

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of the [City] Standards Committee [X]

**BETWEEN**

**WK**

Applicant

**AND**

**YL**

Respondent

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

**DECISION**

**Introduction**

[1] Ms WK has applied for a review of a decision by the [City] Standards Committee [X] to take no further action pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) in respect of her complaint about Ms YL's conduct.

**Background**

[2] Ms WK and her former husband Mr ZM agreed that he would purchase her home (the property) and she would purchase alternate accommodation.

[3] In October 2005 Ms WK signed a conditional agreement to purchase an apartment in [Suburb] (the [Suburb] property). By the end of February 2006 Ms WK had paid a deposit of \$121,000 and the agreement had been declared unconditional.

[4] Both agreements provided for settlement to occur on 17 March 2006.

[5] Mr ZM failed to settle his agreement with Ms WK on 17 March 2006. That left Ms WK short of funds to settle her purchase of the [Suburb] property, and put her at risk of having to forfeit the deposit she had paid.

[6] On instructions from Ms WK, Ms YL wrote to Mr ZM's lawyers on 23 March 2006, setting out Ms WK's offer to lend Mr ZM enough money so he could purchase the property from her (the offer). The offer included terms that the loan was for \$190,000 over a six month term, repayable on 23 September 2006. Mr ZM was to pay interest at the given rate, a penalty interest rate was provided for, and repayment of the loan was to be secured by registration of a second mortgage in Ms WK's favour.

[7] Ms WK would then have been in a position to settle her purchase of the [Suburb] property in March 2006, potentially recovering the \$190,000 from Mr ZM within six months, with him covering the cost of her having borrowed the money, a premium interest rate if he did not, and any security that the registered mortgage would provide.

[8] On 28 March 2006 Mr ZM's lawyers made a counter-offer by fax. They explained that they could not provide a solicitor's certificate to Mr ZM's first mortgagee knowing that Ms WK intended to register a second mortgage, without first advising the first mortgagee. His lawyers forwarded a copy of a mortgage in favour of Ms WK by fax, which Mr ZM appears to have signed on 27 March 2006, saying Ms YL would need Ms WK's consent to the counter offer, but that the mortgage would be provided: "strictly on the basis that we receive your firm's undertaking that it will retain the mortgage within its control and not allow the mortgage to be registered."

[9] The undertaking sought from Ms YL significantly reduced the level of Ms WK's security from a relatively high priority as second mortgagee. The deal enabled Mr ZM to secure lending from the first mortgagee so he and Ms WK could settle their transactions. Ms WK was effectively being asked to gamble on Mr ZM paying her back \$190,000 plus interest, or face the certainty that she would lose \$121,000 when she cancelled the agreement to purchase the [Suburb] property.

[10] Overall, the counter offer appears to have represented a good deal for Ms WK. If Mr ZM repaid her by 23 September 2006, the interest he paid would have covered her cost of borrowing the money. If he did not repay her by 23 September 2006, he would have to pay substantially more interest to cover Ms WK's increased risk. As with any such agreement, it relied on the borrower meeting his obligations.

[11] Mr ZM's lawyers asked that Ms YL communicate rejection of the offer if Ms WK did not agree to Mr ZM's terms.

[12] Ms YL says she sent the counter offer to Ms WK and obtained her instructions on what she wanted. At the review hearing Ms YL said that if Ms WK agreed to the

terms, she could not have registered the mortgage without an order from the High Court, and that the mortgage itself was a “promise to pay” by Mr ZM that would support a debt recovery action if he defaulted. Although there is no written evidence that Ms YL explained those specific points at the time, she discussed Ms WK’s position with her, and Ms WK instructed her to provide the undertaking that the mortgage would remain in her firm’s deeds system and not be registered.

[13] Ms YL’s fax in response to Mr ZM’s lawyers dated 28 March 2006 is a counter offer. With it she enclosed an amended settlement statement, which suggests that the parties had not reached agreement over the precise amounts of payments made between them recognised as a deposit for the property. Ms YL also gave an undertaking as requested in the following form: “We undertake to hold the second mortgage in our deeds system and will not allow the mortgage to be registered at Land Information New Zealand.”

[14] She asked Mr ZM’s lawyers to forward the original mortgage document to her and confirmed Ms WK’s intention to settle on the basis she had set out. Ms WK says her instruction to settle was based on her understanding of the agreement she had reached with Mr ZM at the time. Ms WK says she understood that if Mr ZM did not pay the \$190,000 back to her by 26 September 2006, he would be in breach of his agreement with her, and Ms WK would be able to register the mortgage. Although that understanding is consistent with the offer, it fails to recognise how the deal evolved through the subsequent negotiations recorded in the correspondence that Ms YL provided to Ms WK.

[15] Ms WK’s understanding is inconsistent with the unconditional undertaking requested by, and given to, Mr ZM’s lawyers after Ms YL took instructions from Ms WK. While the mortgage document contains a repayment date of 23 September 2006, the undertaking makes no reference to an end date. It is simply an open-ended undertaking to hold the mortgage and not allow it to be registered, ever.

[16] Ms WK settled her purchase of the [Suburb] property, and Mr ZM took title to the property on 28 March 2006.

[17] It appears that Mr ZM then arranged for a second mortgage to be registered over the property (the second mortgage), and later defaulted on his obligations under that.

[18] Ms WK says she became aware Mr ZM was having financial difficulties in October 2009 when he stopped making payments towards her mortgage. Ms WK

believes she told Ms YL in 2009 or 2010 that Mr ZM had not repaid his debt to her in September 2006.

[19] Ms YL says Ms WK sought her advice in June 2010 and she explained that the mortgage could not be registered, that it was open to Ms WK to register a caveat against the title to the property, but that doing so would attract risk.

[20] Ms WK subsequently uplifted her files, but not the mortgage, from Ms YL.

[21] In January 2011 Ms WK registered a caveat against the property.

[22] In March 2011 Mr ZM's property was sold at mortgagee sale. The sale proceeds were insufficient to repay the amounts secured by the first and second mortgages. Ms WK says she received only part payment of her loan to Mr ZM before he was declared bankrupt.

[23] Ms WK says she believes Ms YL is responsible for the rest of her losses, which she calculates as in excess of \$170,000, because she did not protect Ms WK's interests by registering the mortgage.

[24] The basis of Ms WK's complaint against Ms YL was her understanding that if Mr ZM did not pay her back by 26 September 2006, Ms YL would protect Ms WK's interests by registering the mortgage Mr ZM had signed in her favour. She believes the agreement she had with Mr ZM was that Ms YL had undertaken not to register Ms WK's mortgage before 26 September 2006, but that she could register it thereafter.

[25] Ms YL, however, says that her instructions from Ms WK at the time were to accept Mr ZM's proposal, which meant that she could not register the mortgage. She says Ms WK did not instruct her to register the mortgage, and if she had, Ms YL could not have complied with the instruction because by doing so she would have breached her undertaking. She considers her advice to Ms WK in 2006 was sufficient to inform Ms WK of the implications of agreeing to Mr ZM's terms, and was appropriate in the circumstances.

### **The complaint and the Standards Committee decision**

[26] Ms WK lodged a complaint with the New Zealand Law Society (NZLS) on 21 January 2014.

[27] The substance of Ms WK's complaint was that:

- (a) Ms WK made it clear to Ms YL that if Mr ZM did not repay his debt to her by 23 September 2006, Ms WK expected Ms YL to register the mortgage.
- (b) Ms WK did not find out until July 2010 that her expectation regarding the registration of the mortgage had not been met. She says it came as a surprise to her in July 2010 when Ms YL advised her that the mortgage remained unregistered, and that a second mortgage had been registered against the title to the property.
- (c) Ms YL failed to protect Ms WK's interests by not registering the mortgage when Mr ZM defaulted, and Ms WK suffered loss as a result.

[28] The Committee noted that the complaint was in respect of conduct in 2006. As the conduct had occurred before 1 August 2008 it fell under the transitional provisions in s 351(1) of the Act.

[29] Under that section a complaint can only be made about conduct in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982 (the LPA). The relevant standards of conduct set out in ss 106 and 112 of the LPA called for the Tribunal to conduct an inquiry and form the opinion that the practitioner has been guilty of:

- (a) misconduct in his professional capacity; or
- (b) conduct unbecoming a barrister or a solicitor; or
- (c) negligence or incompetence in his professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute.

[30] The Committee considered all of the material available to it, and reasoned its way to the conclusion that the events that gave rise to the complaint did not give rise to any professional failings or shortcomings by Ms YL which would have reached the relatively high threshold for consideration of complaints under the LPA. On that basis the Committee declined jurisdiction to consider the complaint pursuant to s 351(1) of the Act.

[31] In reaching that decision the Committee determined that:

- (a) Ms YL discussed Mr ZM's lawyers' request that she hold the mortgage unregistered with Ms WK.
- (b) Ms WK instructed Ms YL to agree to Mr ZM's request that she not register the mortgage, and provide the undertaking sought, so that settlement of both transactions could take place at the end of March 2006.

[32] To reach its conclusions the Committee relied on two assumptions. First, that Ms WK understood that by agreeing not to register the mortgage at the time, her loan to Mr ZM would not be secured, and she would be unlikely to be able to register the mortgage at a later date. Second, if Ms WK had doubts about Mr ZM's ability to service and repay the loan between 2006 and 2011, she could have lodged a caveat well before she did, in 2011.

[33] Ms WK disagrees with the Committee's findings and applied for a review.

#### **Application for review**

[34] In her application for review Ms WK says:

- (a) The only implication reasonably to be read into the letter from Mr ZM's lawyers, FF, which set out the conditions for the mortgage, is that the mortgage could not be registered as long as Mr ZM did not default on his payments under it.
- (b) If Mr ZM defaulted on his payments under the mortgage, the agreement not to register would be at an end, and the mortgage could then be registered.
- (c) This was the way Ms YL explained the arrangement to Ms WK over the phone on 28 March 2006.
- (d) Ms WK says Ms YL did not give her clear advice at the time about the possible consequences of agreeing not to register the mortgage.

[35] Ms YL maintains that her advice was sufficient to inform Ms WK of the implications of agreeing to Mr ZM's terms, and appropriate in the circumstances.

#### **Review Hearing**

[36] The parties attended a review hearing in [City] on 18 August 2015. Ms WK was represented by counsel. Mr AB attended as Ms YL's support person.

**The role of the LCRO on review**

[37] The role of the Legal Complaints Review Officer (LCRO) on review is to reach her own view of the evidence before her. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting her own judgement for that of the Standards Committee, without good reason.

**Scope of Review**

[38] The LCRO has broad powers to conduct her own investigations, including the power to exercise for that purpose all the powers of a standards committee or an investigator, and seek and receive evidence. The statutory power of review is much broader than an appeal, and gives the LCRO discretion as to the approach to be taken on any particular review and the extent of the investigations necessary to conduct that review.

**Review Issue**

[39] Ms WK appears dissatisfied that Ms YL refused to release or register the mortgage because of her undertaking. She believes the agreement not to register the mortgage came to an end with Mr ZM's default.

[40] Ms YL says she is professionally obliged to prevent the mortgage from being registered unless Mr ZM's lawyers release her from her undertaking, or she is relieved of her obligations by another lawyers' undertaking. Neither of those things appears to have occurred, and she also says Ms WK gave her no such instruction.

[41] Ms WK's argument is untenable. The undertaking contains no limitation. It is simple and straight forward. It makes no reference to it being extinguished by Mr ZM failing to pay Ms WK back by 23 September 2006. Even if Ms WK had instructed Ms YL to register the mortgage at any time after she gave her undertaking, Ms YL would have breached her undertaking by doing so. As the evidence is that Ms YL has not breached her undertaking, no professional standards issue arises from that aspect of her conduct, and there is no reason to take any further action in that regard.

[42] The question on review is whether there is good reason to depart from the Committee's decision to decline jurisdiction over the aspects of the complaint that arose in 2006. For the following reasons, the answer to that question is no. The Committee's decision is therefore confirmed.

## Discussion

[43] At the heart of Ms WK's review application is her objection to the Committee's assumptions about what she must have known based on Ms YL's advice. Those assumptions led the Committee to conclude that she knew and understood the implications of accepting Mr ZM's offer, in particular that she had no security for the loan and would be unlikely to be able to register the mortgage later if he defaulted. Ms WK's position is that Ms YL gave negligent advice, and lacked the understandings attributed to her by the Committee.

[44] Ms YL has been unable to provide written evidence recording the advice she gave to Ms WK in advance of her instruction to agree not to register the mortgage. While it would have been preferable for Ms YL to have retained some written record, her failure to do so does not raise a professional standards issue in all the circumstances.

[45] The difficulty it creates is that only evidence is the correspondence supplemented by the parties' recollections of events that occurred in a compressed timeframe, when Ms WK was under pressure to take a gamble and settle, or lose \$121,000.

[46] At the time of this review, those events occurred over nine years ago, so it is difficult to trust the reliability of any fresh evidence either party might give without documentary support. The only two people who knew what advice Ms YL gave at the time are her and Ms WK. Ms WK is the only person who understands the intricacies of the decision-making process she went through at the time.

[47] For a time at least it appears her decision was the right one, because it took over four years for her to register any concern with Ms YL about Mr ZM failing to perform his obligations under the agreement, despite his apparent failure to repay the loan in full as the mortgage required by 23 September 2006. I take it that the benefits of his delay outweighed any disadvantage to Ms WK, up to the time when Mr ZM stopped paying altogether in 2009.

[48] Regardless of what Ms WK may have wanted to accomplish in 2006, it is difficult to see how Ms YL could have advanced Ms WK's position any further at that time. Limiting the undertaking in the manner Ms WK now suggests would have been unlikely to have got around the problem presented to Mr ZM's lawyers, who felt themselves unable to provide a solicitor's certificate to the first mortgagee because



they would have been aware Ms WK could register a second mortgage in six months time.

[49] If all that Ms WK says is correct, she instructed Ms YL to give an undertaking which secured Ms WK's silence to other lenders about the existence of her \$190,000 loan to Mr ZM for six months. Although Ms WK was obliged to settle her purchase or lose her deposit, there is no evidence that suggests she had any real leverage in her negotiations with Mr ZM. It is difficult to see how her financial situation could have been improved by registering the mortgage in any event because on her evidence, Mr ZM was short of \$190,000 to settle his purchase from her. He could not pay her what he did not have.

[50] I do not accept that Ms WK would necessarily have made a different decision at the time, regardless of what advice Ms YL may have given her about the possible consequences. Ms WK was under pressure to settle her purchase, was incurring penalties for late settlement, and Mr ZM's willingness to meet those would have been finite. In all the circumstances, I consider it more likely than not that Ms WK was more intent on protecting her \$121,000 in the moment than she was on the future risk presented by Mr NZ's proposal. It is more likely than not that Ms YL gave the advice, and Ms WK either did not absorb it, did not understand it, or chose not to take it.

[51] I do not consider, on the evidence available on review, that a proceeding of a disciplinary nature could have been commenced under the LPA. There is nothing fatally wrong with the Committee's logic, and no good reason to displace their assumptions. Pursuant to s 211(1)(a), the Committee's decision is confirmed.

### **Decision**

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

**DATED** this 26<sup>th</sup> day of August 2015

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**D Thresher**  
**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:

Ms WK as the Applicant  
Mr DD as the Applicant's Representative  
Ms YL as the Respondent  
Mr AB as a Related Person under s 213  
The [City] Standards Committee [X]  
The New Zealand Law Society