

CONCERNING

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of Auckland Standards Committee 5

BETWEEN

ROSALIE J BERRY

Applicant

AND

ROBERT J RONDEL

Respondent

All names and identifying details other than the parties in this decision have been changed.

DECISION

Background

[1] Ms Berry was the owner of a property at [...].

[2] In 2008 she carried out a subdivision of that property which resulted in two lots - Lot 1 (the front lot) on which there was a house, and Lot 2 (the rear lot) being a vacant section.

[3] In November 2008 she entered into an Agreement to sell Lot 2 to the AEJ Family Trust (the Trust). This was a Trust which had been established by her ex-partner WA, of which Mr Rondel and Mr GX (an accountant) were Trustees.

[4] Mr Rondel acted for both parties in that transaction and settlement took place in December 2008.

[5] Having subsequently endeavoured (unsuccessfully) to sell the house property, it was agreed between Ms Berry and Mr WA that the Trust would also buy that property. The agreed price was \$140,000.00 but the Trust was unable to borrow that amount of money.

[6] Ms Berry therefore agreed to sell one half of the property outright to the Trust and to accept payment for the other half by ten annual payments of \$7,000.00 each.

[7] Mr WA, who is a lawyer (but not a conveyancing lawyer), prepared two Agreements. The first was dated 17 February 2010 and was for the sale of an undivided one half share in the property. The sale price was \$70,000.00, the Agreement was subject to finance, and settlement was scheduled to take place on 1 April 2010. The Agreement contained further terms of sale provided by both Mr WA and Ms Berry, none of which impact on the matters which are the subject of this complaint.

[8] Subsequently, a second Agreement was entered into for the sale of “the remaining half share” in the property. This was seemingly signed by Ms Berry and Mr WA on 22 April 2010, and provided for a sale price of \$70,000.00 and settlement on 23 April 2010. That Agreement contained further terms providing for the payment of the purchase price by instalments as recorded above. The first of such payments was to be made on 30 April 2011.

[9] Importantly, the Agreement contained a provision whereby Ms Berry’s half share in the property was “to lessen in time in proportion to the proportion of the \$70,000.00...which has been paid”. It further provided that “once all ten instalments...have been paid...the purchaser shall be entitled to obtain a full and exclusive title to 100% of the fee simple to the land and buildings at [...]...”.

[10] Both Agreements were signed by Mr WA on behalf of the purchaser, recording that his signature was as the agent for, and with the consent of, the Trustees. The Trustees were not in fact consulted by either Mr WA or Ms Berry with regard to the terms of the Agreements.

[11] Ms Berry has a different view of the Agreements that were entered into and that is dealt with in [32] to [39] of this decision.

[12] Mr Rondel was to act for both parties and the Agreements were delivered to him.

[13] He formed the view that it was expensive and cumbersome to implement the terms of the second Agreement and instead, proposed that the whole of the property should be transferred at the same time to the Trust, and that the Trust would enter into a loan agreement which recorded the terms of payment. The loan agreement was also

to contain an Agreement to mortgage, with Ms Berry being appointed as Attorney of the Trustees to execute a mortgage if required.

[14] Mr Rondel advises that he discussed this proposal only with Mr WA. Ms Berry advises that Mr WA denies that any such discussion took place.

[15] The matter proceeded on that basis, but Ms Berry was never advised of Mr Rondel's proposals, or provided with a copy of the title following registration.

[16] Sometime in June 2010, it became apparent that the property had not been insured by the new owner. Mr Rondel made contact with State Insurance who were the insurers for Ms Berry and advised them that the policy should be amended to include the Trust and Ms Berry as joint owners, and that in addition, the ANZ/National Bank was to be recorded as first mortgagee. He also advised the insurer that Ms Berry resided in the property which was not correct.

[17] Sometime later, Ms Berry wished to purchase another property, for which loan finance was required. She sought to use what she thought was her half share in the property as security for such borrowing. Investigations by the bank revealed that the title to the property had been transferred in full to the Trust which not unnaturally, caused Ms Berry some concern. She therefore sought to have her files transferred to Mr NC, of AEL Lawyers Limited.

[18] Immediately following her request, Mr WA made contact with her. Ms Berry's evidence is that Mr WA advised her that it would take some time for Mr Rondel to put the files in order. She advises that he offered her the sum of \$10,000.00 to withdraw her request to have the files transferred. She declined this offer and subsequent inquiries by Mr NC brought the matters complained of to light. As this matter is not mentioned elsewhere in this decision, I accept that Mr Rondel had no knowledge of this alleged proposal by Mr WA.

[19] During this time, it also became apparent that the title to the rear section had not been transferred to the Trust, notwithstanding that settlement had taken place in December 2008. Somewhat confusingly, Mr Rondel wrote to Mr NC on 13 June 2011, asking Mr NC to have Ms Berry sign an Authority and Instruction form (A & I) to enable the transfer to be registered. In that letter he noted that he had handed the A & I to Mr WA for him to obtain Ms Berry's signature but it had not been returned to him. He also noted that on provision of the A & I he would be able to register the transfer to the Trust, thereby enabling Ms Berry to lodge a caveat in terms of the attornment clause contained in the Loan Agreement. At the review hearing, Mr Rondel acknowledged

that this was incorrect, and that the A & I he was asking Mr NC to have signed was in fact the A & I for the transfer of the rear section.

The Complaint and the Standards Committee Determination

[20] Ms Berry lodged her complaint with the New Zealand Law Society Complaints Service on 13 December 2010. In her complaint she recounted the facts set out above. She alleged that both Mr Rondel and Mr WA were guilty of fraud in that the documentation had been altered and the loan agreement concocted so that the Trust could use the property as security for a loan from the bank.

[21] In its decision, the Standards Committee identified the following issues for consideration:

- Fraud;
- Failure to follow Ms Berry's instructions;
- Failure to act in Ms Berry's best interests; and
- Conflict of Interest

[22] It then recorded its discussion and determination in the following way:

Discussion

[11] The Committee resolved to deal with all issues of complaint together because in the Committee's view the main issue of complaint is that Mr Rondel did not follow the terms and conditions in the agreement. Specifically, instead of implementing clauses 1 to 5 - which required the trust to pay the remaining \$70,000 in equal payments over ten years before title would be transferred to the Trust - Mr Rondel transferred title to the trust and provided a Loan Contract incorporating an Agreement to Mortgage with an attornment clause.

[12] The Committee requested the file from Ms Berry and that was available to the Committee at the hearing. The Committee considered the loan agreement and took into account Mr Rondel's explanation. The Committee formed the view that the loan agreement provided adequate and satisfactory security for Ms Berry. In addition it enabled her to register a caveat over the entire title. It was noted that Mr Rondel was only instructed on the agreement after it had been entered into. The Committee also turned its mind to the position of the Trust and came to view that the loan

agreement also provided adequate security for the Trust. The Committee noted that the trust effectively now owned two thirds of the property however it only held half of the title. The Committee came to the view that loan agreement equally benefited both parties.

[23] For the benefit of readers of this decision, it is confirmed that the Committee's decision as recorded here is an accurate record.

[24] Ms Berry has applied for a review of that determination. In general terms she considers that the Committee's investigation into her complaint was poor and inconclusive and that important issues within her complaint were not dealt with individually. She does not accept the Committee's view that the security provided to her was adequate and satisfactory and in addition considers that each part of her complaint should have been assessed individually.

Review

[25] A review hearing took place in Auckland on 26 January 2012 attended by Mr Rondel, and Ms Berry together with a support person.

[26] At the commencement of the hearing I considered that it was necessary to record the nature of a review and the relevance of any settlement discussions which Mr Rondel is anxious should take place.

[27] Section 203 of the Lawyers and Conveyancers Act 2006 (the Act) deals with the scope of a review of a Standards Committee and allows the Legal Complaints Review Officer (LCRO) to review all or any aspect of an inquiry or an investigation by a Standards Committee. It is a broad power.

[28] Section 211 of the Act provides that the LCRO may confirm, modify or reverse a decision of the Standards Committee and empowers the LCRO to exercise all of the powers of the Standards Committee.

[29] Alternatively, the LCRO may him or herself lay charges with the New Zealand Lawyers and Conveyancers Disciplinary Tribunal if he or she considers that the lawyer's conduct should be considered by that Tribunal.

[30] Section 201(4) of the Act provides that:

"if the matter to which a review relates involves an issue of misconduct or unsatisfactory conduct, the Legal Complaints Review Officer may conduct the review in relation to that issue despite-

(b) any negotiation, conciliation, or mediation in relation to the matter to which the review relates or any issue involved in that matter; and

(c) any settlement agreed by the parties to the review”

[31] The following aspects of Mr Rondel’s conduct arising from this complaint require to be considered:

- 1) Mr Rondel acted for both vendor and purchaser in a transaction which involved vendor finance which gave rise to a conflict of interest whereby Mr Rondel should have declined to act for Ms Berry
- 2) Mr Rondel did not obtain Ms Berry’s informed consent in terms of Rule 6.1.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
- 3) Mr Rondel did not provide Ms Berry with the information required to be provided by him pursuant to Rules 3.4 and 3.5.
- 4) Mr Rondel did not advise Ms Berry as to the terms of the Agreements or seek her instructions to vary those.
- 5) Mr Rondel failed to implement the Agreements entered into according to their terms.
- 6) Mr Rondel did not offer any advice to Ms Berry on the merits or terms of the loan agreement nor provide her with a copy thereof.
- 7) Mr Rondel failed to protect Ms Berry’s interests by immediately lodging a caveat against the title to the property.
- 8) The actions of Mr Rondel misled Ms Berry into thinking that the sale of the property had proceeded as she believed it would.
- 9) Registration of the transfer of the whole of the property was apparently effected by Mr Rondel without the appropriate Authority and Instruction as required to create an edealing.
- 10) Settlement of the sale of the rear section was seemingly effected without having the appropriate A & I.

[32] I have given serious thought as to whether or not this matter should be referred to the New Zealand Lawyers and Conveyancers Disciplinary Tribunal. The factors that mitigate against that are:-

- 1) Mr Rondel has acknowledged the shortcomings in the service provided to Ms Berry, although I must say that his response to this review application has differed markedly to his responses to the Standards Committee.
- 2) Despite Ms Berry's assertions, I have not found that Mr Rondel has been dishonest or fraudulent.
- 3) His stated desire to assist Ms Berry (although I have considerable concerns as to his proposal to register further documents notwithstanding that he has been removed as a Trustee, and that such actions would be contrary to instructions from Mr WA).

[33] Accordingly I have determined that the matter will proceed by way of this review. There will be a finding of unsatisfactory conduct, with a further hearing to be convened for the purposes of determining the appropriate penalty. Prior to that hearing the parties are invited to file written submissions as to penalty, such submissions to be received within one month of the date of this decision.

[34] The reasons for this decision follow.

Ms Berry's understanding of the Agreements

[35] Before proceeding with reasons for this decision, it is important to examine the Agreements as signed and Ms Berry's understanding of them.

[36] The first Agreement is dated 17 February 2010. The interest sold is "an undivided one half share" in the "road front house and section at [...]...". The sale price was \$70,000 and was to be paid in full on the settlement date, which was 1 April 2010. It was expressed to be "subject to finance – to be noted that National Bank has approved a \$70,000 loan."

[37] Further terms of sale were included in the Agreement as prepared by Mr WA. The first gave the purchaser the right to rent out the property (excluding the deck, toilet and wash house at the back of the house) and an entitlement to all of the rents derived therefrom. The second further term obliged the Vendor to assist the purchaser to obtain permission and to provide electricity and water to any house to be constructed on the section already sold to the Trust.

[38] Ms Berry then included a further 8 conditions subject to which she agreed to sell her half share in the property.

[39] Ms Berry has advised that when this agreement was signed it was intended that she was to retain the rear half of the house which she intended to develop into a unit for herself and her daughter. She advises that arguments developed over this arrangement and although the Agreement was signed, she states that she did not sign any A & I forms in relation to this Agreement, and she assumed that the Agreement was extinguished.

[40] A second Agreement was then prepared by Mr WA and signed by Ms Berry on 10 April 2010. This Agreement referred to “an undivided half share in the fee simple of the property being the remaining half share to that being sold in the agreement signed by the vendor on 11/2/2010 – both half shares to be clear of the present mortgage of the property.” It is assumed that the date referred to should have been 17 February.

[41] Annexed to this Agreement were 6 additional clauses. These included the following terms:-

- “In addition to the existing Agreement for sale and purchase of a half share in ... the land and buildings at =[...] ... the [...]WA Trust or its nominee will also purchase the remaining share in the said property for \$70,000 ... payable by ten annual instalments of \$7,000 ... the first to be paid on 1 April 2011 ...”.
- “My half share over the said property shall lessen over time in proportion to the portion of \$70,000 ... which has been paid ...”.
- “The terms and conditions pertaining to the sale and purchase agreement already in existence in respect of a half share ... in the land and buildings at [...] ... apply to the remaining half share being purchased as described in paragraphs 1 and 2 except that I now relinquish my right to possession of or development of the rear part or any other part of the house ...”.
- Once all ten instalments of \$7,000 have been paid ... the purchaser shall be entitled to a full and exclusive title to 100 per cent of the fee simple ...”.

[42] Contrary to Ms Berry’s understanding therefore, both Agreements remained in place, each dealing with the sale of an undivided one half share in the property. However, her understanding that she was selling outright an undivided one half share in the property, and the other half share was to be paid for by instalments, was correct.

Conflict of Duty

[43] In whatever form the transaction proceeded, whether in the form as envisaged in the Agreements or as implemented by Mr Rondel, the purchaser was indebted to Ms Berry. Whilst it is possible to suggest that the same solicitor may act for both vendor and purchaser without there being any conflicting duties (but only where the terms of the Agreement are already established) it is readily apparent that a conflict exists where one party advances funds to another.

[44] Somewhat ironically, the conflict of duty was exacerbated when Mr Rondel proceeded to implement the sale by introducing a loan agreement, rather than implementing the Agreements as they had been prepared.

[45] Rule 6.1 of the Conduct and Client Care Rules establishes the basic premise. This Rule provides as follows:

“In acting for a client, a lawyer must, within the bounds of the law and these rules, protect and promote the interests of the client to the exclusion of the interest of third parties.”

[46] Mr Rondel argued before the Standards Committee, that as the Agreements had already been signed when he received them, he was consequently presented with a *fait accompli*. In effect, he argued that his instructions from Ms Berry amounted to a limited retainer. This was accepted by the Committee.

[47] The Agreements had been signed by Mr WA as purchaser, ostensibly with the consent and authority of the Trustees. Mr Rondel acknowledges that there had been no communication between him (or Mr GX) and Mr WA, and Ms Berry would have been aware of that. Mr WA was not a Trustee and without any authority from the Trustees it is highly unlikely that the Agreements were binding.

[48] In any event, it is possible that variations to the Agreements would have been agreed between the parties if they had been advised of the shortcomings of the Agreements prepared and signed by them.

[49] I do not therefore accept Mr Rondel's contention that the Agreements were a *fait accompli*. Indeed, his subsequent actions in varying the terms of the Agreements are in contradiction to this contention.

[50] Given that Mr Rondel formed the view that the terms of the Agreements as prepared required amending, and the fact that the balance of the purchase price was to

be advanced by Ms Berry to the Trust, Mr Rondel could not fulfil the obligations imposed by Rule 6 and act for both parties to the transaction.

Informed Consent

[51] Having determined however, to act for both parties, Mr Rondel then failed to obtain their informed consent. Rule 6.1.1 provides as follows:

“Subject to the above, a lawyer may act for more than one party in respect of the same transaction or matter where the prior informed consent of all parties concerned is obtained.”

[52] Mr Rondel has acknowledged that he has breached the provisions of this Rule.

Client Information

[53] Rules 3.4 and 3.5 require a lawyer to provide certain information in advance (in the case of Rule 3.4) and prior to undertaking significant work (in the case of Rule 3.5). This information is commonly incorporated into a Terms of Engagement letter to be provided to the client.

[54] Mr Rondel has acknowledged that he did not provide this information to Ms Berry.

Acting without Instructions

[55] As expressed by me at the hearing, one of the most troubling aspects of this complaint is that Mr Rondel proceeded to implement the transaction in a way which was not reflected in the Agreements as drawn without instructions, and certainly without instructions from Ms Berry.

[56] Rules 7 and 7.1 are relevant in this regard. They provide as follows:

“7 A lawyer must promptly disclose to a client all information that the lawyer has or acquires that is relevant to the matter in respect of which the lawyer is engaged by the client.

7.1 A lawyer must take reasonable steps to ensure that a client understands the nature of the retainer and must keep the client informed about progress on the retainer. A lawyer must also consult the client (not being another lawyer acting in a professional capacity) about the steps to be taken to implement the client’s instructions.”

[57] As drawn, the Agreements provided that the purchaser would acquire a one half share in the property outright. The remaining half share was to be acquired by the purchaser by ten annual payments of \$7,000.00 each. The second Agreement contemplated that after each payment was made, the appropriate portion of the property would be transferred to the purchaser so that the purchaser's interest in the property increased annually.

[58] I perceive that Ms Berry may have some misunderstanding as to the terms of this Agreement, in that she appears to have the expectation that until all payments were made, she was to retain an undivided one half share in the property. In this regard, the Agreement was somewhat contradictory in that it provided that "once all ten instalments of \$7,000 have been paid the purchaser shall be entitled to obtain a full and exclusive title to 100% of the fee simple to the land". However, the relevant clause does also refer to the arrangement to register annual transfers to reflect the increased ownership of the property. It is this provision of the Agreement that Mr Rondel considered was an expensive and cumbersome process.

[59] In his response to the Complaints Service, Mr Rondel advised that he proposed that the whole of the land in the title would be transferred to the purchaser initially, and that a loan agreement would be entered into which reflected the terms of payment required by the Agreement. The loan contract would incorporate an agreement to mortgage and Ms Berry would thereby be able to lodge a caveat against the title to the whole of the property. In addition she had the ability to execute a mortgage on behalf of the purchaser to enable her to effect a mortgagee sale of the property should default occur.

[60] It may very well be that this did provide Ms Berry with a better form of security as determined by the Standards Committee. However, that is not the issue.

[61] Mr Rondel says he discussed this proposal with Mr WA only. Ms Berry advises that Mr WA says the proposal was not discussed with him. Whether the proposal was discussed with Mr WA or not is immaterial. What is acknowledged by Mr Rondel, is that he did not at any time communicate with Ms Berry to advise her on the merits of his proposal, or the disadvantages of the transaction as recorded in the Agreement. Instead, he proceeded to implement the transaction in a way that meant the whole property was transferred immediately to Mr WA's Trust, leaving Ms Berry with no interest at all in the property other than what was provided by the loan agreement.

[62] The loan agreement was prepared by Mr Rondel and executed only by himself and his fellow Trustee. It did not include Mr WA as guarantor and included a limited liability clause for the benefit of the Trustees. The conflicted position of Mr Rondel in this situation should have been obvious. He was preparing a loan agreement on behalf of a lender, whilst at the same time not only was he acting for the borrower, but he was in fact one of the borrowers.

[63] Mr Rondel acknowledged at the hearing that he and his fellow Trustee had nothing to do with the renting of the property or the collection of funds. Consequently, the Trustees had entered into the loan agreement without securing a means of meeting their obligations in terms of the Agreement.

[64] This only serves to heighten the complete disregard for Ms Berry's interests, and brings into sharp focus, the clear conflict of interest that existed between the Trustees (of which Mr Rondel was one) and Ms Berry.

[65] If in fact the Agreements were a fait accompli as suggested by Mr Rondel, his departure from their terms becomes even more egregious, as he has, by his actions, caused both of his clients to be in breach of the terms of the Agreements.

[66] I must record here my complete disagreement with the decision of the Standards Committee on this aspect of the complaint alone. In its decision, the Committee not only determined to deal with all of the issues together but then proceeded to determine that because in its view, the steps taken by Mr Rondel provided adequate and satisfactory security for Ms Berry, this justified the unilateral action taken by Mr Rondel. Whether the Committee's view is correct or not in that regard (and that is a matter of opinion) Mr Rondel had a duty to consult with and advise Ms Berry of his proposals and to act only in accordance with her instructions.

[67] It was Ms Berry's absolute prerogative to instruct Mr Rondel to act in accordance with her instructions notwithstanding his advice. She was not provided with this opportunity.

[68] To exacerbate matters, it was not until much later that she discovered, contrary to her expectations, that she no longer retained an interest in the form of an undivided one half share in the property.

[69] In this instance alone therefore I consider Mr Rondel's constituted conduct which falls short, and well short of what a client is entitled to expect of her solicitor.

No Caveat

[70] Having proceeded with the loan agreement and the transfer of the title, Mr Rondel did not immediately lodge a caveat against the title to the property to protect Ms Berry's interests. The registered proprietor of the property could therefore have sold the property or mortgaged it to the extent that Ms Berry's security became illusory. Mr Rondel relied upon the fact that any such action required co-operation from him and Mr GX as Trustees, but as events have shown, he is no longer in a position to exercise this control, his appointment as a Trustee having been terminated.

[71] In addition, when the files were provided to Mr NC, neither the original of the loan agreement nor any copy of it was provided to him. It was therefore unclear to Mr NC that Ms Berry had any security at all, and he could see no basis on which to lodge a caveat.

[72] This is a further breach of Rule 6.

The Authority and Instruction forms

[73] Before a solicitor may create an edealing transaction, he must first obtain the appropriate Authority and Instruction form (A & I) from the client. In this case an A & I was required from Ms Berry to authorise Mr Rondel to create the edealing and then submit it for registration. Mr Rondel gave the A & I which he had prepared to Mr WA to take to Ms Berry to sign. Again, no advice or explanation was provided directly to her as to what she was signing.

[74] There was some doubt in my mind as to whether the A & I was in Mr Rondel's possession when he registered the transfer to the Trust on 11 May 2010. This was because Mr Rondel had subsequently written to Mr NC on 13 June 2011 requesting that he obtain an A & I from Ms Berry which would enable the transfer to the Trust to be registered and "enabling Rosalie to lodge her caveat in terms of the attornment clause contained in the loan contract dated 7 May 2010...". The loan agreement provided that the security for Ms Berry's advance was to be the house property. Consequently, it did seem to me that Mr Rondel did not have the appropriate A & I before registering the transfer.

[75] However, following the hearing, Mr Rondel sent a copy of the relevant A & I which he had discovered on Mr WA's file. This is dated 1 May 2010 and presumably was therefore in Mr Rondel's possession when the transfer was effected. I do not know whether or not it was in his possession when he created the edealing.

[76] However the A & I which Mr Rondel has provided, refers to a transfer of a half share in the property pursuant to the Agreement dated 17 February 2010. It is not an authority to register a transfer of the whole of the title. Mr Rondel did not therefore have authority to register a transfer of the whole of the property to Mr WA's Trust.

[77] Following the hearing, Ms Berry has provided me with a copy of an A & I which she retained in her possession and is unsigned. It is in exactly the same form as that which Mr Rondel has sent me. Ms Berry holds the view, that Mr Rondel had attached the signature page of the A & I signed by her to the front page of a further A & I form prepared by him. Whatever is correct, it is apparent that Mr Rondel did not hold an A & I form which authorised the transfer of the whole of the property.

[78] In addition, although the sale of the rear lot had taken place in December 2008, at the time of this complaint, the transfer of the property had not been registered. As I understand it, the A & I which Mr Rondel was requesting from Mr NC, was in fact the A & I to enable the transfer of the rear section to be registered. Whether or not the edealing was created has not been established, but there is enough uncertainty surrounding this matter for me to provide a copy of this decision to the Registrar General-of Land as provided for by section 159 of the Act.

[79] It does seem that Mr Rondel proceeded with the sale of the section, and accounted for the sale proceeds to Ms Berry, without being in a position to register the transfer to the Trust. This does not of course affect Ms Berry, but is a matter about which Mr WA may be properly aggrieved.

Ms Berry's suspicions

[80] It is appropriate here to address Ms Berry's suspicions that Mr Rondel has adopted the course of action which he did, to enable Mr WA to secure funding from the Bank for the purchase. She holds the view that Mr WA used the first Agreement (which did not include any vendor finance) to secure this funding. She points to the fact that the Bank had written to Mr Rondel on 20 April 2010 with the loan agreement, which was prior to the Trust signing the second Agreement.

[81] She then alleges that she believes "Mr WA used the agreement of February illegally and without [her] permission to acquire a loan from the bank. Mr Rondel married the two A & I forms together and then transferred the property solely into the Trust's name to safeguard them from finding out about the second agreement and my involvement in the property."

[82] I do not share Ms Berry's views on this for the following reasons:-

- a) notwithstanding Ms Berry's view of the Agreements, the terms of the Agreements meant that both Agreements were in force;
- b) the first Agreement referred to the sale of an undivided one half share; and
- c) the Bank's lending was not to be secured over the [...]Street property.

Consequently, the Bank would not have been concerned to know that Ms Berry retained an interest in the property as its funding was secured over alternative properties owned by the Trust.

State Insurance

[83] Settlement took place around 7 May 2010. However, it was not until early June 2010 that steps were taken to effect insurance which reflected the new ownership. It is the duty of a solicitor acting in a conveyancing transaction, particularly where he is acting for a party whose lending is secured by the property, to make sure that the property is adequately insured and the interests of the various parties properly recorded. A failure to effect this until approximately one month after settlement is a further breach of Rule 6 of the Conduct and Client Care Rules.

[84] In addition, at the time the insurance was put in place, it was recorded by the insurer, on Mr Rondel's advice, that both Ms Berry and the Trust were joint owners, and that the ANZ/National Bank had an interest as mortgagee. This did not reflect the structure that had been put in place by Mr Rondel and in addition, he informed the insurance company that Ms Berry resided in the property when he knew that was not the case.

[85] In all of the circumstances, it is likely that the insurance cover was prejudiced by this incorrect information.

[86] Furthermore, Mr Rondel was instrumental in suggesting that Ms Berry's existing arrangements for payment of the insurance premium by direct debit remain in place and that she be reimbursed by Mr WA. Given that Ms Berry no longer owned the property, there was absolutely no reason why she should remain primarily liable for payment of the premiums, and again her interests were not protected.

Misleading Conduct

[87] Nothing provided by Mr Rondel to Ms Berry gave any indication that the arrangement contemplated by her had not proceeded. The bill rendered to her following settlement referred to the sale of a one half share of the property, and the discussions with the insurer in which Ms Berry participated also proceeded on the basis that she remained a co-owner of the property.

[88] In addition, Mr Rondel did not provide Ms Berry with a copy of the loan agreement at any time and it was not until this was provided to the Standards Committee and then to Ms Berry that she became aware of its existence. It had also not been provided to Mr NC to enable him to understand how Ms Berry's interest in the property had been dealt with. This constitutes breaches of Rules 7 and 7.1.

[89] Ms Berry considers that actions taken by Mr Rondel were taken in conjunction with Mr WA to enable the Trust to acquire the title to the whole of the property immediately, so that the Bank would advance funds for the purpose of this purchase. She therefore considers that Mr Rondel and Mr WA have engaged in fraudulent conduct to deprive her of her half interest in the property, and then to deceive her as to the true position.

[90] Mr Rondel did not stand to gain in any way personally from this transaction. Whilst he was a Trustee of the Trust, he was not a beneficiary and there is no reason that I can discern that Mr Rondel would intentionally engage in a process so as to deprive and deceive Ms Berry. In addition, the Bank was not intending to use the [...] Street property as security for its lending to Mr WA's Trust, and it is unlikely that it would have been concerned as to the intended use of the funds for this purpose.

[91] More importantly, there is no evidence that can support such allegations and I find that there is no element of dishonesty or intent to defraud in Mr Rondel's conduct. If there were, I would have no hesitation in referring this matter to the Disciplinary Tribunal.

[92] I do find however that Mr Rondel's conduct constitutes unsatisfactory conduct as that term is defined in sections 12(a), (b) and (c) of the Lawyers and Conveyancers Act 2006.

General Comments

[93] Mr Rondel has offered no reasons which would explain his conduct, other than to say that he encountered a mental block which prevented him from recognising the various issues that presented themselves. He relied largely upon the fact that Mr WA was a fellow practitioner and trusted that he would properly acquaint Ms Berry of all matters discussed between him and Mr WA.

[94] He acknowledges the unsatisfactory conduct on his part and wishes to assist Ms Berry where he can. In this regard I understand that he is in communication with Ms Berry's current solicitor to endeavour to rectify matters. As noted at the beginning of this decision however, I have serious reservations as to what Mr Rondel can do now that his appointment as a trustee has been terminated. There are however options that remain open to him to be explored with Ms Berry through her current solicitor. She should not of course be expected to incur any costs in this regard.

[95] Notwithstanding any agreement the parties may come to between them, Orders remain to be made following the finding of unsatisfactory conduct. In this regard I seek submissions from each of the parties as to what Orders provided in section 156 of the Act they consider appropriate. Following that, I intend to convene a further hearing to be updated on any negotiations between the parties and to hear from the parties directly on the issue of penalty.

[96] I also seek submissions from the parties as to the publication of Mr Rondel's name in conjunction with the publication of this decision and the subsequent decision to come in respect of the Orders.

[97] Finally, I consider that aspects of this matter require this decision to be referred to the Registrar General of Land, and this decision will be referred to that Office pursuant to section 159 of the Act.

Decision

- i. The decision of the Standards Committee is reversed.
- ii. Pursuant to section 152(2)(d) of the Lawyers and Conveyancers Act 2006, I find that Mr Rondel's conduct constitutes unsatisfactory conduct in terms of section 12(a), (b) and (c) of the Lawyers and Conveyancers Act 2006.

Costs

[98] Costs on this hearing will be dealt with in the subsequent decision to follow as to Orders.

DATED this 21st day of February 2012

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:

Registrar-General of Land pursuant to section 159 of Lawyers and Conveyancers Act 2006
Rosalie Berry as the Applicant
Robert Rondel as the Respondent
Auckland Standards Committee 5
The New Zealand Law Society