LCRO 119/2010

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Auckland Standards Committee 3
BETWEEN	**CH** of Auckland Applicant
AND	**XO** of Auckland Respondent

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

DECISION

Background

[1] In May 2008 the Applicant and his wife approached the Respondent for advice in connection with various matters, particularly with regard to the difficulties they were facing in the lawnmower repair business which they operated from premises in [Auckland].

[2] Subsequently in August 2008, as a result of negotiations carried out with a potential purchaser of the business, the Applicant provided the Respondent with an Agreement for Sale and Purchase which had been prepared by himself and the purchaser. He requested that the Respondent review the agreement and comment on any matters which she considered should be drawn to his attention.

[3] After making some amendments to the Agreement with regard to a proposed employment contract, the Agreement was returned to the Applicant and was then signed by the purchaser and the Applicant.

[4] Schedule 1 of the Agreement provided for a list of tangible and intangible assets included in the sale. Under the heading of intangible assets were inserted the words:-"benefit of vendors existing lease."

[5] An additional clause 16 was inserted as a further term of sale. Clause 16(a) made the agreement conditional upon the landlord agreeing to vary the lease of the premises to give the purchaser a right to renew the lease for two further terms of three years each.

[6] The purchaser's solicitor corresponded directly with the landlord's solicitor with regard to the conditions, and on 5 September 2008 wrote to the Respondent as follows:

> I can now confirm on behalf of the purchaser [Mr H] that
>
> (1) Clause 8.2(1) of the agreement re landlord's consent to my client as assignee is satisfied subject to execution of the usual Deed of Assignment of the Lease by both our clients and the landlord. You may need to obtain verification of the landlord's consent which has been advised to us by the landlord's lawyer [BM].
>
> (2) Clause 16 regarding my client reaching agreement with the landlord is satisfied. This means the agreement is now only conditional upon my client's approval of the lease pursuant to clause 9.1(2) of the agreement....

[7] In that same letter, the purchaser's solicitor advised that the purchaser agreed to release the Applicant from the provision in the agreement whereby the Applicant was to be employed by the purchaser, on the basis that a restraint of trade be entered into by the Applicant. He also outlined what was expected of the Applicant pursuant to the agreement.

[8] In a letter dated 10 September to the purchaser's solicitor, the Respondent advised:

> We refer to your earlier facsimile dated 5 September 2008, and can now confirm items 2 to 6 have been agreed to by [the Applicant]. [The Applicant] is also agreeable to a restraint of trade for 2 years and 10 kilometres radius from the premises.

[9] By a letter dated 11 September 2008 the purchaser's solicitor advised:

> My client has now instructed me he has now approved the lease condition in the agreement subject to your being able to provide me on settlement with two completed copies of the now enclosed Deed of Assignment from your client to my client. I confirm the landlord has approved the lease variations in the assignment...

Subsequently, in the same letter he says:- *"I confirm therefore the agreement is now unconditional."*

[10] He further goes on to say:-*"I confirm our discussion that some kind of interim settlement will need to be arranged to give time for the landlord to sign the Deed of Assignment."*

[11] Under the interim settlement arrangement agreed to, possession of the premises, the stock and plant passed to the purchaser on the contractual settlement date (12 September 2008). The amount to settle was paid to the Respondent, against an undertaking given by her in her letter of 12 September 2008, "to hold the settlement funds in our trust account pending us forwarding to you an executed Deed of assignment of Lease."

[12] On 15 September, the Respondent forwarded the Deed of Assignment of lease to the landlord's solicitor, unsigned by her clients. The landlord's solicitor made changes to the document. The amendments were initialled by the directors of the landlord's company and the amended document executed.

[13] To hasten the completion of the document, the Respondent arranged to uplift the document from the landlord's solicitor, which, because of the amendments, required to be returned to the purchaser's solicitor for initialling by the purchaser. The documents were provided to her under cover of a letter dated 18 September in which the landlord's solicitor wrote:-

> Further to your message left on the writer's answerphone we advise that the Assignments have been made available on the basis that you give us your undertaking to use your best endeavours to have the changes to the Deed of Assignment initialled by your clients (and the assignee) and will not deal with the same until those amendments are initialled. We further require your undertaking that you will return one fully initialled copy to us together with payment of our costs immediately upon settlement of the matter. As well, our client is to be reimbursed for the part of the insurance premium as previously detailed.

Presumably the Respondent provided these undertakings, or at least did not demur from the record of them, as she then uplifted the document.

[14] The purchaser's solicitor objected to the changes, and on the 19th September the landlord's solicitor required the Respondent to return the documents.

[15] On 26 September 2008, the Respondent paid to the Applicant all but $7,000 of the funds presumably with the agreement of the purchaser's solicitor.

[16] Following agreement between the purchaser and the landlord as to the wording of the Deed of Assignment, the documents were returned to the Respondent under cover of a letter from the purchaser's solicitor dated 7 October. The Respondent

forwarded the document to the Applicant on 13 October for execution. The Applicant then sought separate advice from another solicitor before executing the documents.

[17] Problems continued in finalising the transaction because of incorrect insurance data and it was not until March 2009 that settlement was finally completed.

[18] During this time relations between the Applicant and the Respondent had deteriorated and on 16 April 2009 the Applicant lodged a complaint with the New Zealand Law Society. He complained that:

(a) the Respondent had given incorrect advice in respect of the transfer of the business's phone numbers;

(b) she had failed to advise that by virtue of the variation of the lease providing rights of renewal, that the Applicant as guarantor retained an ongoing contingent liability through to the end of all rights of renewal in 2018;

(c) that she had failed to advise him with regard to the restraint of trade clause;

(d) that she had communicated poorly and failed to respond to inquiries and complaints;

(e) that she had failed to provide a statement and report as required by the Applicant to complete GST and IRD returns.

The Standards Committee decisions and application for review

[19] The matter was originally considered by the Standards Committee on 8 October 2009 and it determined that no further action would be taken in respect of the complaint for the reason that further investigation was unnecessary.

[20] The Applicant lodged an application for review of that decision with this Office, and in a decision dated 24 February 2010, the LCRO came to the view that because of the factual disputes and questions as to whether the Respondent had adhered to appropriate standards, it was inappropriate for the Committee to take no further action pursuant to s138(2) of the Lawyers and Conveyancers Act 2006. He referred the matter back to the Standards Committee, with a direction for the matter to be reconsidered and determined.

[21] On 17 June 2010 the Standards Committee issued its decision, having reconsidered the matter.

[22] The Committee determined that overall it was satisfied that the Respondent had done the best she could to assist the Applicant and his wife who were in a difficult commercial situation. The Committee considered that the Respondent had acted at all

times in her client's best interests, and that the Applicant and his wife knew the options available to them before they committed to the assignment of the lease on extended terms.

[23] Having formed this view the Standards Committee resolved to take no further action pursuant to s152(2)(c) of the Lawyers and Conveyancers Act 2006.

[24] The Applicant has applied for a review of that decision and refers to specific paragraphs in the decision. In general terms he seeks a full and complete review of the complaint.

[25] In his complaint to the Complaints Service, the Applicant sought: –

(a) A refund of outstanding monies from the sale (following completion of the matter this has now been addressed).

(b) A refund of the costs incurred by reason of him seeking alternative advice.

(c) Compensation of $15,000 representing the value of the business of which he had been deprived.

(d) Compensation for the costs of establishing a Trust to protect the home belonging to himself and his wife from the contingent liability to the landlord.

Review

[26] Although initial contact between the parties took place in May 2008, all of the conduct about which the Applicant complains took place after 1 August 2008 which is the date that the Lawyers and Conveyancers Act 2006 came into effect. Consequently, I have proceeded with this review on the basis that the conduct of the Respondent is to be considered in accordance with the provisions of that Act.

[27] The overall tenor of the Applicant's complaint is that the Respondent had evidenced a general lack of care in reviewing the documents relating to this transaction, and had failed to provide appropriate advice in relation to those documents and the transaction as a whole.

[28] The Lawyers and Conveyancers Act introduced an element of consumer protection that had been lacking in the Law Practitioners Act 1982. Section 152(2)(b) of the Lawyers and Conveyancers Act provides that a Standards Committee may determine that there has been unsatisfactory conduct on the part of a practitioner. Section 12(a) of the Act defines unsatisfactory conduct as 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.

[29] Part of the material obtained by me in conjunction with this review was the Respondent's file. As a general comment at the outset, I observe minimal written correspondence to the Applicant or file notes recording the content of the various telephone conversations, advice or information which the Respondent says she imparted to the Applicant. By way of example, there is no record of the content of the telephone discussion which took place on the 8th September about the letter received from the purchaser's solicitor on 5 September. All that is recorded in the Respondent's time sheets, which she says doubles as her diary, is the fact that a telephone conversation took place. This is an inadequate record about a crucial piece of correspondence.

[30] The Agreement for Sale and Purchase of the business was signed on 22 August 2008. Some time just prior to this, the unsigned agreement was taken by Mrs CH to the Respondent's office for her to review. It is clear that some communication took place with regard to the content of the Agreement but again, there is no written report to the Applicant recording what was discussed and the Respondent's advice. Similarly, there are no file notes which the Respondent can point to which records the content of those discussions.

[31] This lack of record keeping originally led to the Respondent asserting that the Agreement was already signed when it was delivered to her office. She subsequently accepted however, that she had sighted the Agreement prior to it being signed, and indeed had amended it in her own handwriting.

[32] The lack of important items of correspondence on the file and file notes does leave me to consider whether the Standards Committee was provided with a complete copy of the Respondent's file. Apart from the lack of file notes, I have not been able to locate copies of important documents such as correspondence from the purchaser's solicitor authorising partial release of the sale proceeds in September. I have however proceeded on the basis that what was provided does represent the complete file.

[33] Without any written confirmation of the content of discussions between the parties, it has been difficult, and sometimes impossible, to come to a decision as to the matters that were discussed and the advice provided. The importance of written confirmation of matters discussed, cannot be over-stated. I acknowledge that there were time pressures surrounding this transaction, but it is in those circumstances where a lawyer needs to be particularly diligent in recording matters discussed and advice provided. In this instance, the Applicant had both email and fax facilities and was therefore able to readily receive written correspondence.

[34] During the course of the review, it has also become apparent that the Respondent did not provide the Applicant with copies of correspondence from third parties. In particular, she did not provide the Applicant with a copy of the letter dated 5 September. The Applicant had both fax and email facilities and it would have been a simple matter for this to have been provided to the Applicant. Instead, the Respondent chose to rely purely on telephone conversations between herself and the Applicant to discuss the matters raised in the letter. On the strength of those discussions, the detail of which was not recorded, she then committed the Applicant and his wife to the various matters raised in that letter. This is unsatisfactory, from both the client's point of view, and from the point of view of the lawyer who then seeks to assert that all the matters raised in the letter were communicated to the client.

[35] The Respondent says that she had a long telephone conversation with the Applicant about the content of the letter dated 5 September 2008. However, her diary note reveals nothing of the content of that conversation other than the fact that there was a telephone call to the purchaser's solicitor.

[36] These comments are made by way of a general observation with regard to what I consider to be less than satisfactory file management practices of the Respondent. However, they are general comments only and do not support any adverse finding against the Respondent in respect of any particular aspect of the complaint.

The Standard Committee's decision

[37] Before proceeding further with this review it is pertinent to refer to a number of aspects of the Standards Committee decision as I am somewhat concerned that the Committee may have misdirected itself and proceeded on the basis of incorrect conclusions.

[38] In paragraph 33 of its decision the Standards Committee states as follows:-

> Problems arose when the landlord refused to consent to an assignment of the lease unless the landlord's own requirements were met, namely extending the lease with two renewals through until 2018 with Mr CH acting as guarantor. Mr CH had a choice of not complying with those demands, and sought advice not only from Ms XO but also from Mr XN about those issues. Ultimately, Mr and Mrs CH had little practical choice in the matter because the only alternative was to allow the sale of the business to fall through with the result that they would face ongoing business losses and continue to be liable under the existing lease through until 2012.

[39] It was not the landlord who imposed requirements to extend the lease (with two renewals) with the Applicant acting as guarantor. The Applicant had already signed an Agreement which was conditional upon the landlord agreeing to a variation of the lease

"by the addition of a clause giving the purchaser (as tenant) a right of renewal of two further terms of three years each resulting in a final expiry date (if such renewals are exercised) of January 2018." (clause 16(a) of the Agreement for Sale and Purchase).

[40] The Applicant was therefore committed to agreeing to a variation of the lease extending its term by way of renewals as soon as the agreement was signed. From then on, it was only a matter of whether the landlord agreed to this condition. The Applicant therefore had no choice whether to comply or not once the agreement was signed. This is contrary to the statement made by the Committee.

[41] The Committee also notes that the Applicant and his wife had little practical choice as to whether or not to agree to the landlord's requirements. As noted above, it was not the landlord's requirements. However, whether a client has a practical choice is not the issue to be addressed in a complaint about professional standards. The question in this case is whether the Respondent provided services which met the standards of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer. The Applicant was entitled to be properly advised about all aspects of the transaction, advice on which he could then make decisions. In this regard, it is wrong for either the Respondent or the Standards Committee to assume that the Applicant did not have any choice in the decisions to be made. He could, for example, have decided on a course of action which was not at all commercially sensible. It is the role of a lawyer to make sure that a client has all the relevant advice, facts and information on which to make a decision, not to predetermine what that decision should be.

[42] In paragraph 34 of the decision the Committee seems to be under the impression that the Applicant had an option in October 2008 not to proceed with the sale. That is not correct. By that stage, the agreement had not only been declared unconditional, but the sale price had been paid by the purchaser and all but $7,000 released to the Applicant and his wife. The purchaser had been in possession of the premises and the business from 12 September 2008.

[43] In addition, the Respondent had accepted all the terms set out by the purchaser's solicitor in his letter of 5 September. This included the restraint of trade. As a result of this, the Applicant was legally bound to proceed with the transaction. He had no legal options, contrary to the view seemingly held by the Committee.

[44] In paragraph 35 of the decision, the Committee states that the Sale and Purchase Agreement had been signed without obtaining legal advice from the Respondent on that particular draft. Again, this is not correct. It has been established

and accepted, that Mrs CH had delivered the draft of this particular agreement to the Respondent for comment, and in fact the Respondent had made some handwritten changes to it. In this regard, therefore, the Committee has proceeded on a significant misunderstanding of the facts.

[45] In paragraph 35(1) the Committee states that the Applicant had the option of pulling out of the sale on the grounds that the second condition had failed. It was agreed at the hearing, that this was a reference to Clause 16 of the Agreement. By letter dated 5 September 2008 the purchaser's solicitor had notified the Respondent that this condition was satisfied subject only to approval of the terms of the lease. That condition was satisfied on 11 September. After that date, the Applicant did not have the option of withdrawing from the Agreement.

[46] I have given some careful consideration to this particular aspect of the transaction. Both the Standards Committee and the Respondent have adopted the view that at the time of discussing the letter from the purchaser's solicitor on 8 September, and again when discussing the amendments to the Deed of Assignment, the Applicant had a choice of not proceeding with the Agreement. In the paragraph headed "telephone numbers" of her letter of 19 April 2011 in response to the submissions made by the Applicant at the hearing, the Respondent states "at this point Mr CH had a choice to make to decline items 1-4 [she may mean 6] of the letter of 5th September from the purchaser's solicitor, and possibly let the sale fall over, or to accept the conditions and proceed with the sale."

[47] This does not accord with my view of the position which the Applicant was in at that point in time. In his letter of 5th September, the purchaser's solicitor first records that the landlord had consented to the assignment of the lease and consequently the condition in clause 8.2(1) of the agreement had been satisfied. He then records that the condition in clause 16 had been satisfied. He then goes on to say:- "This means the agreement is conditional only on my client's approval of the lease pursuant to clause 9.1(2) of the agreement. I record your phone advice today that you would post me a copy of the lease. I note the lease [here I presume he means the agreement] gives my client 5 working days from receiving the lease to approve or disapprove the lease." Consequently, at this stage, the agreement is unconditional save for the purchasers approval of the lease. That was a condition inserted for the benefit of the purchaser, and it was at the purchaser's discretion only to approve or disapprove the lease. The Applicant had no choice. He was committed to the sale. I am therefore puzzled at the suggestion by the Respondent and the Standards Committee

that the Applicant had the option of terminating the agreement at that stage. I do not see how that can be correct.

[48] In paragraph 35(2) of the decision, the Committee "agrees with Ms XO's observation that Mr CH had no real option but to go ahead with the sale after the landlord demanded a guaranteed extended lease, otherwise he would have been left with a failing business and no other purchaser." The landlord did not demand a guaranteed extended lease - it merely confirmed acceptance of the request by the purchaser's solicitor in his letter of 22 August 2008 sent in terms of the Agreement requesting consent to the "insertion of a clause giving [my] client rights of renewal of two further terms of three years each, resulting in a final expiry date (if such renewals are exercised) of January 2018."

[49] The misunderstandings of the Committee referred to above must have had some impact on its decisions and in proceeding with this review and the outcome thereof it is important to bear these matters in mind.

What advice did the Respondent provide?

[50] The primary issue is what advice did the Respondent provide to the Applicant prior to the agreement being signed.

[51] It has been accepted that the draft of the Agreement (which was ultimately signed) was delivered to the Respondent for review and comment. At the review hearing, the Applicant advised that he asked the Respondent to review the Agreement and to inform him about any matters with which he should be concerned. He also states that he specifically asked the question as to whether the Agreement as drafted committed him to transfer the phone numbers of the business to the purchaser.

[52] The draft which formed the basis of the Agreement as signed, is significantly different from another draft Agreement produced by the Respondent at the hearing. That draft provided for a sale price of $285,000 and in Schedule 1, the intangible assets specifically included the transfer of phone numbers, fax numbers, email, and a database of the business. In other words, that draft represented the sale of the complete business.

[53] The draft subsequently provided to the Respondent in August 2008 provided for a sale price of $80,000 allocated as follows:-

Tangible Assets (as per Schedule 1)	$5,000.00
Intangible Assets (as per Schedule1)	$35.000.00

Stock in trade (being all spare parts and accessories as inspected plus hand-held and walk behind equipment as detailed in List 1 and List 2, in clean, unused and in original condition).	$40,000.00
	$80,000.00

[54] Schedule 1 listed the intangible assets as being "the benefit of vendors' existing lease". It was the Applicant's intention that this was all that was being sold by way of intangible assets.

[55] However, the standard form of Agreement for Sale and Purchase effects the sale of the "business". Clause 1.1(4) of the Agreement defines the business as including "the assets".

[56] The "assets" of the business are then defined in clause 1.1(3) as meaning "the tangible and intangible assets" including those listed in Schedule 1 (emphasis added).

[57] The "intangible assets" are further defined in clause 1.1(8) of the Agreement and by virtue of clause 1.1(8)(d) includes the goodwill of the business.

[58] Consequently, the agreement as completed, did not limit the intangible assets to those recorded in Schedule 1 but included the goodwill of the business, contrary to the intention of the Applicant.

[59] It is not evident that the Applicant communicated to the Respondent that the only intangible asset he intended to sell was the location. As far as she was concerned the Applicant was selling all aspects of the business including the goodwill. That is how the agreement presented. The sum of $35,000 was allocated to intangible assets and there was nothing in it to cause her to consider that this Agreement represented anything other than a sale of all of the business operated by the Applicant.

[60] The only specific question which the Applicant says he asked of the Respondent was whether the phone numbers were included in the sale. He has a file note dated 21 August recording that conversation and says that the Respondent advised him that they were not. On the basis of that advice, he then signed the Agreement on the following day. The Respondent denies that there was any such conversation at that point in time.

[61] I am inclined to accept that the Applicant's version of events as correct. He says that the sale was an aggressive takeover, and the purchaser was not prepared to pay anything for goodwill. Approximately one-third of the business was generated by

persons ringing the business and requesting servicing of ride-on mowers on site. Logic would have it therefore that the Applicant would not wish to provide this to the purchaser if the purchaser was not prepared to pay for that business. In addition, the Applicant's diary note records asking this question on 21 August whereas the Respondent has nothing other than her recall, which has previously been shown to be deficient.

[62] However, when all of the circumstances are considered there is insufficient evidence to support an adverse finding against the Respondent in respect of these matters. There would appear to have been inadequate communication between the parties as to what it was that the Applicant intended to sell. The Agreement was completed by the Applicant and the purchaser. It presented as a sale of the entire business. The Applicant said nothing to the Respondent to indicate otherwise. There was nothing other than the disputed telephone conversation concerning the telephone numbers which would have indicated to the Respondent that the sale was anything other than a sale of a business in the usual way. To achieve what the Applicant intended would have required substantial amendments to the standard form agreement and it would be unreasonable to have expected the Respondent to be alert to the need to do so without some instructions from the Applicant. To ask the Respondent to advise of any matters which the Applicant should be aware of without providing some indicators as to what the Applicant was wanting to achieve was not providing all of the relevant information to the Respondent to enable her to provide the necessary advice.

The lease obligations

[63] The parties had initially met in May to discuss various matters which included, it would appear, the issues that presented in connection with selling the business. The Respondent states that she explained to the Applicant the principle of law that results in a tenant and guarantor remaining bound by the terms of a lease through to the end of its term, notwithstanding any assignments. The Respondent says that she suggested establishing a Trust to minimise exposure to the adverse consequences of this.

[64] The Applicant says he is unable to remember such a discussion, but does not deny that it took place. However, he rightly points out, that in May 2008 negotiations had not commenced with the purchaser and consequently there was no suggestion that the term of the lease was to be extended.

[65] The Applicant's concern is that the Respondent did not raise this matter in August 2008 when the Agreement was provided to her for comment prior to signing.

The Respondent does not contend that the matter was specifically discussed at that time and relies upon the earlier discussions in May. The discussions in May identified that the Applicant would remain liable on the terms of the lease until its expiry in 2012. Clause 16 of the Agreement provided that it was conditional on the purchaser and the landlord reaching agreement to vary the lease by the addition of a clause giving "the purchaser (as tenant) a right of renewal...." The legal principle whereby a tenant remains liable under a lease notwithstanding assignment, is not something that is well known or understood by tenants. Consequently, the Respondent should have recognised that the Applicant would have been unlikely to have realised that by agreeing to a variation of the lease providing for renewals, he was extending his contingent liability to 2018, and made a point of explaining this to him when he asked for her to review the Agreement and advise on any issues that he should be aware of.

[66] Both the Respondent (letter dated 20 May 2008) and the Standards Committee (para 35(i)) have adopted the position, however, that if the Applicant did not agree to the purchaser's requirements that the lease be varied to provide for rights of renewal, that the sale would not have proceeded. That is not the point. As noted earlier, the Applicant and his wife were entitled to make decisions appraised of all the relevant facts. If they had been aware of their exposure to the liability of the extended lease, they may very well have decided not to sell but to continue to trade until the end of the lease in 2012, or indeed, close down the business at an earlier stage while acknowledging that they retained liability under the lease. The potential liability pursuant to the lease as varied, is in excess of $300,000.

[67] The issue is that this is not a decision for the Respondent to make. In her response to the Complaints Service dated 20 May 2009, the Respondent had this to say about the Applicant's exposure:

> The purchasers negotiation with the landlord was proving to be difficult in that the landlord was not agreeable to a new lease with the purchaser (the purchaser's preference was a new lease), but wanted to extend the existing lease. The only way in which the sale would proceed was to agree to this extension. I called CH into the office, and we discussed the options, in particular the personal guarantee which would be required to be signed. I gave him a photocopy of the guarantee to take away with him. Once again it became very clear to me that CH had no idea of what he had gotten himself into when he actually purchased the business, let alone the requirements of selling the business. Clearly he was unhappy with this situation, but at this point only days before settlement and under considerably (sic) stress, he agreed to the extension of the lease. If he did not agree, then the sale would not happen, and he would be stuck with the failing business, and no real hope of any further sale, not least due to the falling economic climate. CH left my office to think on the matters discussed.

[68] The purchaser's preference was for a new lease but that is not what clause 16(a) of the Agreement provided. The Agreement was conditional only upon the

landlord agreeing to the existing lease being amended to provide rights of renewal. That is what the Applicant had agreed to and was committed to accepting. The purchaser's solicitor wrote to the landlord's solicitor on 22 August and requested this variation. By letter dated 5 September 2008 the purchaser's solicitor then advised the Respondent that the condition had been satisfied. The assignment of the lease reflected the terms of the Agreement for Sale and Purchase. The only real point in time when the Applicant had any choice in the matter was when the Agreement was signed. It is understandable that he would not be happy to realise that he was exposed to a potential liability in excess of $300,000 when he had previously been under the impression that the variation of the lease was a matter between the landlord and the purchaser.

[69] In connection with this aspect of the complaint I have formed the view that the Respondent has fallen short of the standard of competence and diligence required by s12(c) of the Lawyers and Conveyancers Act.

Reporting

[70] Regulation 12(7) of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 provides as follows:

> Each practice must provide to each client for whom Trust money is held a complete and understandable statement of all the Trust money handled for the client, all transactions in the client's account, and the balance of the client's accounts, – (c) in respect of all other transactions, promptly after or prior to the completion of the transaction.

[71] Rule 9.6 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (Client Care Rules) also provides that:

> A lawyer must render a final account to the client or person charged within a reasonable time of concluding the matter or the retainer being otherwise terminated. The lawyer must provide with the account sufficient information to identify the matter, the period to which it relates, and the work undertaken.

[72] The Applicant says he did not receive any statements, an account, or reports from the Respondent. He says the copies that are referred to by the Standards Committee in paragraph 35(iv) of its determination, were obtained by him when he received a copy of the Respondent's file.

[73] On the Respondent's file is a letter dated 24 November 2008, addressed to the Applicant's company, reporting completion of the sale and enclosing a statement. In that letter she states:

> One copy of the executed Deed of Assignment of Lease has been forwarded to the landlord's solicitors to be held by them, together with payment of their costs, and payment of the insurance premium and water rates.

[74] However, on 17 December 2008, the Respondent sent an email to the Applicant referring to the fact that she had been waiting since 24 November for additional funds required from the purchaser in respect of insurance. She states:-

> We are still holding the executed documents (incidentally you returned them to me unwitnessed and I needed to return them to XN for witnessing) and will complete settlement once the purchaser has come to the party, so to speak.

[75] Not only does the Respondent advise in this email that, contrary to the letter dated 24 November, she was still holding the Deed of Assignment, but she refers to the fact that she had been obliged to have the documents witnessed by the alternative solicitor consulted by the Applicant. She had already included this comment in the account dated 31 October 2008 which the Respondent says was sent to the Applicant on 24 November. The Applicant says he did not receive that letter and statement and I am inclined to accept that is the case as the sale had not been completed, the Respondent continued to hold the Deed of Assignment, and the insurance apportionments had not been finalised. This is supported by the fact that the Applicant subsequently made inquiries as to when he would receive final statements and accounts.

[76] Nevertheless, the standard of proof to be applied in these matters is the civil standard of the balance of probabilities, and applying that standard, it must be accepted that, having been prepared, the letter and statement were sent.

[77] The matter was not finalised until March 2009. On 19 March 2009, following a number of inquiries from the Applicant, the Respondent advised by email that she was completing the statements for the sale of the business. She requested advice as to how the Applicant wished these to be sent. He replied that it was in order for them to be sent by email.

[78] There is on the Respondent's file, a statement dated 20 March 2009, which picks up the debit balance from the statement dated 24 November 2008, and includes the two adjustments to that statement in respect of insurance and stock. However, there is no letter which the Respondent can provide me with or which I can locate on the file, under cover of which that statement was sent to the Applicant. The statement needed some explanation, as it does not include any bill for the matters undertaken by the Respondent from 24 November 2008 to the date of finalisation of the transaction in March 2009. I have therefore come to the conclusion that this statement was not sent to the Applicant, a conclusion which is supported by the ongoing requests from the Applicant for final statements and accounts.

[79] In her letter to the Law Society dated 14 August 2009, the Respondent refers to waiving outstanding costs of $1,216.09 and I have taken that to be the case, as no account has been provided to the Applicant. The fact that it is an exact figure would indicate that a bill had been prepared. However, there is no bill on the file and the Applicant says that he has neither received any statement or bill from the Respondent.

[80] In an email dated 15 April 2009, the Applicant again requests confirmation that everything has been settled together with final statements. He says:-

> I have sent several emails requesting our final statement and confirmation that everything has actually been settled. Could you please respond to this email with a statement for 08,09 financial year. Secondly, please confirm that the sale is finalised.

[81] This email was forwarded as a reply email to the Respondent's email of 19 March, which indicates that the Applicant had not received any statement or report from the Respondent.

[82] It would appear also that the Respondent did not reply to the Applicant's email of 15 April 2009 and as a result of her failure to respond, the Applicant was motivated to lodge the complaint with the Law Society.

[83] The failure to provide this final reporting statement and invoice (or advice that fees were to be waived) constitutes breaches of regulation 12(7) of the Trust Account Regulations and rule 9.6 of the Client Care Rules.

The Deed of Assignment

[84] A matter raised in this review which causes some concern is the issue raised by the Applicant as to the Respondent's general lack of care. On 18 September 2008, the Respondent uplifted the Deed of Assignment from the offices of the landlord's solicitors in an attempt to hasten the completion of the matter. In normal circumstances, it would not be expected that any undertaking would be required from the assignor's solicitor, other than to make payment for the landlord's solicitor's costs. However, without checking the documents, it appears that the Respondent provided an undertaking to use her best endeavours to have amendments to the document initialled by her clients and the purchasers. There is no indication that she was aware of what changes had been made. Lawyers must exercise utmost diligence when giving undertakings, even a "best endeavours" undertaking. No copy of the undertaking given was retained by the Respondent and the only evidence of the undertaking is that recorded in the letter from the landlord's solicitor of 18 September. It is difficult to understand how a best endeavours undertaking can be given without firstly being aware of the amendments

to the document, and secondly, without discussing these with the persons who were expected to acknowledge same. By giving such an undertaking, it could be considered that the Respondent had compromised her ability to properly advise her client. This matter is not such as to attract an adverse finding, but should be noted by the Respondent. In reaching this decision, I have been influenced by the fact that the landlord's solicitor did not require the Respondent to take steps to fulfil her undertaking. Had they done so, the full extent of the position in which she had put herself and her client in would have become apparent.

Communication

[85] A final matter to be addressed is the general unhappiness of the Applicant with regard to communications from the Respondent. He says that she was difficult to contact and did not respond to communications. She responds by advising that she had replied by way of ten emails throughout the period from December 2008 to March 2009. The number of emails sent is to a large extent irrelevant – the issue is whether there has been an adequate level of response to the Applicant. There is nothing to be gained by examining this aspect of the complaint in any detail, but it reflects the general unhappiness with the level of service and client care provided by the Respondent.

The landlord's solicitors bill

[86] Upon receipt of the Respondent's file through the Law Society, the Applicant noted the bill paid to the landlord's solicitor for $1,687.50. In his letter to the Complaints Service dated 3 August 2009, he states that he was totally unaware of the payment of this invoice. He also complains about the amount of this bill. He notes that included in the bill are attendances by the landlord's solicitors meeting the purchaser on site. I have not sighted a copy of the Deed of Lease, but it is usual for an assignor to pay the landlord's solicitor's costs and disbursements for attendances in connection with the assignment. However, it does have to be queried why it was necessary for the landlord's solicitor to attend an on site meeting which was presumably to view the state of repair of the premises, and for the purposes of discussing what contribution the landlord would make (if anything) to the costs to be incurred by the purchaser in upgrading the premises.

[87] The relevance of this however is that the Respondent has made payment of the account without reference to the Applicant. This is a clear breach of Regulation 12(6)(b) of the Trust Account Regulations which provides that: -

> A practitioner may make transfers or payments from a client's trust money only if –
>
> > (b) the practice obtains the client's instructions or authority for the transfer or payment, and retains that instruction or authority (if an item) or a written record of it.

It is also a breach of Section 110(1)(b) of the Lawyers and Conveyancers Act which requires that a practitioner must hold money received on behalf of any person "exclusively for that person, to be paid to that person or as that person directs."

Summary

[88] In this review I have found breaches by the Respondent of rule 9.6 of the Client Care Rules, and regulations 12(6)(b) and 12(7) of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008. There is also a breach of s110(1)(b) of the Lawyers and Conveyancers Act 2006. It follows therefore that there will be a finding of unsatisfactory conduct as that term is defined in s12(c) of the Lawyers and Conveyancers Act in relation to these aspects of the complaint

[89] Given the doubt surrounding the circumstances relating to the advice sought and offered with regard to the requirement to provide the telephone numbers to the purchaser, there will be no finding of unsatisfactory conduct in that regard.

[90] I find the Respondent's conduct in respect of the advice provided (or not provided) by her when reviewing the draft agreement, in relation to the Applicant's exposure to the contingent liability under the lease was such as to constitute conduct that falls short of the standards of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer. Consequently, there will be a finding of unsatisfactory conduct as that term is defined in s12(a) of the Lawyers and Conveyancers Act in relation to that aspect of the complaint. However, no appropriate Order by way of compensation is available to be made by this Office in respect of the contingent liability to which the Applicant is exposed. The Applicant has not suffered any loss as at the date of this review and the Applicant's contingent liability is considerably in excess of what could be provided for by this Office. The Applicant should seek advice as to what remedies are available to him through the Courts in this regard.

[91] However, I do accept that the Applicant has incurred additional legal costs in seeking to protect his assets from the landlord in the event of a claim being made. The Applicant produced accounts totalling approximately $9,300 in respect of work described as "Family Trust and Estate Planning." Without further description it is not clear what the full extent of the work is, but this is a considerable cost incurred by the

Applicant and his wife, which they may not have incurred otherwise. There will therefore be an Order to pay the sum of $1,000 to the Applicant by way of compensation. It is not appropriate to make an Order for payment of the full costs as the Trust provides benefits other than protection from a claim by the landlord. It may not even be effective. In addition, the claim could also arise prior to 2012, a liability to which the Applicant was exposed in any event. The Applicant sought a second opinion on the documentation of his own volition and it is not appropriate for there to be any Order in that regard.

Decision

[92] Pursuant to Section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is reversed. In its place, I find that the conduct of the Respondent in relation to the matters specified in paras [87] and [88] constitutes unsatisfactory conduct for the reasons specified.

Orders

1. Pursuant to s156(1)(d) of the Lawyers and Conveyancers Act 2006, the Respondent is ordered to pay the sum of $1,000 to the Applicant by way of partial compensation for the legal costs incurred by the Applicant.

2. In respect of the breaches of Rule 9.6 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 and regulation 12(7)(c) of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008, the Respondent is censured pursuant to s156(1)(b) of the Act.

3. In respect of the breaches of regulation 12(6)(b) of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008, and s110(1)(b) of the Lawyers and Conveyancers Act 2006, the Respondent is also censured pursuant to s156(1)(b).

4. Pursuant to s 156(1)(i) the Respondent is fined the sum of $750, such sum to be paid to the New Zealand Law Society within 30 days of the date of this decision.

Costs

In accordance with the LCRO Costs Orders Guidelines, the Respondent is ordered to pay the sum of $1,200 on account of costs. Even in the absence of a finding of unsatisfactory conduct, I consider that this costs Order would have been appropriate

pursuant to s210(2)(a) of the Lawyers and Conveyancers Act. Payment is to be made to the New Zealand Law Society within 30 days of the date of this decision.

DATED this 3rd day of May 2011

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Owen 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:

CH as the Applicant
XO as the Respondent
The Auckland Standards Committee 3
The New Zealand Law Society