established by the contractual limitation clause which amounted to $8,240.00. NI did not mark the letter "without prejudice".

[36] By the end of the day, NI had not received confirmation that CCI had agreed to settle on this basis and TR and TS were left in a state of considerable anxiety. As a result, they contacted TT over the weekend and requested that he assume control of the file with a view to effecting the settlement. The background facts to the ultimate settlement of the matter are included in the decision relating to the complaint against TT. In short, however, settlement was ultimately achieved in the sum of $7,000.00. Costs rendered by NI amounted to $17,423.15.

The complaints and the Standards Committee determination

[37] TR and TS lodged their complaint with the New Zealand Law Society Complaints Service on 13 August 2010. It included the following allegations:

- During the preparation of a civil litigation case for a court hearing, NI destroyed the case, gave misleading legal opinion and used threats against TR and TS. While carrying out the attack on them, he knew it would cause them psychological damage and in so doing, weaken their mental state so he could force them to agree to a pre-hearing settlement.

- As a result, NI effectively acted in the defendant's interest by denying TR and TS their day in court and proper recompense for damages.

- It appeared that NI did not confirm with the defendant's in-house legal counsel that the defendant's insurer had been informed and that rather, it appeared that the defendant's in-house legal counsel may have been allowed to run the entire case without their insurer's authority.

- The Notice of Proceeding, Statement of Claim and briefs of evidence were so poorly prepared that the case would have been jeopardised had it gone to court.

- During the initial preparation of the case, NI tried to covertly inform them that TT was also acting for the second and third defendants.

- NI did not undertake a proper review of the background law that applied to the case and the ARC's interpretation of the law. Their expert witness had a pertinent letter from the ARC concerning the interpretation of the law which was not sought by NI until two weeks prior to the scheduled court hearing.

- They were given confusing and misleading legal advice by NI who also withheld legal opinion that led them to be confused about their legal rights. In this regard, they cited as an example, that NI had led them to believe they needed to attend a mediation and, if offered a "reasonable sum", that they would need to accept it as otherwise they risked having the case viewed poorly by the judge.

- Discovery was not properly undertaken and further discovery of documentation was not pursued as agreed and instructed. They also considered the discovery documentation received from the defendant appeared to have been tampered with such that pertinent details on certain copies of the invoices from the defendant were different from the same invoices they had on their files.

- NI advised them that it was in their interests for the expert witnesses to meet and was instructed accordingly. There is no evidence that NI pursued this.

- The expert witness' brief of evidence was not put into a legal framework and there was no meeting between NI, TR and TS and the expert witness to develop the case for a court hearing, which again would have jeopardised the case had it gone to court.

- The individual briefs of evidence prepared by NI were no more than amended copies of typed records and events provided by TR and TS.

- NI removed an entire section from TR's brief of evidence relating to an alleged undisclosed conflict of interest which they believed to be a central pillar of their case. They were not informed of this deletion and believed that it was carried out covertly at the last moment, when the brief was printed by NI for signing by TR.

- In a telephone discussion with the defendant's legal counsel, NI conceded that it was problematic for trustees to claim general damages.

- Although they instructed NI not to engage further with the defendant's legal counsel, he nevertheless proceeded to secretly negotiate with the defendant and, unknown to TR and TS, agreed to a two-week "settlement period" and, in so doing, allowed the defendant to defer submission of their briefs of evidence.

- NI deliberately confused and stressed TR and TS to force them to settle the case for a minimal sum.

- A seven-page settlement offer letter drafted by NI was incomprehensible and stated that their case lacked merit and argued for the defendant.

- NI advised that the proposed settlement sum and terms had been agreed with the defendant when, in fact, this was not the case. He also advised TR and TS that they could not claim general damages as they were trustees, nor claim damages in excess of five times the fee, which was in complete contradiction to the previous 19 months of legal advice received.

- NI had not only been professionally negligent, but had also committed a crime, and was motivated by a conflict of interest to slowly and systematically destroy their case and resolve to take the case to court.

[38] These complaints were distilled by the Standards Committee into breaches of the following Conduct and Client Care Rules:

- Failure to promote client's interests: LCCC Rule 6;
- Overcharging: LCCC Rule 9;
- Withholding relevant information: LCCC Rule 7;
- Incompetence and discourtesy: LCCC Rules 3, 3.1;
- Failure to provide updated client service information: LCCC Rules 3.4 - 3.6;
- Conflict of interest: LCCC Rule 6.1;
- Failure to administer practice appropriately: LCCC Rule 11; and
- Failure to respond to enquiries: LCCC Rule 3.2.

[39] Having considered all of the material provided by the parties, the Standards Committee determined, pursuant to section 138(2) of the Lawyers and Conveyancers Act, to take no further action in respect of the complaint. In reaching this decision, the Standards Committee made the following comments:

> [17] ...the committee noted that the litigation appeared to proceed without rancour or dissatisfaction until [CCL] assumed responsibility for the defence from [CCK]. At that point, it appeared that [TR and TS] lost confidence in [NI's] handling of the case...
>
> [18] [NI's] advice relating to drafting and preparation of the claim and all attendances prior to 1st August 2008 were considered under the Law Practitioners Act 1982 ... The Committee did not consider that there was negligent or incompetent conduct of such a degree or so frequent as to reflect on [NI's] fitness

to practise. Thus judgment calls made or advice given in respect of the sums claimed in the proceedings as issued including quantum and heads of damage were not considered by the Committee.

[19] The Committee noted an email dated 20 June 2009 from [TR and TS] to [TT] in which [TR and TS] expressed their appreciation of [NI's] efforts and apologised for their conduct in a meeting the previous Wednesday. They acknowledged in that email that [NI] had worked hard for them and done everything possible to act in their best interests.

[20] Although there had been some delays in obtaining details and filing of briefs, the Committee did not consider that [NI's] conduct from 1st August 2008 onwards amounted to any issues that gave rise to professional shortcomings. This was a claim concerning a relatively small sum of money. By reason of the circumstances, including a determined and well-funded defendant, it appeared to become increasingly difficult to continue to conduct the case on a cost-effective basis and thus it appeared to be pragmatic to attempt to settle the litigation. Litigation lawyers are not guarantors of their client's claims. It was ultimately [TT] that oversaw the settlement.

[21] The Committee did not consider that there was sufficient evidence of a breach of duty of care or negligence, or a breach of LCCC Rules 6, 9, 7, 3, 3.1 or 3.2. As to the conflict of interest and practice administration allegations, these were more appropriately directed at the firm's partners. The obligation to provide client service under LCCC Rule 3.4 did not apply as [TR and TS] instructed [NI] before this requirement came into force.

The review application

[40] In his application for review, TR included the following reasons:

- The Committee had failed to review the case file and needed to do so to make a full and proper determination based on all available information.
- The statement by the Committee that TR and TS lost confidence in NI's handling of the case when CCL were appointed is inaccurate. CCL took over the case on 27 March 2009 but TR and TS only became dissatisfied with NI's conduct on 15 May 2009.

- The Committee has not given reasons or examples as to why NI's advice was not negligent or grossly incompetent such as to meet the threshold for disciplinary action under the Law Practitioners Act 1982.

- The two items of legal advice provided by NI that go to the crux of their complaint are

  a) can trustees claim general damages; and

  b) that the contractual limitation clause for liability did not apply.

- NI advised throughout the proceedings without qualification that they could claim general damages of which typically a court would award $10,000 and a contractual limitation clause of five times the fee ($8,240) did not apply. Based on that legal advice, NI advised TR and TS that they could safely make a claim for $20-30,000 in damages.

- If NI had advised them that they could not claim general damages because they were trustees and could not claim damages in excess of a contractual limitation, then the claim would have been limited to $8,240 and, given such advice, they would simply have made an application to the Disputes Tribunal which at that time had a maximum jurisdiction of $7,500.

- The reason for delivering the letter to NI thanking him for his services was an attempt to calm a very tense situation concerning NI's short-comings as a lawyer. They assert that although NI may have worked hard and done everything possible within his abilities, it does not necessarily mean that NI acted competently. They also note further correspondence concerning NI to the firm which was far less complimentary of his conduct.

- In reaching a decision that none of NI's conduct after 1 August 2008 amounted to issues which gave rise to professional shortcomings, the Committee had not addressed the specific issues and allegations made by TR and TS. They consider that the Committee had also failed to consider NI's negligent conduct in delaying researching case law until 18 months after proceedings had been issued rather than carrying out the research prior to beginning the proceedings and serving the documents.

- Although the claim was relatively small, as noted by the Committee, it failed to consider the substantial variation in the initial advice that they could safely claim $20-30,000, as compared to the ultimate outcome.

- The Committee determined that it was pragmatic to attempt to settle the litigation, but did not take note of the following aspects of NI's conduct and responsibilities:

1. Proposing to conduct a legally weak case against a well-funded defendant that was a multinational with 5000 employees, whilst not having properly researched or prepared the case prior to beginning proceedings.

2. Conducting a legally weak case that led to the 'circumstance' of having to settle the case for a 'relatively small sum of money', whilst having assured [them] throughout 18-months of proceedings that [they] had a 'strong case' for a claim of $20,000 to $30,000.

3. Proposing an uneconomic case that could not be conducted on a cost effective basis.

4. Haphazard preparation of the case and the briefs of evidence that gave the defendant just cause to extend the court hearing time with extensive cross-examinations, and the subsequent grounds to potentially appeal the judgment.

5. Failure to pursue a meeting of the expert witnesses, that would have reduced the amount of court time, making the pursuit of the case less cost effective.

6. Sending a '2-page settlement offer letter' to the defendant on the 22 May 2009 that would have been prejudicial to our case had we continued to a court hearing.

Review

[41] An initial hearing was held with TR only on 7 August 2012. NI was advised that he was entitled to attend that hearing but did not do so as he was engaged in a trial.

[42] Following that hearing, NI was provided with a copy of the audio of the hearing and a list of the issues arising out of that hearing on which I required comment from NI.

[43] A further hearing for this purpose was scheduled for 11 October 2012 attended by both NI and TR.

[44] Following that hearing, TT was requested to provide all file notes which had been removed from the files provided to TR. On 25 October 2012 TT provided a copy of the correspondence file which included all file notes. TT asserts ownership of those file notes and requested that they not be provided to TR and TS.

[45] At this stage, copies of those file notes have not been provided to TR and TS. However, section 208(1) of the Lawyers and Conveyancers Act 2006 provides that "all evidence and information received or ascertained under section 207(1) must be disclosed to every party, and every party must be given an opportunity to comment on it."

[46] Section 208(2) provides as follows:

> Where, in the opinion of the Legal Complaints Review Officer, there is good reason for not disclosing to every party any evidence or information received or ascertained under section 207(1) or for withholding from a party some of the evidence or information so received or ascertained, the Legal Complaints Review Officer may, as the case requires, -
>
> (a) refuse to disclose that evidence or information to that party; or
>
> (b) give that evidence or information to that party after the Legal Complaints Review Officer has made to it such deletions or alternations as he or she considers necessary.

[47] I have proceeded to complete this review and issue this decision without forwarding the file notes to TR and TS as requested by TT as, in my view, there is little further comment that could be provided that would affect the outcome of my decision. However, if TR and TS wish to view the file notes, they may apply to this Office accordingly, at which time I will seek further submissions from TT on that issue.

[48] In this decision, I have adopted a somewhat different approach from that adopted by the Standards Committee. Rather than focusing on the specific Conduct and Client Care Rules identified by the Standards Committee as being applicable to this matter, I have had reference to the statutory provisions contained within the Law Practitioners Act and the Lawyers and Conveyancers Act. Before examining the detail

of those provisions, it is pertinent to take something of an overview of the matters which have given rise to the complaints by TR and TS.

An overview

[49] TR and TS were unhappy at the methodology of the testing carried out by CCI and their recommendations. The reason for this is that the CCI's recommendations would have resulted in significant remediation costs and extended the time to complete the development. They sought a peer review of CCI's work and were advised that it was inadequate to the extent of being negligent. They wished to take action against CCI to recover their actual and perceived costs and consulted CCJ.

[50] NI recorded the firm's instructions in his file note of 11 October 2007. At paragraph 6, he noted:

> Our instructions are that our client is happy to go to Court. They will do so based on principle and to stop [CCI] from being negligent to others in the community. They are rather wealthy and do not need the money and can afford to go to Court.

[51] In an earlier file note of 5 October, NI had recorded the proposed strategy to be followed in connection with the matter in the following way:

> We will have a meeting with both [TR and TS] next week and set out where we shall head with this claim. I consider the best approach is to draft up a quick Statement of Claim to lodge in the District Court here in [Auckland] and attach that to a letter to the in-house Counsel. Depending on our client's view on whether their claim can be elevated to a higher status (and the quantum increased) we should follow this action and attempt to gain a settlement out of this company for between $15,000 and $20,000. We should also tell them to notify their solicitors in our initial letter.

[52] He also recorded in the first paragraph of that memo that the potential claim by TR and TS was founded on a breach of contract and negligence.

[53] He did nothing to dissuade TR and TS from pursuing action against CCI. Nor did he provide any form of report or opinion to them in which the causes of action and potential remedies were critically examined. This is evident from the fact that TR has repeatedly stated in correspondence and at the review hearings, that the proceedings were not about negligence. The amounts to be claimed were amounts suggested by

TR and TS and there does not appear to have been any independent thought or assessment of those sums.

[54] NI proceeded on the basis that CCI would seek to settle the claim in whatever way it was presented. However, his optimism as to the reaction by CCI to the proceedings proved to be ill-conceived and the firm did not simply take fright at the fact that proceedings had been issued and seek to settle. Instead, particularly when CCL were instructed, the strength of the claim by TR and TS was scrutinised and the content of the pleadings and evidence were challenged.

[55] As the shortcomings in the pleadings and evidence were exposed by CCL, NI then had to persuade TR and TS that they should settle the matter for a sum which was substantially less than they had been led to believe they could expect, and in addition, they were exposed to costs orders about which they had not been advised.

[56] At the same time, they had received bills of costs from NI in the region of $17,000.[2]

[57] The essence of the complaints by TR and TS is simply that they were not properly advised as to the merits of their claim, were encouraged in their desire to take action against the firm to issue proceedings, and then were exposed to a very weak negotiating position as their case crumbled.

[58] It is NI's role in this scenario which I address in this review.

Conduct prior to 1 August 2008

[59] As referred to in the Standards Committee determination, the Lawyers and Conveyancers Act 2006 came into force on 1 August 2008. By that stage, proceedings had been issued and the proposed mediation was about to be rejected by CCK.

[60] In its determination, the Standards Committee refers to the standards against which NI's conduct was to be measured in determining whether his conduct was such as could have been the subject of proceedings under the Law Practitioners Act 1982. Before the complaint could be considered by the Standards Committee in respect of that conduct, it was necessary for the conduct to fall below those standards.

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[2]There is some discrepancy in the total amount of the bills of costs. The Standards Committee referred to bills totalling $17,423.15 whereas TR variously referred to the sum of $16,719 in his letter of complaint dated 13 August 2010. It has not been necessary to reconcile the various amounts referred to.

[61] In considering that issue, the Standards Committee looked at the conduct up to that date somewhat in isolation and concluded that it was not such that disciplinary proceedings under the Law Practitioners Act could have been commenced in respect of that conduct. However, although proceedings were issued prior to that date, the strategy on which they were issued and the content of the pleadings existed as much after as before that date. To that extent, therefore, the time at which the conduct took place becomes somewhat less important as the proceedings and conduct based on the strategy identified by NI continued after that date.

[62] The relevance of this is that the Lawyers and Conveyancers Act introduced a new concept of unsatisfactory conduct. That terms is defined in section 12 of the Act as follows:

> In this Act, **unsatisfactory conduct**, in relation to a lawyer or an incorporated law firm, means—
>
> (a) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; or
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> (b) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including—
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> (i) conduct unbecoming a lawyer or an incorporated law firm; or
>
> (ii) unprofessional conduct; or
>
> (c) conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm, or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 7);[3]

[63] In addressing NI's conduct in the context of the various Conduct and Client Care Rules, the Standards Committee examined the conduct in terms of a potential finding of unsatisfactory conduct by reason of section 12(c). In the approach adopted

[3] There is a further section 12(d) which has no relevance to this complaint.

by me, the definition of unsatisfactory conduct in section 12(a) is more relevant and in the following sections of this decision, I consider NI's conduct with reference to this definition.

NI's conduct

[64] This file was referred to NI by TT after TT realised that he would be unable to give it his attention. TT's instructions to NI were to "read the documents carefully and form a considered opinion"[4] and then to contact the clients to talk about the claims.

[65] NI identified that any action against CCI would be based on a breach of contract and negligence. The alleged negligence was based on the peer review. Although NI identified that proceedings were to be based on a breach of contract, there was no investigation as to what the terms of the contract were.

[66] The next event which occurred was the meeting with the clients on 11 October. It is clear from NI's file note of that meeting that TT did attend the meeting initially.[5] However, I do not take from this that TT played any significant part in the meeting or offered any advice to TR and TS. Rather, he advised that whilst he would be supervising NI, the day-to-day carriage of the file was in NI's hands.

[67] NI's approach was driven by his understanding that TR and TS wished to go to court on principle to stop CCI from being negligent to others in the community and that the firm would not wish to proceed to defend the matter to avoid undue publicity. He reasoned that the firm would wish to settle the matter.

[68] That approach is a legitimate approach to take but can only be pursued from a position of strength. That necessitates a thorough review of the facts, the evidence and the law before embarking on such a course of action. If a plaintiff's position is exposed as being weak, this will be readily exploited by counsel for the defendant and lead to a rapid abandonment of the claim and exposure to costs.

[69] The action against CCI was based on negligence and breach of contract. The evidence of negligence relied upon came from the expert engaged by TR and TS. The strength of that evidence needed to be explored at least in a preliminary way before embarking on the proceedings and encouraging the clients as to the merits of the claim.

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[4] Handwritten memorandum of instructions dated 4 October 2007.
[5] Paragraph 1 of memorandum. Refer to [15] above.

[70] In addition, before proceeding with a claim of breach of contract, the terms of that contract should have been identified and examined. If that had been done, the limitation subsequently advised by CCI and their counsel would have been identified from the outset. It is clear that NI did not establish the terms of the contract as he stated in a memorandum to TU dated 13 November 2007 that "unfortunately there is no contract so we cannot pursue that angle." However, after suggestions by TU, the Statement of Claim did include a claim for breach of contract, notwithstanding that the terms had not been established.

[71] Similarly, it was accepted that TR and TS's trust was the appropriate plaintiff as the owner of the property. In this regard I have some doubt that the correct identity of the plaintiffs was properly considered, as the proceedings named TR and TS as the plaintiffs, whereas there was a third trustee who should have been included as a party if the proceedings were to be brought by the Trust. However, the question which was subsequently raised by CCL was that the court would not award damages for stress and anguish to persons suing as trustees. That was a question which, it would not be unreasonable to expect and which should have been considered by NI at the outset.

[72] CCI responded to NI's initial letter, which enclosed the draft proceedings. In its letter of 4 April 2008, the firm categorically denied negligence and referred to the terms of the contract. NI referred to this response as a "highly defensive stance" but nevertheless confirmed the "validity" of the claim to TR and TS. Having received this response (and from previous correspondence sent directly to TR and TS by CCI), it was apparent that the firm would vigorously defend the proceedings and NI's expectation of an early settlement based on the proceedings as issued, was unlikely.

[73] Nevertheless, he continued with the claim and proceedings were filed without any further research or advice to TR and TS. CCK communicated with NI following that on 21 May 2008. In their letter they pointed out that the contract between the parties required any dispute to be mediated before any proceedings were issued, and again, if NI had established the terms of the contract, this would have been evident.

[74] The email from NI, under cover of which he forwarded the letter from CCK to TR and TS noted, "I do recommend that you think seriously about entering into mediation prior to continuing with the proceedings." Given that the overall strategy was to extract a settlement from CCI, it is somewhat surprising that NI was not somewhat more forceful in identifying mediation as the opportunity to achieve this. However, his

comment gave the impression that mediation was optional, and CCI reserved the right to apply for a stay of proceedings and to seek directions.

[75] In the end, CCI itself effectively withdrew from the mediation process when a date nominated by them was unsuitable for TR and TS's expert. From that point on, the matter progressed with discovery and judicial conferences and was finally set down for hearing. During that time, no further examination of the evidence or research was undertaken, so that it was not until the briefs of evidence were prepared that TR and TS's claim came under scrutiny. Speculation as to the reasons for a change of counsel and other communications from NI all proceeded on the premise that TR and TS's claim was well-founded and could be supported.

[76] Following receipt of the plaintiff's briefs of evidence, CCL responded with observations as to what they considered were weaknesses in TR and TS's claim. These included:

- The claim for consequential loss was speculative and no valuation evidence had been adduced.
- The details of the proposed amendment to the Statement of Claim would not assist the plaintiffs and any additional costs incurred by them by reason of changes to the building code, would be represented by the increased value of the new property.
- The courts did not award damages to trustees for undue stress.
- The limitation of liability clause in the contract applied.

[77] CCL then made a settlement offer, noting that it was a "Calderbank" offer. There is nothing on the file provided to me, either in the form of files notes, emails or other correspondence, in which NI explains the nature of a Calderbank offer to TR and TS. Such offers represent an important stage in litigation, and clients need to be properly advised, not only as to the nature of such an offer, but the strength of their case needs to be examined before such an offer is rejected. NI says that he explained to TR and TS what a Calderbank offer was and its consequences. At the review hearing, and in correspondence with this Office and the Standards Committee, TR clearly did not have any understanding as to the nature of such an offer and its importance.

[78] From then on, NI came under increasing pressure from CCL to convince his clients to settle. However, he took no steps to bolster his clients' claim and it was not until May that he had another solicitor undertake what turned out to be a limited amount of research into the binding nature of the limitation of liability provision in the contract between TR and TS and CCI.

[79] In addition, I have not noted any research into the contention by CCL that trustees could not be awarded general damages for stress. In the letter from CCL in which this is contended, no research or reference to precedents were provided, but nevertheless, it appears that the contention was readily accepted by NI without argument or any independent research. The claim for general damages increased the amount claimed to a sum which turned an uneconomic claim into one that was marginally economic. By conceding that point, the claim became one which TR and TS state they would not have pursued if they had been advised that the claim for general damages could not be sustained.

[80] Following receipt of the Calderbank offer, it was agreed that NI would prepare a letter of counter-offer. For the purposes of settling on an appropriate amount, NI met with TR and TS on 19 May 2009. At that meeting, NI advised TR and TS that the real risk at trial was the limitation of liability provision in the contract.[6] Nothing had changed from the time when NI was first consulted and the proceedings issued. However, NI was now advising TR and TS that there was a risk that the Court would hold that the term was binding on them, a fact which had been raised in the Statement of Defence filed in August 2008.

[81] In addition, it is apparent from the file note of that meeting[7] that the general damages claim had been conceded by NI. Again, this was an identifiable issue at the beginning of the instructions.

[82] On 21 May, TU was pressing for a response to his client's offer. He advised that the settlement option was diminishing as his client was about to incur further costs in producing the briefs of evidence. In a telephone conversation, NI agreed to have a response to the Calderbank offer to TU before 5pm on that day. At 4.45pm, he provided TR and TS with the draft letter which he indicated he wanted to send to TU by 5.30pm. NI says that he made an error of judgement in providing this letter to TR and

[6] Refer paragraph 9 file note dated 21 May 2009.
[7] Ibid at paragraph 14.

TS at this stage, rather than leaving the letter to be revisited and amended the following day before sending it to TR and TS. He had of course committed to respond to TU by 5pm that day.

[83] It is understandable that TR and TS were extremely concerned to receive this draft. With regard to the limitation of liability clause, NI noted in his draft that this would be the main issue to be determined at trial. He noted that such clauses must be unambiguous – and then conceded that the clause in the contract with TR and TS was unambiguous. He then stated "[t]hat is the risk they assume continuing to trial."

[84] He also conceded that TR and TS were "in trade" and that therefore the Consumer Guarantees Act guarantees were not applicable.

[85] Remarkably, the clauses set out in [34] above (paragraphs 24 and 25 of the settlement letter) conceded that the quantum claimed by TR and TS was excessive and that issues as to causation was a trial risk to be assumed. He also accepted that the contractual limitation clause provided a sound defence to any claim for legal liability in excess of that limitation and referred to the potentially defective pleadings as to quantum, noting that it was understandable that CCI should oppose any application to amend the pleadings.

[86] The draft counter-offer contains surprising concessions and statements that did not in any way counter the observations made by CCL as to the weakness of TR and TS's case. NI submits that it was an error of judgement to provide this draft to TR and TS and that he should have left it until the following morning when he could revisit the draft. By acknowledging an error of judgement, NI implies that he would have amended the draft to the extent that the letter would have been different in tone and content altogether. This suggestion is difficult to accept.

[87] Unsurprisingly, TR and TS were appalled at the content of the draft and instructed that it was not to be sent. Instead, they attended at NI's office the next morning to discuss the counter-offer. It was at that meeting that NI recorded that TR and TS had lost the will to pursue their claim.

[88] This note in itself shows a remarkable lack of awareness on NI's part. Up until that time, NI's advice to TR and TS had been that they had a strong case and encouraged them to pursue their claims. They were now in receipt of a draft letter to the defendant's lawyers in which NI was effectively acknowledging that their claim was

weak and lacked merit. In these circumstances, I would anticipate most clients would decide that they did not wish to pursue a claim. Nevertheless, NI somehow divorces himself from any responsibility for the situation in which TR and TS found themselves.

Conclusion

[89] Although the proceedings were drafted and filed prior to 1 August 2008, NI's conduct after that date included pursuing the proceedings and failing to provide TR and TS with a proper assessment of the merits of the case. Consequently, the Lawyers and Conveyancers Act is applicable to much of the conduct complained of. NI's advice to and representation of TR and TS failed to reach a standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer in the following way:

- The strategy recorded by NI in his memorandum of 5 October 2007 exhibits a somewhat naïve expectation that CCI would seek to settle any proceedings issued by TR and TS.
- The pleadings pleaded breach of contract, but the terms of the contract were not established prior to proceedings being issued.
- The contract between CCI and TR and TS contained a mandatory mediation provision prior to the issue of proceedings which was not recognised by NI.
- There was no research undertaken until close to trial date (and then such research was minimal) as to the enforceability of the limitation of liability clause.
- There was inadequate exploration of the evidence on which the negligence claim was founded until close to trial.
- The contention by CCL that the courts would not award general damages to trustees was readily accepted with no evidence of any research.
- No valuation evidence was sought to validate the claim for loss of profits and the indications are that NI did not fully understand this claim or have evidence to support it in settlement negotiations.

[90] Having considered all of this material, I find that NI's conduct in representing TR and TS constitutes unsatisfactory conduct by reason of section 12(a) of the Lawyers and Conveyancers Act.

[91] In addressing the complaint and the Standards Committee determination in a different manner from that adopted by the Standards Committee, I have not specifically addressed all of the elements of the Committee's determination or the allegations by TR and TS. The allegations made by TR and TS include a range of conduct as set out in [37] above. Other than the conduct which I have specifically referred to, none of the allegations made by TR and TS is supported by evidence to an appropriate degree. It is important that this is noted, as some of the complaints made by TR and TS, such as conspiracy and criminal conduct, are serious.

[92] TR and TS have been meticulous in the manner in which they have presented their complaints and this application for review. However, they have done themselves something of a disservice by including at times, somewhat wild allegations. Nevertheless, I do not agree with NI when he stated in his response to the Law Society that because such allegations were "preposterous and so far from the truth that [the] complaint, in its entirety, must be called into question."

Penalty

[93] NI did not competently advise TR and TS as to the merits of the litigation on which they embarked. They incurred costs to CCJ in the region of $17,000. They recovered $7,000. In the circumstances, I consider that an appropriate remedy must include a reimbursement of the costs incurred by them in this aborted litigation. A claim for this amount could have been pursued through Disputes Tribunal proceedings. Accordingly, there will be an order that NI reduce his fess to $7,000 inclusive of GST and disbursements.

[94] NI is no longer employed by CCJ, but the effect of this order is that the monies taken by CCJ as fees will need to be refunded to TR and TS by that firm.

[95] If the parties are unable to agree the amount to be refunded, leave is granted for either party to apply to this Office for the matter to be determined and the Order will be amended to record the amount to be repaid.

[96] In addition, it is evident that TR and TS have suffered a great deal of personal stress and anguish. In previous decisions of this Office, it has been accepted that

orders to provide compensation for personal stress and anguish may be made pursuant to section 156(1)(d) of the Lawyers and Conveyancers Act.

[97] In *Sandy v Khan*[8], the LCRO noted at [29] that an award for anxiety and stress should be modest, though not grudging. In that case, he made an award of $2,500. In another decision, *Wandsworth v Ddinbych & Keith*[9], the LCRO awarded the sum of $1,200 to the review applicant.

[98] The circumstances in which compensation on this basis has been awarded vary widely, but in general terms, there must be something more than the stress associated with the complaint itself. Thus, in *Sandy*, the lawyer's firm had acted for both parties in the sale and purchase of a business in circumstances where the complainant's interests had become compromised. In *Wandsworth*, the lawyer had wrongfully terminated a retainer and a compensation order under this head was made to compensate the complainant for the stress of having to arrange new representation in the litigation in which he was involved and the general disruption to his business and personal affairs.

[99] Litigation in itself places the parties under considerable stress, even where well-founded. In this case, TR and TS were encouraged to pursue litigation, but in the end were advised by NI that they should settle their claim because a major element of the claim could not be supported and they were at risk that the Court would accept the contractual limitation of liability. They should not have been encouraged to commence this litigation and deserve some acknowledgement of the stress they encountered associated with this process.

[100] In their letter of complaint, TR and TS referred to their state of mind. Elsewhere, they advised that medication had been prescribed to assist them to get through this difficult period. The seriousness of the consequences of NI's advice should not be understated.

[101] Any assessment of compensation under this head is necessarily arbitrary and is, to some extent, an acknowledgement only that the consequences of a lawyer's actions need to be recognised. Previous LCRO decisions refer to compensation of this nature being modest though not grudging. The maximum that can be awarded under

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[8] *Sandy v Khan* LCRO181/09.

[9] *Wandsworth v Ddinbych & Keith* LCRO 149 & 150/09.

section 156(1)(d) is $25,000.[10] In the circumstances, I consider that an appropriate award under this head is $5,000.

Decision

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

2. Pursuant to section 156(1)(e) of the Lawyers and Conveyancers Act 2006, NI is ordered to reduce his fees to the sum of $7,000 including GST and disbursements. The parties are referred to [95] of this decision with regard to the amount to be refunded.

3. Pursuant to section 156(1)(d) of the Lawyers and Conveyancers Act 2006, NI is to pay the sum of $5,000 to TR and TS by no later than 20 March 2013.

Costs

In accordance with the Costs Orders Guidelines issued by this Office, where a finding of unsatisfactory conduct is made against a practitioner, costs will be awarded against the practitioner. Accordingly, pursuant to section 210 of the Lawyers and Conveyancers Act 2006, NI is ordered to pay the sum of $1,600 to the New Zealand Law Society by way of costs, such sum to be paid by no later than 20 March 2013.

DATED this 21st day of February 2013

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:

TR as the Applicant
NI as the Respondent

[10] Regulation 32 Lawyers and Conveyancers Act (Lawyers: Complaints Services and Standards Committees) Regulations 2008.

Managing Partner of CCM
TT as the Managing Partner of CCJ
The Auckland Standards Committee 3
The New Zealand Law Society