LCRO 141/2010

CONCERNING	an application for review pursuant to section193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of Auckland Standards Committee 4
BETWEEN	**KR** Applicant
AND	**WH** Respondent

DECISION

Background

[1] In 2008, KR reached agreement with his former partner as to the division of relationship property assets between them and made an appointment to meet with a solicitor at ADS to provide instructions to prepare a property relationship agreement. However, on the appointed day, 16 September 2008, KR was advised that the solicitor with whom he had the appointment was unable to attend. KR had made arrangements for leave from work and it was therefore arranged that he would meet with WH to provide the instructions. WH continued to act for KR thereafter.

[2] Whilst the terms of the agreement were largely agreed between KR and his former partner, there was an issue with regard to overseas property about which WH indicated she needed to consult with her principal, WG, who was about to depart overseas.

[3] The initial letter to KR's former partner was sent by WH on 24 September 2008.

[4] On 3 October 2008, WH received by fax, a letter from ADR advising that they had been instructed by KR's former partner, that the terms of the letter of 24 September 2008 were largely agreed, and requested a draft agreement.

[5] The detail of the attendances which took place on the file is recorded in the section of this decision headed “The delay”. However, the facts giving rise to one aspect of this complaint are that ADR sent three further faxes seeking a response from WH and the draft agreement to which she did not reply.

[6] The main point of disagreement between KR and his former partner was that KR considered the balances of the mortgage and flexi account should be taken as at 31 October, whereas his former partner insisted that the date should be fixed at 3 October. Her position was that she had accepted a value of the property based on the fact that she would receive payment from KR speedily, and that she had incurred rental costs from that date. She did not consider that she should be paying rent as well as mortgage payments and expenses for the month of October.

[7] KR on the other hand, took the view that as his former partner had not made any mortgage payments during September when she had been in sole occupation of the property it was reasonable that mortgage outgoings should effectively be shared for those two months.

[8] However, his former partner was adamant that the date should be fixed as at 3 October and on 17 November ADR sent a fax to WH advising that unless that was agreed by 5:00 p.m. that day, then their client would not sign the agreement as it stood.

[9] Faced with this ultimatum, KR agreed.

[10] Following execution of the agreement, WH provided a copy of the document to the BNZ and requested that the bank provide the loan documentation required to enable KR to pay his former partner the amount agreed to be paid pursuant to the agreement. She advised the bank to contact KR directly to discuss the facilities required.

[11] The loan documentation received from the Bank provided for a housing loan of $136,000.00 and a Rapid Repay home loan with a credit limit of $15,000.00. This was effectively an overdraft facility available for use by KR as and when required.

[12] When lodging her certificate and requesting drawdown, WH requested payment of the housing loan of $136,000. Instead, when making the advance, the bank credited the firm’s trust account with $151,000 being the housing loan and the total Rapid Repay facility.

[13] On completion of the refinancing, WH deducted the balance of her fees for the conveyancing transaction and credited KR’s account with the balance of $14,333.13.

[14] On the day after the transactions took place (being Tuesday 2 December) KR sent an e-mail to WH inquiring why the sum of only $14,333.13 had been credited to his account when he was expecting the full balance of $15,000 credited by the bank in error to be repaid.

KR's complaints and the Standards Committee determination

[15] The first complaint raised by KR, is that WH did not act in accordance with the terms of engagement issued by the firm. He complains that she failed to;

1) act competently and in a timely manner;

2) act promptly and conscientiously; and

3) communicate with KR and keep him informed about the status of the work.

[16] He considered that WH's actions "resulted in a significant amount of unnecessary time spent dealing with the settlement agreement, inevitably incurring additional costs". He alleges that the delay forced him to agree to a settlement with which he was not entirely satisfied and which did not represent the best settlement for him.

[17] He also refers to the fact that although he had sent his letter of complaint directly to WG on 15 December 2008 he did not receive a response until 26 June 2009, and the response was from WH. He again refers to the firm's terms of engagement which informed clients that complaints could be referred to WG if the client did not wish to refer the complaint to the person acting in the matter.

[18] With his complaint to the Complaints Service, KR included his letter of complaint to the firm dated 15 December. In that letter he also complained that WH had deducted the conveyancing costs from the additional funds which the bank had sent to the firm in error without reference to him.

[19] Having considered all of the material, the Standards Committee determined to take no further action in connection with the complaint. In its determination the Standards Committee recorded its determination in the following way;-

> "The Committee considered all the material before it. The Committee did not consider that there was any evidence to support the allegation that [WH] failed to act competently or in a timely manner. In regard to the alleged deduction of fees without consent, the Committee noted that the terms of engagement provided by [ADS] specifically provided authority for them to deduct funds held on behalf of

> the client in their trust account, for which they had provided an invoice. In the circumstances, the Committee was of the view that the client did not deduct funds without the client's consent. In all the circumstances, the Committee was of the view that further action was unnecessary and accordingly resolved to take no further action pursuant to section 138(2) of the [Lawyers and Conveyancers] Act."

The review

[20] A review hearing took place in Auckland on 3 May 2012 attended by both KR and WH.

The firm's response to the complaint

[21] In this review application, KR refers in the first instance to the length of time taken to respond to his complaint sent to WG. He submits that this epitomized WH's overall management of his case.

[22] To a large extent, responsibility for this must be assumed by WG. The information provided to KR at the commencement of his instructions contained the procedures adopted by the firm to deal with the complaints. It states that "If you do not wish to refer your complaint to [the person carrying out the work] or you are not satisfied with that person's response to your complaint, you may refer your complaint to [WG]." That is what KR did. It was therefore incumbent on WG to respond directly and not delegate the responsibility for the response back to WH. In addition, it is unacceptable that it should take six months for a reply to a complaint to be provided. Such delay is counter-productive to the reason for having a complaints process and will not assist in any way to resolve a complaint at an early stage. Other than these comments however, the delay in responding to the complaint is not directly relevant to the complaints itself.

Was there a delay in progressing the file?

[23] The primary aspect of KR's complaint relates to the delays which he considers occurred in progressing the file. He refers to the commitments provided by the firm in its terms of engagement and disagrees with the Committee when it came to the view that matters had been dealt with promptly other than on one occasion referred to in the Standards Committee determination. In support of his complaint, he cites the letter from his former partner's solicitor where on 17 November 2008 she states:

> "Once again we do not understand why there has been a delay of 5 weeks for such a straightforward matter"

[24] Following the review hearing I retained WH's files and have thoroughly reviewed the progress of the matter. To ensure that a complete picture of the progress

of the file is presented, I have set out below the various attendances and correspondence on the file;-

- 16 September 2008 - instructions received
- 17 September 2008 - proposed letter to KR's partner sent to KR for approval;
- 22 September 2008 - KR replies with comments;
- 23 September 2008 - amended draft letter provided for approval;
- 24 September 2008 - response received from KR and letter sent;
- 3 October 2008 - letter from ADR confirming approval in broad terms to content of letter;
- 6 October 2008 (Monday) - letter sent by email to KR. WH advises that she wishes to consult with WG regarding terms of agreement and that WG was overseas until 30 October 2008. She advises - "the agreement can be drafted in the meantime and then adjusted accordingly to be valid in accordance with NZ and UK legislation. I hope this timeframe is okay with you-please let me know";
- 7 October 2008 - KR's response- "I am happy for you to proceed with drafting a separation agreement which is valid here and in the UK";
- 8 October 2008 - WH responds by email and refers to KR's question as to "weather tightness" of agreement. "I will be able to advise regarding that on [WG's] return from [overseas] or before."
- 9 October 2008 - ADR seeks confirmation from WH of receipt of letter dated 3 October 2008 and advice when draft agreement will be provided.
- 9 October 2008 (Thursday) - WH provides draft agreement to KR and notes

  > "I have received a further fax from your former partner's solicitor today and will respond that we will be in touch shortly".

- 14 October 2008 - KR responds with comments on draft.

- 16 October 2008 - WH provides amended agreement to KR for comment.

- 17 October 2008 (Friday) - KR forwards email received from former partner;-

> "Hello - my solicitor wrote to yours 2 weeks ago asking for the draft agreement but can't get a response. Can you please let me know what is happening with it? Thanks."

- 20 October 2008 (Monday) - fax from ADR-

> "Please urgently confirm receipt of [previous letters] and kindly advise when we may expect a draft relationship property agreement for...perusal"

- 21 October 2008 – WH forwards fax from ADR to KR and notes that she has had preliminary advice from WG and is making amendments to the agreement.

> "However for certainty I would like to wait until she returns next week to go through the agreement with her."

- 21 October 2008 – KR responds

> "I do feel it is important that the agreement is as "weather tight" as possible and I would therefore prefer you to consult with [WG] on her return. I agree that this may be difficult whilst she is out of the country."

- 22 October 2008 - WH advises ADR that a relationship property agreement has been drafted and that it is hoped to have that to them "early next week."

- 29 October 2008 - WG arrives back in New Zealand and WH advises KR that she will endeavour to discuss the file with WG the following day (Thursday).

- 4 November 2008 (Tuesday) - KR seeks advice as to progress.

- 4 November 2008 - WH's secretary responds-

> "Julie is out of the office today. On her return tomorrow she will endeavour to answer your queries."

- 5 November 2008 - fax from ADR

> "To date a draft relationship property agreement has still not been provided for our perusal. This is now our fourth request."

> "Due to the incredible amount of delay in this matter our client insists that the balance for the flexi account and the mortgage account be set at Friday 3 October."

- 6 November 2008 - KR inquires again as to progress.
- 6 November 2008 - WH provides amended relationship property agreement to KR and copies fax from ADR. She apologises for the lateness of reply and advises that she has been out of the office.
- 6 November 2008 - KR confirms agreement with draft property agreement.
- 7 November 2008 - WH acknowledges minor amendment to agreement and seeks instructions from KR as to whether he wishes to view the covering letter to ADR.
- 9 November 2008 - KR confirms request to sight draft covering letter.
- 10 November 2008 (Monday) - draft letter provided but wrong version. Corrected version provided to KR for approval.
- 10 November 2008 9.57 a.m. - KR provides comments for letter and advises that further email received from his former partner expressing annoyance about delays and issuing an ultimatum for everything to be "signed off and transferred to [her] account by the end of this week."
- 10 November 2008 - draft agreement provided by fax to ADR.

[25] From this review of WH's file it is apparent that KR was advised and agreed that the draft agreement would be sent to ADR at the end of October when WG was due to return from overseas. The complaint therefore reduces to the fact that WH did not respond to the faxes from ADR and whether the time taken to provide the draft agreement after WG's return was reasonable.

[26] By fax stated 3 October 2008 (Friday) ADR confirmed agreement in broad terms with the content of the letter sent to KR's former partner. In a follow up fax on 9 October, the solicitor sought an acknowledgement of receipt of her 3 October letter and advice as to when the draft agreement would be available.

[27] On that day, WH provided the draft agreement to KR. She also advised that she would respond to ADR but did not do so.

[28] However, KR was aware of what progress had occurred and was also aware and accepted that the draft agreement would not be provided to his former partner's solicitor before the end of the month. It is therefore a little puzzling that he did not respond directly to his partner when she inquired as to the situation on Friday 17 October. Instead, he sent the email through to WH and requested advice as to whether she had replied to ADR as she indicated that she would.

[29] WH was absent from the office on Monday 20 October, but it does seem that a phone message was left to this effect with KR. In any event, she responded on 21 October. On that day, KR expressed his concern that WH had not responded to ADR and requested her to do so immediately so that his former partner did not form the view that they were trying to delay the matter.

[30] WH accordingly advised ADR by fax on 22 October that the agreement had been drafted and would be provided early the following week.

[31] In her response on 5 November, the solicitor from ADR was somewhat peremptory, and referred to the fact that the draft had still not been provided. To be fair to WH, she had advised ADR that she expected to provide the draft agreement early in the last week of October. If there was any delay, it was a delay in this period, from the date of WG's return on 29 October, until 10 November when the draft agreement was provided.

[32] It is apparent from the file that WH sent all documentation and all correspondence to KR for approval. KR was therefore fully advised as to the situation, and there is little to support his complaint that WH failed to communicate with him and keep him informed about the status of his work.

[33] At the review hearing, KR stated that he was surprised that WH (or the firm) did not have the knowledge required to address the issue with regard to overseas property without the need to wait until WG's return. WH advised KR at the outset that she was unsure of this matter and that she wished to wait until WG returned to ensure that it was correctly addressed. This was acknowledged and accepted by KR and his email of 21 October specifically addressed this.

[34] If anything, WH is to be commended for being upfront to KR about her lack of knowledge and if KR was unhappy that she needed to wait until WG's return, then he should have made that known to WH at that time.

[35] It is also understandable that WG would have had a number of matters to attend to on her return and it would have to be recognised that it may have taken a few days for her to address this particular issue with WH.

[36] Although WH may not have been able to respond to all of KR's correspondence, she did respond readily and at the same time advised the reasons why she had not been able to reply immediately. KR was fully advised at all times of where matters were at, and his final instructions to fax through the draft agreement were sent at 3:08 p.m. on Friday 7 November.

[37] The draft agreement was provided by fax on Monday 10 November after KR had approved the form of the covering letter.

[38] Other than an understandable delay between 30 October and 10 November in finalising the form of the agreement, I do not accept that WH can be accused of any delays in attending to this matter for KR. She kept him advised at all times with regard to progress. I do acknowledge that she did not respond to the first two faxes from ADR until 22 October but KR himself had the opportunity to advise his former partner that the draft agreement would not be available at least until at least the end of October. It is certainly not tenable for him to adopt for himself, the criticisms by his former partner's solicitor that there had been "an incredible amount of delay" and that there had been a delay of "five weeks to draft" the agreement. KR knew the reasons why the draft had not been provided and could have advised his former partner himself. Whilst it would have been desirable for WH to respond to ADR's faxes (as indeed she said she would) it would be somewhat draconian to find that this constituted a breach of the Conduct and Client Care Rules in these circumstances.

[39] I therefore concur with the Standards Committee with regard to this aspect of the complaint.

Deduction of fees

[40] Immediately prior to completion of the refinancing WH had prepared a statement recording the proposed advance of $136,000 and after payment of the balance due to KR's former partner, the sum of $666.87 was required to be paid to meet the total fees and disbursements payable to the firm. This statement was sent by email to KR on Friday 28 November with advice that "We require our conveyancing fees to be paid on settlement."

[41] Settlement did not however take place on Friday 28 November because the funds were not received from the bank until nearly 5:00 p.m. on that day. As noted above, the Bank mistakenly credited the firm's account with the total Rapid Repay facility as well.

[42] At 9:14 a.m. on the following Monday (1 December 2008), the bank sent an e-mail to WH as follows: "Could you please credit [KR]'s account with $10,000 [account number] as discussed by telephone this morning".

[43] At 9:25 a.m. WH sent an e-mail to KR as follows:-

> "Settlement funds were received late on Friday from Bank of New Zealand (after I had left the office). Despite our request for only $136,000 (copy attached) the amount of $151,000 was paid by Bank of New Zealand. The funds were placed on interest bearing deposit over the weekend and the amount of $135,390.12 will be paid to your former partner in accordance with the relationship property agreement. Please advise the account details for where the remainder funds are to be repaid back to."

[44] It was KR's expectation that the full sum advanced in error would be credited back to that account. Instead, WH deducted the balance due of $666.87 and credited the specified account with $14,333.13.

[45] An amended statement was prepared recording these transactions but there is no indication on the file that these statements were sent to KR. Instead, he discovered for himself on the next day that his account had been credited with this amount. He immediately sent an e-mail to WH at 9.20am as follows:-

> "Can you please instruct me why only $14,333.13 has been repaid into my account when the bank was only instructed to arrange a mortgage of $136,000?"

[46] Following receipt of this email it seems that WH tried to contact KR by telephone. She then sent an e-mail as follows;-

> "I have tried to ring you attached [*sic*] is the amended settlement statement taking into account the funds received on Friday. As discussed in our message if you need to call me, please do so."

[47] There is nothing further on the file which records any discussion with KR and his complaint includes the fact that WH deducted the amount due to the firm without his authority.

[48] The information for clients sent to KR in connection with this matter provided as follows ;-

> "We may ask you to prepay amounts to us, or to provide security for our fees and expenses. You authorise us;

> a) to debit against amounts prepaid by you;
>
> b) to deduct from any funds held on your behalf in our trust account any fees, expenses and disbursements for which we have provided an invoice."

[49] KR had also been advised that the firm required payment of the fees and disbursements "on settlement".

[50] KR advises that he had set aside the funds required to make payment of the balance due and it is implicit in this that he was agreeable to WH applying the balance of the housing loan in part payment of the fees and disbursements. His complaint is that she deducted the balance of the fees and disbursements due to the firm from funds that had been advanced in error by the bank and which had been acknowledged by all concerned as being in error. Indeed, it would seem that WH herself, as recently as 9.14am on the Monday morning intended to credit the full sum back to the Bank as evidenced by the email received from the Bank.

[51] WH advised at the review hearing that she recalled speaking to KR on that morning and obtaining his verbal approval to deduction of the balance of the conveyancing fees but not the final account with regard to relationship property matters. Those fees remain outstanding.

[52] That explanation is not consistent with the e-mail sent by KR on Tuesday 2 December seeking advice from WH as to why she had credited his account with less than the full overpayment. I am satisfied that KR did not give approval to those funds being used as suggested by WH.

[53] In *Heslop v Cousins* [2007] 3 NZLR 679, the High Court held that a solicitor does not have a right of set off or lien where funds are being held for a specific purpose. In this instance, it was acknowledged that the funds had been paid by the Bank in error and were to be repaid in full to the Bank.

[54] I am aware of the previous decision from this Office, *A v Z* (LCRO) 40/2009 which requires that a solicitor must have the client's signed consent to deduct fees. The information provided to KR would not have been sufficient to meet those requirements.

[55] Section 110(1)(b) of the Lawyers and Conveyancers Act 2006 provides as follows;-

> A practitioner who, in the course of his or her practice receives money for, or on behalf of, any person –

> (b) must hold the money, or ensure that the money is held, exclusively for that person, to be paid to that person or as that person directs.

[56] Section 113(2) does not override that requirement where the funds are held for a specific purpose and the funds should have been paid in full to the Bank.

[57] For that reason I therefore come to the view that WH's conduct in this regard constitutes unsatisfactory conduct by reason of section 12(c) of the Lawyers and Conveyancers Act 2006 and the determination of the Standards Committee will be reversed in this regard.

[58] Having reached this decision, it is necessary to consider what Orders (if any) should be imposed as a result of this finding.

[59] This breach had no impact on the outcome of the completion of the property relationship agreement, and it is therefore not appropriate that any of the outcomes sought by KR be considered.

[60] WH had advised KR that the firm required payment of the costs and disbursements of the conveyancing on settlement and at the review hearing KR advised that he had set aside the sum of $666.87 required for this purpose. He was therefore able to readily rectify the situation by crediting the Rapid Repay account with that sum.

[61] Balanced against this is the fact that any breach of section 110 needs to be considered carefully. Lawyers are entrusted with clients funds and must be meticulous in how they deal with those. Weighing up these factors I have come to the view that the appropriate penalty is to reprimand WH pursuant to section 156(1)(b) of the Act. In addition, I consider that a small fine is appropriate to reinforce that. WH will also be required to pay costs in accordance with the Costs Orders Guidelines issued by this Office.

Decision

Pursuant to section 211 (1)(a) of the Lawyers and Conveyancers Act 2006

1. The decision of the Standards Committee is confirmed with regard to KR's complaint concerning delay in progressing his matter.

2. The Standards Committee determination is reversed with regard to the complaint relating to the deduction of fees.

3. The conduct of WH in deducting the balance of the firm's fees and disbursements from the funds forwarded by the Bank in error constitutes unsatisfactory conduct as that term it is defined in section 12(c) of the Lawyers and Conveyancers Act.

Order

WH is to pay the sum of $250 to the New Zealand Law Society by way of fine pursuant to section 156 (1)(i) of the Lawyers and Conveyancers Act 2006 such sum to be paid to the New Zealand Law Society within one month of the date of this decision.

Costs

This application for review has been partially successful and there has been a finding of unsatisfactory conduct against WH. In accordance with the Costs Orders Guidelines provided by the Office WH is ordered to pay the sum of $500 by way of costs to the New Zealand Law Society within one month of the date of this decision.

DATED this 14th day of May 2012

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O W J Vaughan

Legal Complaints Review Officer

In accordance with section 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

KR as the applicant
WH as the respondent
The Auckland Standards Committee 4
The New Zealand Law Society
Secretary for Justice (redacted)