LCRO 141/2015

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of a Standards Committee
BETWEEN	**DV**
	Applicant
AND	**RG**
	Respondent

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

DECISION

Introduction

[1] Ms DV has applied for a review of a decision by a Standards Committee, in which the Committee decided that no action was necessary on Ms DV's complaints about Mr RG's competence, conduct and the service he had provided. Ms DV also complained that Mr RG had described himself as a lawyer when in fact he was a Legal Executive. No further action was taken on that aspect of her complaint.

Background

[2] Ms DV says she and her husband entered into an agreement for sale and purchase in relation to a residential property on or about 1 July 2011 (the agreement). At clause 19.0 the agreement recorded that the transaction was conditional on:

> the vendor's mortgagee approving the sale of the said property thereby giving guarantee of transfer of title to the purchaser on settlement date. The vendor or the vendor's solicitor must contact the purchaser or the purchaser's solicitor in writing by 4pm on the 5th working day after acceptance of this offer that this condition is satisfied or this agreement will be at an end.
>
> (the condition)

[3] The DVs then instructed Mr RG.

[4] The vendor was to satisfy the condition by 8 July 2011, but requested an extension of four days, to 12 July 2011, and a corresponding extension to the date for settlement. To record the proposed extension of time, the vendor's lawyer sent Mr RG a document (at that point unsigned by the vendor) for Ms DV and her husband to sign (the variation).

[5] Ms DV and her husband signed the variation, and Mr RG returned that to the vendor's solicitor. There is no evidence of the vendor having counter-signed or returned the variation.

[6] Mr RG says that he followed up with the vendor's lawyer on several occasions. However, he says he received no response until 29 July 2011 when the vendor's lawyer advised Mr RG that the vendor had not signed the variation and the agreement was at an end.

[7] The agreement was not performed.

[8] Mr and Ms DV formed the view that Mr RG is responsible for the agreement not being performed because of the way he dealt with the variation and what followed, or perhaps more accurately, did not follow. Ms DV also believes Mr RG held himself out as a lawyer when in fact he was a Legal Executive, and she is affronted by that perceived deception. Ms DV made a complaint to the New Zealand Law Society (NZLS) setting out her concerns about the way Mr RG had managed the variation process, delays, and saying he had misled her into believing he was a lawyer.

Complaint

[9] The Standards Committee identified the following as issues arising from Ms DV's complaint:

(a) Whether Mr RG failed to act competently in relation to the variation of the agreement? (rule 3);[1]

[1] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

(b) Whether Mr RG failed to respond to queries in a timely manner? (rule 3); and

(c) Whether Mr RG represented to Ms DV that he was a lawyer in breach of sections 21 to 24 of the Act.

[10] The Committee considered the complaint and the parties' correspondence. In respect of each of the three issues it had identified, the Committee determined Ms DV's complaint on the basis that, having regard to all the circumstances, no further action was necessary or appropriate pursuant to s 138(2) of the Act.

[11] The Committee considered whether Mr RG had failed to act competently in relation to the variation of the agreement. The Committee's view was that settlement was conditional on the mortgagee's approval being forthcoming by 8 July pursuant to clause 19. The Committee considered Mr RG, Ms DV and her husband had no control over fulfilment of that condition. As Ms DV and her husband had already committed to clause 19 by signing the agreement before they instructed the firm for which Mr RG worked, the Committee's view was that Mr RG was not responsible for how the agreement operated, or failed to, when the vendor did not complete the condition.

[12] The Committee considered whether Mr RG had acted in a timely manner. This issue arose from Ms DV's complaint that Mr RG had avoided taking her calls, and failed to respond to her emails. The Committee reviewed the exchanges of email between the parties, and reached the conclusion that Mr RG's responses to queries were timely. While he may not have responded immediately to emails, the parties had also been in touch by telephone.

[13] The Committee considered whether Mr RG represented to Ms DV that he was a lawyer in breach of sections 21 to 24 of the Act, noting that there could be difficulties driven by uncertainty as to whether the Chinese interpretation of "lawyer" had the same meaning in English, and whether any distinction between a lawyer and a registered Legal Executive in China corresponded with that distinction here. The Committee considered the possibility that there might in fact be no Chinese equivalent to the qualification of Legal Executive as that is recognised in New Zealand.

[14] The Committee considered that Ms DV may have formed a view based on representations by others, rather than by Mr RG himself, which, in combination with differences in language and expression, may have given rise to misunderstanding.

[15] While the Committee observed that it might have been prudent for Mr RG to have made his Legal Executive status plain in email correspondence, and to have

been alert to signs of misapprehension, there was no evidence that he had expressly described himself as, or held himself out as, a lawyer in breach of the Act.

[16] Ms DV disagrees with the decision and applied for a review.

Review Grounds

[17] Ms DV says the decision is unfair, and relied too heavily on the explanations provided by Mr RG, with which she took issue.

[18] Ms DV says Mr RG told her that the agreement was unconditional in all respects, and repeated her concerns about Mr RG having held himself out as a lawyer when he was not.

[19] Ms DV also mentions another law firm, but those comments are not relevant to this review which focuses on Mr RG's conduct.

Nature and Scope of Review

[20] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[2]

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
>
> The Review Officer has broad powers to conduct his or 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. These powers extend to "any review" …
>
> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[21] More recently, the High Court has described a review by this Office in the following way:[3]

> A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the

[2] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].
[3] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

> LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[22] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

(a) Consider all of the available material afresh, including the Committee's decision; and

(b) Provide an independent opinion based on those materials.

Review issues

[23] The first point to note is that Mr RG was not a lawyer. He was a Legal Executive employed by a lawyer. As he was employed by a lawyer at the time of the conduct that is the subject of Ms DV's complaint, his conduct is regulated by the Act through a series of provisions that lead to the conclusion that Mr RG's conduct, services and fees are regulated to the same minimum standards that are applied to the conduct of lawyers pursuant to the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the rules).

[24] Rules 3 and 11.1 are of particular relevance to the conduct Ms DV complains of and help to frame the issues to be considered on review, which are:

(a) Whether, in providing regulated services to Ms DV, Mr RG always acted competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care (rule 3); and

(b) Whether Mr RG engaged in conduct that was misleading or deceptive or likely to mislead or deceive Ms DV on any aspect of his practice (rule 11.1).

Analysis

Jurisdiction over Employees

[25] Although Mr RG was not a lawyer at the time of the conduct complained of, he was employed as a registered Legal Executive by the firm that acted for Ms DV and

her husband. Employees are referred to in s 132 of the Act, which provides for complaint to be made about:

> (a) The conduct of "a person who is not a practitioner but who is an employee…of a practitioner";[4] and
>
> (b) The standard of the service provided, in relation to the delivery of regulated services by a person who is not a practitioner but who is an employee of a practitioner.

[26] The standards of misconduct and unsatisfactory conduct are contained in ss 7 to 14 of the Act. Relevantly, s 14 says:

> In this Act, unsatisfactory conduct, in relation to a person who is not a practitioner but who is an employee of a practitioner or an incorporated firm,—
>
> (a) means conduct of the person in the course of his or her employment by the practitioner or incorporated firm that would, if it were conduct of a practitioner, be unsatisfactory conduct under section 12 or section 13; and
>
> (b) includes conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the person, or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 11).

[27] There is no evidence that could support conclusion that misconduct standards should be applied to Mr RG's conduct.

[28] The relevant standards against which to consider Mr RG's conduct are contained in the practice rules that apply to lawyers, and their employees by extension, in this case because of ss 132, 14 and 12.

[29] Section 12 defines unsatisfactory conduct in the following ways:

> In this Act, unsatisfactory conduct, in relation to a lawyer or an incorporated law firm, means—
>
> (a) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; or
>
> (b) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including—

[4] Lawyers and Conveyancers Act 2006, s 132(1)(a)(iii).

> (i) conduct unbecoming a lawyer or an incorporated law firm; or
>
> (ii) unprofessional conduct; or
>
> (c) conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm, or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 7) …

[30] Thus the words "person who is not a practitioner but who is an employee of a practitioner" can be substituted for the word "lawyer" in rules 3 and 11.1. The standards to be applied to Mr RG's conduct are therefore:

> (a) In providing regulated services to a client, a person who is not a practitioner but who is an employee of a practitioner must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care (rule 3); and
>
> (b) A person who is not a practitioner but who is an employee of a practitioner must not engage in conduct that is misleading or deceptive or likely to mislead or deceive anyone on any aspect of the employee's practice.

Did Mr RG act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care?

[31] In providing regulated services to Ms DV, Mr RG was under an obligation to always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care pursuant to rule 3.

[32] Ms DV says Mr RG's handling of the variation lacked competence. Whether or not she is correct is best answered with reference to the terms of the retainer, the agreement and the variation, which provide some scope for the duty of care Mr RG owed to Ms and Mr DV. The scope of that duty is relevant to Mr RG's conduct on 8 July when the vendor's lawyer indicated the vendors could not perform the condition by the due date and would need an extension.

[33] The agreement was at the centre of the retainer between Ms DV and Mr RG. Mr and Ms DV had signed it before they instructed Mr RG. He therefore had no influence over how any part of it was drafted. The agreement was framed on the basis that if the condition was not performed by 8 July the agreement came to an end. If the variation had been signed, the timeframe for the vendors to communicate the

mortgagee's consent would have been extended to 12 July, but if the condition was not performed by that date, the agreement would come to an end.

[34] It is clear from the concerns Ms DV expresses that she, and presumably Mr DV, were committed to buying the property the vendors were selling. It is understandable that they would be distressed at the prospect and the reality of the transaction not being concluded. That is not to say that the failure of the transaction can be attributed to any of the failings they allege in Mr RG's provision of regulated services.

[35] For the DVs' part, their offer to purchase was conditional. They needed to secure finance, and wanted to obtain a builder's report. On 5 July 2011 Ms DV received finance approval. On 6 July 2011 Mr RG emailed her noting that only three matters had emerged from the DVs' builder's report, and saying:

> Please instruct us whether you are satisfied with the finance and build report conditions due today, and declare unconditional for the agreement.

[36] Ms and Mr DV instructed Mr RG to declare the agreement unconditional on their part. Ms DV says Mr RG told her the agreement was unconditional in all respects.

[37] The fact that the agreement was unconditional on the DVs' part does not mean the transaction was unconditional on the vendor's part. As there is no evidence that the mortgagee had consented, it is not clear how the vendors could declare the agreement unconditional on their part. The consent of the mortgagee appears to have been the only prerequisite to the agreement being declared unconditional on the vendor's part.

[38] Regardless of what the vendors or the DVs might have wanted, neither the sale nor the purchase could proceed without the mortgagee's consent. If the vendors did not communicate the mortgagee's consent, the parties could not perform the agreement.

[39] Ms DV's complaint suggests the DVs have come to believe Mr RG should have pressed harder to get the mortgagee's consent. While Mr RG could perhaps have pressed the vendor's lawyer harder for mortgagee consent, he could not compel the mortgagee to consent. He also could not communicate directly with the vendors because rule 10.2 prohibited direct communication with them. It is not apparent the DVs instructed Mr RG to press harder at the critical time, on or before 8 July. Nor is there any reason for him to have done so, because parties to agreements are expected to apply reasonable efforts to fulfilling conditions or ensuring conditions are fulfilled.

[40] An email from Mr RG to Ms DV on 8 July indicates the vendor may have been struggling to obtain approval from the mortgagee. It appears Mr RG understood this to be because the person with whom the vendor was dealing, presumably the mortgagee's representative, was away on sick leave. Hence the request from the vendor's lawyer for a variation to the date in the condition from 8 to 12 July 2011. If Ms and Mr DV had refused to sign the variation, it appears the condition would have operated to bring the agreement to an end on 8 July. That was not what the DVs wanted.

[41] Although the DVs signed the variation, there is no evidence of the vendors having signed it. If that is correct, and the condition was not satisfied, the agreement came to an end on 8 July. If the variation had been signed, but the mortgagee did not consent, the agreement would still have come to an end, but on 12 July. There is no evidence of the mortgagee having consented, but of greater significance to Ms DV's complaint, the circumstances in which the agreement came to an end were, and always have been, beyond Mr RG's control.

[42] The correspondence between Ms DV and Mr RG around that time indicates a misunderstanding on Ms DV's part. Her view appears to have been that she and her husband had done all that had been asked of them, and as their part of the agreement was unconditional there could be no impediment to its performance. As has already been mentioned, Mr RG had no influence over the terms of the agreement, which the parties signed before the DVs instructed him. There is no reason to think Ms DV's misunderstanding was based on anything Mr RG had told Ms DV, or should have told her but did not. Mr RG's conduct in doing nothing further is consistent with the understanding that when the signed variation was not returned by close of business on 8 July, the condition had the effect of bringing the agreement to an end. He followed up, because the DVs wanted the transaction to proceed, but the evidence suggests that after 8 July there may have been no agreement for the DVs to give effect to.

[43] Some of Ms DV's communications to Mr RG after 8 July are in Chinese script. Some translations have been provided. I take it those translations are by Ms DV. According to the translation, a communication from Ms DV to Mr RG dated 2 August 2011 says:

> 1. Either the situation that the purchasing agreement has been signed by both party and has become unconditional, if the vendor required to cancel the contract without considering our cost caused by this purchasing (building report and legal costs), is it fair to the purchaser according to the law?

> 2. Previously, you asked us to sign a variation form after their bankrupt, as a developed form? Or if we didn't sign it at that time, there would not be so much trouble now?
>
> …

[44] That email highlights the two key issues of concern to Ms DV. First, her concern about the apparently unrecoverable costs associated with the failed transaction. The second, and perhaps related issue, is her dissatisfaction with Mr RG's handling of the vendor's proposed variation. Those concerns were key to Ms DV's complaint.

[45] Ms DV comes back to those concerns later when she says that:

> before we signed the [variation] form, he [Mr RG] didn't give us the explanation that the variation form is a counter offer based on the previous unconditional contract. As a result, the vendors successfully withdraw our purchasing agreement without providing any compensation on our lost [sic].

I cannot understand the logic of Ms DV's argument because the evidence available on review indicates that the agreement was not unconditional on the vendors' part.

[46] The correspondence, and the other communications between Mr RG and Ms DV, do not suggest Mr RG did not act in a timely manner. While he may not have responded by return, there is no evidence to support a finding that Mr RG was other than sufficiently prompt in his attention to the transaction and Ms and Mr DV at every significant stage. There is no evidence to support a finding that if he had moved more quickly or done anything differently the transaction would have eventuated. Everything hinged on the vendors communicating the mortgagee's consent.

[47] As mentioned above, Mr RG was obliged by rule 3, in providing regulated services to Ms DV, to always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care. The evidence does not support a finding that Mr RG lacked competence or did not act in a timely manner. It is not apparent that Mr RG acted in a manner that was inconsistent with the terms of the retainer or his duty to take reasonable care. It is therefore not possible to conclude that Mr RG contravened rule 3.

Did Mr RG represent to Ms DV that he was a lawyer when he was not?

[48] While the Act includes offence provisions to protect the status of lawyers, rule 11.1 prohibits lawyers, and by extension their employees, from engaging in conduct that is misleading or deceptive or likely to mislead or deceive anyone on any aspect of the employee's practice.

[49] At the time he acted for Ms and Mr DV in 2011 Mr RG was not a lawyer. He was a registered Legal Executive. Ms DV, however, says Mr RG misled her as to his status in the legal profession. She says he told her he was a lawyer. Ms DV says she was not aware Mr RG was a Legal Executive, and says she is willing to swear that he told her he was a lawyer. She says he was known as “Lawyer RG”, and when she and others referred to him as a lawyer, he did not correct them. Ms DV says she was misled by the way he expressed himself, and the independent legal advice he gave to the DVs and others. She says she was not aware that Mr RG was under the supervision of a principal of the firm, because Mr DV did not tell her.

[50] Mr RG denied telling Ms DV he was a lawyer or leading her to believe he was. Mr RG said that before he was admitted as a barrister and solicitor (in May 2014) he introduced himself as "Mr RG" or "Manager RG" because his responsibilities included administrative areas of the practice of the firm he was with. Mr RG says he presented himself as a very busy and experienced Legal Executive. He denies having conducted himself in a way that misled or deceived Ms DV into thinking he was a lawyer, or was likely to have misled or deceived her.

[51] There is a direct conflict between the parties’ evidence on this point. The standard of proof in disciplinary proceedings such as this is the balance of probabilities, which is the civil standard, and is to be applied flexibly according to the nature of the case.[5] The more serious the complaint, the stronger must be the evidence to support it if the complaint is to be upheld. To complain that a Legal Executive has misrepresented his status as being that of a lawyer is a serious accusation, and would require strong and persuasive evidence to justify an adverse conclusion. No such evidence is present here.

[52] While I can accept that Ms DV sincerely believes Mr RG misled her into believing that he was a lawyer, beliefs cannot found a decision, no matter how sincerely they are held.

[53] There is no independent evidence either way, it is simply a case of Ms DV’s word against Mr RG’s, with the added complication of language issues quite possibly leading to misapprehension. Further enquiry of clients who may have had dealings at times with Mr RG is unlikely to be conclusive, and in any event is inappropriate in a process of review which is private to the parties pursuant to s 206(1) of the Act.

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[5] See *Z v Complaints Assessment Committee* [2007] NZCA 91, [2008] 1 NZLR 65.

[54] It appears from her request to have the title Legal Executive explained to her in the course of the disciplinary process, that Ms DV was not aware there was a New Zealand qualification of Legal Executive, or what that means. There is some overlap in the regulated services that can be provided both by Legal Executive and lawyers. There may be no equivalent in Ms DV's community. Ms DV's evidence suggests her understanding may have been coloured by acquaintances who spoke to her about Mr RG. The circumstances do not lead to the conclusion that it is more likely Mr RG engaged in conduct that misled or deceived Ms DV than that he did not.

[55] The process of review does not lend itself to resolving conflicts of evidence such as the present one. The evidence is insufficient to found the conclusion that Mr RG contravened rule 11.1.

Summary

[56] As discussed above, there is no good reason to depart from the Committee's decision to take no further action in respect of Ms DV's complaint about Mr RG's conduct or the service he provided.

Determination

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

DATED this 28th day of June 2016.

D A 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 DV as the Applicant
Mr RG as the Respondent
Mr ED as the representative for the Respondent
A Standards Committee
The New Zealand Law Society
Mr TY as a related party