LCRO 110/2012

CONCERNING	An application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of [A North island] Standards Committee
BETWEEN	**MR VW** Applicant
AND	**MR AR** Respondent

DECISION

Complaint issues:

[1] In a complaint to the Lawyers Complaint Service dated [September 2010], Mr VW (the Applicant) asserts that Mr AR (the Practitioner) failed in his professional duties to him in connection with the purchase of a takeaway business in [the North Island]. Settlement of the sale and purchase agreement had occurred on 29 April 2009.

[2] According to the Applicant, after settlement the Council inspected the business premises and pointed out requisitions that had not been complied with. These had apparently been requisitioned as early as in 2003, but the Applicant says that the Practitioner had not properly investigated or otherwise advised him about them.

[3] About a week after settlement, the landlord increased the rent by 100%. The Applicant asserts that the Practitioner should have made this possibility clear to him before settlement.

[4] A pre-settlement inspection of the takeaway premises by the Council had not been undertaken. According to the Applicant, the Practitioner should have advised him to have an inspection carried out.

[5] The Applicant says that he would not have proceeded with the purchase "*had (he) known these facts*". The business struggled and was sold at a considerable loss approximately 12 months after settlement. The following sums were sought from the Practitioner:

Rental increase (the difference between the pre-purchase rent and the increased rent until sale)	$ 24,295.00
Compliance costs	$ 42,735.32
Loss on sale (original purchase price was $100,000; sale price was $35,000)	$ 65,000.00
	$132,030.00

[6] Before making his complaint to the Law Society the Applicant raised his concerns with the Practitioner, and received a written response to them dated 22 August 2011. In that letter the Practitioner denied any wrongdoing.

Practitioner's response to the complaint

[7] Upon being notified about the complaint to the Lawyers Complaints Service, the Practitioner responded by providing a copy of his [August] letter to the Applicant, and said further that the complaint "... *is predominantly a civil claim to recoup alleged business losses and should more appropriately be dealt with by Court proceedings. As a matter may result in civil proceedings we do not believe it is appropriate for us to respond in detail."*

[8] On 14 February the Standards Committee wrote to the Practitioner and urged him to provide it with a fuller and more detailed response. Specific questions were put to him. Answers were provided by the Practitioner on 9 March 2012 (see below).

Further material from the Applicant

[9] In a letter dated [February] 2012 the Applicant, through his representative Ms VY, provided the Lawyers Complaints Service with further material. In essence the Applicant asserted that the Practitioner had been negligent in three particular respects:

- the Practitioner should have advised the Applicant about the outstanding Council requisitions, which a search of the Council records would have revealed;

- the Practitioner should have committed the landlord to a specific rental increase, in writing; and
- the Practitioner failed to negotiate a "*business turnover warranty clause*" in the Agreement for Sale and Purchase.

[10] The Applicant also commented upon the Practitioner's [August] 2011 letter, suggesting that none of the Practitioner's explanations excused the fact that he was negligent in his representation of the Applicant throughout the sale and purchase process.

Further response from the Practitioner

[11] The Lawyers Complaints Service forwarded the Applicant's [February] 2012 letter to the Practitioner, and invited his response.

[12] On 9 March 2012 the Practitioner responded to both the Standards Committee's earlier enquiries, and the Applicant's further material. A summary of that response is:

- an initial Agreement for Sale and Purchase ("the first agreement") was prepared by a registered legal executive employed by the Practitioner's firm, on or about 14 January 2009. The first agreement was "*canned*" by the Applicant in telephone instructions to the firm on 20 January 2009;

- the Applicant attended with the Practitioner on 2 March 2009 and provided written instructions to prepare a "*memo specifying (the Applicant's) conditions of purchase (of the takeaway business)*";

- on the basis of these written instructions, on 3 March the Practitioner wrote to the vendor's solicitor making a formal offer to purchase the takeaway business on specified terms;

- the Practitioner next heard from the Applicant on 6 April when he indicated that the purchase was proceeding (apparently more at the behest of the Applicant's partner, Ms VY). On the following day the Applicant informed the Practitioner that he had signed an agreement with the vendor;

- the Practitioner received a copy of that agreement ("the second agreement") from the vendor's new solicitor, on 15 April. The second agreement was dated 6 April 2009;

- the Practitioner's understanding was that the Applicant had dealt directly with the vendor on all matters prior to the signing of the second agreement.

Standards Committee hearing and decision

[13] The Committee held its hearing "on the papers", and had the benefit of the original complaint, the Practitioner's response, further material from the Applicant and the Practitioner's response to that, as well as the Practitioner's answer to specific questions from the Committee.

[14] In its decision the Standards Committee set out the detail of both the complaint and the responses, and then determined that there had been no unsatisfactory conduct by the Practitioner. Specifically the Committee said:

> *With respect to the complaint about the lease and rent the committee noted that (the Applicant) was largely in control of the second Agreement and had negotiated it personally. The second agreement was not a repeat of the first. (The Applicant) dealt with the Landlord direct and the issue was never raised when the standard form Deed of Assignment was made available to him for signing.*
>
> *In reference to the complaint regarding Local Authority the committee do not believe (the Practitioner) had any obligation to further examine those records. For some reason, the Local Authority, having made some requisitions, did not update those requisitions in each annual report. There was nothing in the report he had received that would alert him to the requisitions.* [sic.]

[15] The Committee also noted that the Applicant may well have other remedies. It was also critical of the Practitioner's "*tardiness in dealing with (the Standards Committee's) enquiry*".

[16] Beyond the general comment that the Applicant may well have other remedies, the Committee did not specifically address the complaint about the turnover warranty.

Application for Review

[17] In his Application for Review, the Applicant makes the following points:

- the Standards Committee did "*not have an accurate picture of the case*";
- there is no evidence of the Practitioner asking the Council whether there were any outstanding requisitions in relation to the business premises;
- the Practitioner was negligent in not pursuing and confirming the question of any rental increase, with the landlord. The Practitioner should not have assumed that the Applicant had prudently negotiated that issue;

- the Standards Committee had asked itself the wrong question: instead of asking "*whether the Practitioner had acted in a satisfactory manner*", it should have asked itself "*whether the Practitioner was negligent in his handling of the sale and purchase agreement*";

- the Standards Committee made a factual error in referring to two Agreements for Sale and Purchase. The Applicant says that one was prepared and not signed and a second agreement formed the basis of the eventual settlement, so that there was only ever one "Agreement for Sale and Purchase"; and

- more generally, the Practitioner's professional duties extended to performing a comprehensive "diligence" (I interpret that to mean "due diligence") for the purchase of the business, and this should not require specific instructions.

Decision:

Review on the papers

[18] This review has been undertaken on the papers pursuant to section 206 of the Lawyers and Conveyancers Act 2006 (LCA). The parties have consented to this process, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all the information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

The issues

[19] As distilled from the complaint to the Law Society and the responses to that, and the Application for Review, the issues appear to be:

- the requisition issue;

- the rental increase issue;

- the "due diligence" issue; and, for completeness

- the turnover warranty issue.

[20] Ultimately the test will be whether any of the Practitioner's actions (or omissions) raise any professional standards issues: specifically whether any of his conduct was "unsatisfactory" as that is defined in s12(a) of the Lawyers and

Conveyancers Act 2006 ("LCA"). That section relevantly provides that unsatisfactory conduct means

> *... conduct of a lawyer ... that occurs at a time when he ... 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.*

The facts – observations:

The first agreement

[21] There seems to be no dispute that the Practitioner (and his firm) were fully engaged with the process leading up to the preparation and execution of the first agreement. Initial instructions from the Applicant appear to have been given on or before 13 January 2009, as the Practitioner's Client Care Letter was sent on that date.

[22] There are two versions of the first agreement: a partial one, which is handwritten, and a fully typed version. It is clear that the partial handwritten document was simply a working copy. The typed document is dated "January 2009" and is signed by the Applicant, as purchaser. The Practitioner says that the typed document was prepared by a member of his firm "*on or about 14 January 2009*". I infer from this, that the typed document was signed by the Applicant at about this time also.

[23] After the first agreement was signed, the Practitioner contacted the [local] District Council ("the Council"), seeking information about the premises at which the takeaway business was situated. The Council responded by email on 23 January 2009. That response attached the scanned inspection notes from the then most recent food premises assessment, which had occurred on 16 October 2008. The email did not draw attention or otherwise refer to any issues arising from that inspection.

[24] Included amongst the attachments to the Council's email were copies of:

- a "Food Premises Evaluation Checklist" dated "16/10/08";
- the Council's letter to the then business owner dated [August] 2008 attaching the Certificate of Registration of the premises;
- the Certificate of Registration of the premises; and
- the Council's Grading Certificate of the premises.

[25] None of those documents refer to any requisitions. In particular, on the Checklist the inspector has recorded the following:

- in relation to "Assessment of Premises (structural): *Acceptable conditions with only maintenance items requiring attention but able to be registered"*;

- of the 14 items to be checked for compliance, all but four were ticked as "complying". The four which were not ticked have not been further commented upon in the Checklist, the other Council documents forwarded to the Practitioner or in the Council's email to the Practitioner.

[26] On 29 January 2009 the Applicant telephoned the Practitioner and instructed him that the "*contract had been canned*". There is some confusion in the papers as to the exact date of this telephone call. In his submissions to the Standards Committee, the Practitioner indicates that the call was received on 20 January. However the attached contemporaneous handwritten file note of that call seems to be dated 29 January. In the Practitioner's letter to the Applicant dated 22 August 2011, he refers to 29 January as the date on which he received instructions that the first agreement had been "canned". It seems clear that the date was in fact 29 January – the Practitioner and the Council had corresponded between 22 and 23 January.

[27] Finally, in relation to the general circumstances surrounding the first agreement, the Practitioner says that when he spoke to the Applicant on 21 January about the first agreement, he advised him that it provided for rental reviews every two years, from 1 June 2005. On that basis, rental reviews would occur on 1 June 2007, and 1 June 2009. Quite apart from what was discussed, the first agreement clearly records that term.

The second agreement

[28] It appears that after the collapse of the first agreement, the Applicant continued to discuss the purchase of the business directly with the vendor. This culminated in the Applicant meeting with the Practitioner on 2 March 2009 and giving him written instructions to "*draw up a memo specifying (his) conditions of purchase*". Included amongst those conditions were "*(t)here is to be no increase in the rent from the current level*" and "*(t)here is to be no rent review for 5 years i.e. until 2014*". Those written instructions were dated 26 February 2009. It also appears that the Practitioner was instructed at this time to register a company on the Applicant's behalf, which was ultimately to own the takeaway business [Company A].

[29] The Applicant also told the Practitioner that he was having difficulty obtaining the vendor's books. The two had a discussion about this, and the Practitioner suggested a firm of accountants to review any financial records that might be obtained.

[30] Armed with those instructions the Practitioner wrote to the vendor's solicitor on 3 March 2009 and renewed the Applicant's offer to purchase the business, setting out the Applicant's conditions. He invited the vendor's solicitor to take instructions on the renewed offer.

[31] Of significance, in his letter the Practitioner added a condition that had not been part of the Applicant's written instructions: namely that the purchase was conditional upon the Applicant's accountants "*being satisfied with vendor's financial statements for previous two years.*" This was clearly added on the Practitioner's initiative, to address the Applicant's concerns about the lack of access to the vendor's books.

[32] There was no immediate response to the Practitioner's letter and indeed not much appears to have happened, so far as the Practitioner is concerned, for several weeks after he sent his letter. He received two telephone calls from the Applicant in early April to advise that the sale was proceeding – although seemingly with some reluctance on the Applicant's part – and to advise that the vendor had changed solicitors.

[33] It seems clear that behind the scenes since the collapse of the first agreement, the Applicant and the vendor continued to have detailed discussions about the sale and purchase of the business. That those discussions were detailed is clear from the written instructions the Practitioner received from the Applicant, dated 26 February.

[34] The vendor's new solicitor finally responded to the Practitioner's [March] 2009 letter, on 15 April 2009. He included a copy of the second agreement (which was dated 6 April 2009) and indicated that settlement was to take place [in April] 2009. Of note, the second agreement provided for rent reviews every two years from 1 June 2005 – as with the first agreement. This differed from the written instructions the Practitioner received, and the offer contained in his letter of 3 March 2009. Given the reference to rent reviews in the second agreement, it seems clear that the landlord had rejected the purchaser's request for a suspension of them.

[35] Furthermore, the second agreement did not include the "accountants' satisfaction" clause that had been referred to in the Practitioner's 3 March 2009 letter.

[36] It is also relevant to note that in his letter attaching the second agreement, the vendor's solicitor refers to the Applicant and the vendor having negotiated directly with the owner of the premises for a transfer of the lease. There was also a reference to the parties dealing directly with one another in relation to the purchase of stock in the business.

[37] Significantly also, the second agreement had been signed by the Applicant some nine days before the Practitioner received it. The Practitioner did not prepare the second agreement, although it is not entirely clear who did prepare it. Apart from his 3 March 2009 letter, the Practitioner does not appear to have had any discussions or engaged in any other negotiation with the vendor's solicitors (old or new); he simply received an already signed and clearly negotiated agreement.

[38] Settlement took place on [April] 2009 as scheduled, and the Practitioner reported to the Applicant and enclosed a settlement statement.

[39] On [May] 2009, the Council carried out its annual inspection of the premises. This inspection resulted in the Council insisting upon compliance with the 2003 requisitions, in addition to a number of other essential matters. Compliance with all matters was a pre-condition to the premises being registered for the 2009 – 2010 year.

[40] Naturally distressed by this turn of events, the Applicant set about attending to the required works, to a total cost of $42,735.32. It was necessary for the Applicant to close the premises whilst some of the work was being carried out, resulting in a loss of income to the business.

[41] Then in June of 2009 the landlord purported to exercise his right to review and increase the rental of the premises. This led to negotiations between the landlord and the Applicant, which culminated in the landlord fixing the rent at $41,500 + GST per annum. This was, almost to the dollar, a 100% increase in the annual rental. By the time this sum was fixed, considerable arrears had also accrued.

[42] As well as those two set-backs, the business struggled almost immediately after settlement, and continued in this way for several months. The Applicant felt that he had no choice but to advertise it for sale; eventually he sold it to the landlord for $35,000. By then the Applicant says he was considerably out of pocket. He attaches the blame for that squarely on the shoulders of the Practitioner.

[43] With those matters in mind, I now turn to consider each of the issues that I have identified in paragraph [19] above.

Consideration of the issues

The requisition issue

[44] The premises were registered by the Council in August 2008, and inspected in October of that same year. At the time of the registration and inspection, there were Council requisitions dating back to 2003. Registration is an annual event, and according to the Council in its letter to the Applicant dated 8 May 2009, registration (then due to expire on 31 July 2009) was "*dependant on the satisfactory compliance with the requirements of the Regulations*". Quite how the premises were annually registered between 2003 and 2009 is something of a mystery in the light of the outstanding requisitions. The 2008 inspection was absolutely silent on the topic.

[45] Given the information that the Practitioner had at the time he prepared the first agreement, when the premises had been registered for 12 months from August 2008, they had been inspected in October of that year (in which there was no mention of any outstanding matters), it is difficult to know what more he could reasonably have done. In my view the Practitioner was entitled to rely upon what the Council told him in its email to him on 23 January 2009. There was nothing to alert him that anything was amiss, or even potentially amiss.

[46] The fact that this related to the first agreement, which was subsequently abandoned, does not affect the position. The second agreement was presented to the Practitioner approximately 10 weeks later – and still within the 2008 – 2009 registration and inspection period. It was reasonable for the Practitioner to still rely upon both of those events.

[47] It is possible to imagine that a highly competent, meticulous and very conservative practitioner might take the added step of asking a Council in circumstances such as these, to confirm that there are no outstanding issues of any description in relation to either the premises or the business. However the law does not demand such a standard of excellence from lawyers – the test is what a reasonable practitioner in possession of the facts, should do. As indicated, my view is that a reasonable practitioner in possession of these facts would be entitled to rely upon what the Council provided him – namely that there were no outstanding issues with the premises.

[48] For that reason, I do not consider that the actions of the Practitioner in relation to the requisition issue raise any professional standards issues.

The rental increase issue

[49] The Applicant's difficulties with this aspect of his complaint, include the following:

- In their discussions prior to the preparation of the first agreement, the Practitioner specifically advised the Applicant about the existing rental review provisions in the lease. It must have been clear to the Applicant that such a review was due to take place in June of that same year.

- Indeed, the fact that the Applicant was aware of this provision is apparent from his written instructions to the Practitioner, discussed by them on 2 March 2009. The Applicant specifically sought a condition suspending the rent review provision.

- This condition was conveyed to the vendor's solicitor by the Practitioner in his 3 March 2009 letter; the response dated 15 April 2009 made it clear that the Applicant and the vendor had negotiated directly with the landlord about the lease.

- Significantly, the Applicant signed the settlement agreement without any recourse to the Practitioner for advice. He simply telephoned the Practitioner and told him that he had signed it. At that point the Practitioner had not even seen the second agreement; he did not receive it for a further nine days.

[50] Again, it is difficult to know what more the Practitioner could have done. He gave appropriate advice about the rent review at the time that the first agreement was prepared; he took no part in (and was not asked to take any part in) the negotiations between the Applicant and the vendor, or the Applicant and the landlord, after the collapse of the first agreement; he complied with his client's written instructions in relation to that issue when he wrote to the vendor's solicitor to formalise a second agreement; and he waited for further instructions from his client. I noted that the Applicant had given to the Practitioner a memorandum setting out the terms upon which he would purchase the business which included specific terms relating to rent reviews. The Practitioner had sent these to the vendor's lawyer. Thereafter the Applicant had signed an agreement without any reference to the Practitioner. The result was that the Applicant signed the purchase agreement without ensuring the Practitioner had perused the agreement to ensure that the terms wanted by the

Applicant were in fact included. In particular, at no point was the Practitioner instructed to contact the landlord and negotiate the rent review provision in the lease.

[51] It cannot be the case that the Practitioner was expected to regularly follow-up with the vendor's solicitor and the Applicant after he sent his 3 March 2009 letter – had he done so he might have been criticised for generating unnecessary fees. It would have been clear to the Practitioner that the Applicant was content – indeed preferred – to do most of the "leg work" himself.

[52] For those reasons, I do not consider that the actions of the Practitioner in relation to the rental increase issue raise any professional standards issues.

The due diligence issue

[53] This particular description of the complaint arises for the first time in the Application for Review. The Applicant says that the Practitioner should have carried out a due diligence of the premises and the business. Had he done so, he would have discovered the requisition issues and any problems with turnover. I also infer that the Applicant considers that as part of the Practitioner's due diligence, he would have advised the Applicant to arrange a pre-purchase inspection by the Council.

[54] This complaint is really a summary of the individual complaints, with the exception of the pre-purchase inspection issue. I have already dealt with the requisition issue; below I deal with the turnover warranty issue.

[55] In relation to the pre-inspection issue, I accept that in some circumstances a lawyer might advise their client to arrange a professional pre-purchase inspection of business premises. In some way this is similar to a pre-purchase inspection of business books.

[56] However the Practitioner was here faced with recent Council material which revealed nothing out of the ordinary; he was acting for a client who was pro-active about dealing directly with the vendor and the landlord; his client had not raised any concerns about the premises (as he had done with the books), and his client had signed an agreement without reference to him.

[57] For those reasons, I do not consider that the actions of the Practitioner in relation to the due diligence issue (as that relates to the failure to advise the Applicant to arrange a pre-purchase inspection) raise any professional standards issues.

The turnover warranty issue

[58] This issue was raised by the Applicant with the Practitioner in about July 2011. The Practitioner responded to that aspect of the complaint (along with other aspects) in his letter dated 22 August 2011, and indicated that he had not been "*asked (by the Applicant) for and … gave no advice on the financial viability of the business.*"

[59] To the extent that the Applicant may have alluded to concerns about the viability of the business, on 2 March 2009 he raised with the Practitioner the fact that he had been unable to inspect the vendor's books. The Practitioner's response to this was to advise the Applicant to add an "accountants' satisfaction" clause to his list of conditions, and he recommended a firm to carry out an inspection of the books.

[60] However, the second agreement did not contain such a provision, and as already noted in this decision, that agreement was signed before the Practitioner had seen it, much less been consulted about it. It is difficult to see what more the Practitioner could do – his client had committed himself to signing the second agreement without the benefit of any advice about it.

[61] As with the other three issues, I do not consider that the actions of the Practitioner in relation to the turnover warranty issue raise any professional standards issues.

Summary of decision

[62] For the reasons I have extensively outlined above, I agree with the Standards Committee's decision. Nothing that the Practitioner did (or failed to do) has raised any professional standards issues, as they are defined in the LCA and the various Rules and Regulations made thereunder.

Decision

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

DATED this 12th day of December 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:

Mr VW as the Applicant
Ms VY as the Representative for the Applicant
Mr AR as the Respondent
[Director of an associated company]
[North Island] Standards Committee
The New Zealand Law Society