LCRO 159/2017

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [Area] Standards Committee
BETWEEN	**WD** Applicant
AND	**YB** Respondent

DECISION

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

Introduction

[1] Mr WD has applied for a review of a decision by the [Area] Standards Committee (the Committee) to take no further action in respect of his complaint concerning the conduct of Mr YB, the principal of YB Legal, [City].

[2] From November 2011, YB Legal acted for Mr and Mrs WD (the WDs) on the purchase of a residential property at [Street Address], [City] (the property). Ms UF, a legal executive who was employed by YB Legal at the time, worked with Mr YB on this matter.

[3] On 2 November 2011, having negotiated directly with the owners of the property, the WDs entered into the first of the two agreements for the purchase of the property which contained finance and builder's report conditions for their benefit. There

was no Land Information Memorandum (LIM) condition, as the the "no" option on the printed form was selected. The list of chattels in schedule 1 included "new underfloor insulation (pink batts in ceiling)". There was no real estate agent involved, as this was a private sale.

[4] The WDs, who did not obtain legal advice before they signed the agreement, instructed Mr YB's firm to act for them on the purchase. They were unsuccessful in arranging finance in respect of the first agreement and on 15 November 2011 instructed Mr YB to avoid that agreement.

[5] A few days later Mr YB's firm prepared the second agreement, also a private sale, which was signed by the vendors and the WDs on 22 November 2011. The second agreement also contained finance and builder's report conditions. As with the first agreement the LIM condition was stated not to apply. The chattels listed in schedule 1 included "freestanding fire, underfloor insulation". A valuation of the property obtained by the WDs dated 14 November 2011 referred to "new log fire place" in the lounge.

[6] Having received Mr WD's instructions, Mr YB informed the vendors' lawyer, Ms TG, on 25 November 2011 that the conditions in the second agreement had been satisfied. However, the financier, a bank, imposed a loan condition requiring that cladding work be done to the house within three months of settlement and withheld $13,000 of the loan to cover the cost of that work. This necessitated the WDs having to apply for a loan on "hardship grounds" from [Finance Company] so that they could complete the purchase.

[7] Ms UF states that during this time she discussed the Heat Smart loan with Mrs WD "as [the WDs] negotiated … directly with the vendors" before they instructed Mr YB's firm to act on both agreements.

[8] On 8 December 2011, Ms TG forwarded the settlement statement to Mr YB's firm accompanied by a letter stating that:

> [p]lease note that the rates for the property contain a Heat Smart loan. Further information may be obtained from the [Area] District Council.

[9] Four and a half years later in May 2016, when the WDs sold the property, the details of the Heat Smart loan surfaced. On 19 May 2016, the WDs raised with Mr YB their concerns that he had not informed them about the Heat Smart loan at the time they purchased the property.

[10] Mr YB responded on 20 May 2016 stating that he would "locate [their] old file and reply". On 26 August 2016 he responded to a reminder received from Mr WD. He explained why it had taken him three months to respond to the WDs' concerns, stated that he had assumed that their new lawyers would have informed them that "the loan was attached to your rates and how [the WDs] had obviously been paying them with the annotation on the rate demand … since [their] purchase in 2011". He observed that if they "had concerns surely [they] would have noticed this on the first rate demand".

[11] In their reply on 29 August 2016, the WDs informed Mr YB first, that he had not advised them about the Heat Smart loan when they purchased the property, and secondly, how much they had paid to the Council, included on the rates assessment for the property, in reduction of the loan and how much they paid to the Council to fully repay the loan when they sold the property. They requested that Mr YB reimburse those amounts to them, and forward their purchase file and related documents to them. They stated that if Mr YB did not meet these "demands" by 9 September 2016, they would make a complaint to the Law Society.

[12] Mr YB forwarded by courier a copy of the file to the WDs on 6 September 2016.

Complaint

[13] Mr WD lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 13 December 2016 stating that Mr YB had "made an error in representing [the WDs] which is below the standard expected of a lawyer representing someone in a real estate transaction".

[14] The substance of his complaint is contained in the WDs' 29 August 2016 email to Mr YB, a copy of which Mr WD attached to his complaint. In particular, he:

(a) claimed that Mr YB "failed to point out to [them] that there was an outstanding energy efficiency loan on the property"; and

(b) demanded that Mr YB pay to them the sum of $6,277.99 comprising the amount they had paid to the Council by way of rates, $3,709.25 ($741.85 per year for five years), plus the balance owing of $2,568.74 when they sold the property.

[15] In support of his complaint he stated that:

(a) the purchaser of the property from them did not agree to take over the balance of the loan of $2,568.74 which they had to repay to the Council; and

(b) it took Mr YB three months to respond to their concerns about this issue.

Standards Committee decision

[16] The Committee, delivered its decision on 17 July 2017 and determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act), that no further action on the complaint was necessary or appropriate.

[17] The issues identified by the Committee were whether Mr YB failed to:[1]

(a) advise the WDs of the existence of the Heat Smart loan; and

(b) respond to the WDs concerns in a timely manner.

[18] In reaching its decision to take no further action concerning the Heat Smart loan aspect of the complaint the Committee:[2]

(a) stated that there was "insufficient evidence presented by Mr WD [for the Committee] to conclude that Mr YB did not discharge his obligations in a professional manner"; and

(b) noted that following completion of the purchase the WDs made payments in reduction of the loan for five years before raising their concerns with Mr YB.

[19] The Committee did not consider that Mr YB's response time of three months to Mr WD's complaint raised any issue of a professional nature that warranted further inquiry.

Application for review

[20] Mr WD filed an application for review on 23 August 2017. In support of his application he:

(a) reiterates that neither Mr YB nor Ms UF, on whom the WDs relied for advice concerning the purchase, informed them about the Heat Smart loan;

---

[1] Standards Committee determination, 17 July 2017 at [7].
[2] At [10]–[11].

(b) states that the rates assessment did not contain a reference to the Heat Smart loan; and

(c) says that the Committee did not address the issue whether Mr YB had breached his professional obligations by not requesting a LIM report.

Mr YB's response

[21] In his response dated 27 September 2017, Mr YB states that he is satisfied that the Committee's decision is correct "based on the facts of their full and experienced inquiry". He submits that:

(a) the Committee did not say that it disbelieved the WDs but held that there was "insufficient evidence presented by Mr WD" to enable the Committee to conclude that there had been a professional failing or shortcoming by Mr YB;

(b) the standard condition in the agreement which relates to an application by a purchaser for a LIM had been deleted; and

(c) the WDs did not provide him with copies of the builder's report, and valuation obtained by them.

[22] Although Mr YB does not specifically address the WDs' complaint concerning the time taken by him to respond their concerns, he repeats his submission to the Committee that the WDs:

(a) gained financially from the increase in capital value of the property from the time of purchase to which the installation of the log fire and insulation in the house by the vendor would have contributed; and

(b) would have had insufficient funds to complete the purchase had they not taken over the Heat Smart loan from the vendors.

Review on the papers

[23] The parties agreed to the review being dealt with on the papers. This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all the information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

The role of the LCRO on review

[24] The role of LCRO on review is to reach his own view of the evidence before him. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting his own judgement for that of the Committee, without good reason.

Nature and scope of review

[25] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[3]

> … 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.

[26] More recently, the High Court has described a review by this Office in the following way:[4]

> 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 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.

[27] 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.

---

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

Issues

[28] As identified by the Committee, the issues on this review are whether Mr YB:

(a) failed to inform the WDs about the Heat Smart loan at the time they purchased the property; and

(b) did not respond to the WDs concerns raised by them about that matter in a timely manner.

[29] A related issue to the question of whether Mr YB failed to inform the WDs about the Heat Smart loan, is whether he ought to have advised the WDs to obtain a LIM report from the [Area] District Council.

Analysis

(1) The Heat Smart loan

(a) Professional duties

[30] A lawyer must disclose to his or her client information that is relevant to the retainer, take reasonable steps to ensure that the client understands the nature of the retainer, keep the client informed about progress, and consult the client about steps to be taken to implement the client's instructions.[5]

[31] Lawyers are also required to act competently. Rule 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) states that:[6]

> In providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

(b) Did YB Legal inform the WDs about the Heat Smart loan?

[32] The WDs negotiated the purchase of the property, a private sale, direct with the vendors. Ms UF is adamant that she discussed the Heat Smart loan with Mrs WD who is equally adamant that she did not.

---

[5] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 7, 7.1.
[6] Thereby putting into effect the purposes of the Lawyers and Conveyancers Act 2006 contained in s3(1) which include maintaining public confidence in the provision of legal services, and protecting the consumers of legal services.

[33] Mr WD refers to the statement in the vendors' lawyer's letter of 8 December 2011 to YB Legal, which accompanied the vendors' lawyers' settlement statement, that "the rates for the property contain a Heat Smart loan … Further information may be obtained from the [Area] District Council". He says that this letter, which was on their file received from Mr YB, shows that Mr YB knew about the Heat Smart loan but did not tell them about it.

[34] Although Mr YB's response to the WDs' complaint does not specifically refer to this letter, he did so two weeks earlier in his email dated 3 March 2017 to the vendors' lawyer, Ms TG, who by that time also acted for the WDs. In that email, referring to the Council's home insulation frequently asked questions,[7] Mr YB asked Ms TG to inform him whether the vendors "discussed [the Heat Smart loan] with [the WDs]". He stated that he understood that "both parties acknowledged this debt".

[35] Ms TG did not give a direct answer to that question. In her reply email to Mr YB dated 6 March 2017, she stated that:

> whether the Heat Smart loan is repaid or not is a matter of negotiation at the time of each individual transactions – and caveat emptor still applies. Mr WD should have identified this himself as part of his due diligence.
>
> … it is simply too late for a complaint in the circumstances. Mr WD – or his solicitors – had the opportunity to raise the issue and/or object prior to settlement.

[36] She added that in her view the vendor warranties — contained in the sale and purchase agreement between the parties — referred to by Mr YB were not relevant. She noted that the amount of money at stake was "comparatively small", and suggested referral of the matter to the Property Disputes Committee of the Auckland District Law Society Inc.

[37] For her part, in an email to Mr YB dated 15 May 2017, Ms UF states that she:

> recall[s] speaking to [Mrs WD] about the settlement figure and the loan as stated in the accompanying letter [dated 8 December 2011] from the vendors solicitor (unfortunately there isn't a file note – although at the time I thought I had recorded that)

[38] The parties maintain diametrically opposing views on this issue. The information provided by the parties to this Office is not sufficiently conclusive for me to make a finding either way whether Mr YB informed the WDs about the Heat Smart loan before the settlement of the purchase of the property.

[7 Area] District Council "Home Insulation" <www.[Area].govt.nz>.

[39] The standard of proof to be applied in disciplinary hearings, is the civil standard of a "balance of probabilities" applied flexibly to the seriousness of the matter''.[8] On the information before me I am unable to reach the conclusion with the degree of probability necessary that Mr YB failed to inform the WDs about the Heat Smart loan.

(c) LIM issue

[40] Concerning the LIM issue, the WDs state that:

(a) the property was the first house they had purchased in New Zealand, they did not know what a LIM was, and relied on Mr YB to advise them on all matters concerning the purchase;

(b) Mr YB did not say in his response to the Lawyers Complaints Service whether he had advised them to obtain a LIM, or what information the LIM would include; and

(c) the Committee did not address this issue, and that "a LIM report would have shown the existence of the [Heat Smart loan]".

[41] Mr YB states that the LIM condition had been "crossed out on the agreement". He says that the WDs "did not request a LIM", which had "been to their detriment and/or misunderstanding". He says that irrespective of that "they negotiated and accepted with the vendor to take the loan over yearly otherwise they would have been short of funds to settle and they knew that".

[42] Ms UF says that at that time "before heat smart loans were widely used by ratepayers" that "a 'rates' search as such" was not common practice, and that on the settlement day when she would telephone the Council "to make sure the rates were up-to-date", that enquiry did not include "targeted rates" such as payments in respect of a Heat Smart loan.

[43] In response to an inquiry from the Lawyers Complaints Service, the [Area] District Council stated that at the time of the purchase "the Council file for the property was in paper form" and "[did] not show any record of having been inspected" and "[no] LIM report was requested".

[44] I make the following observations concerning this aspect of the WDs' complaint. First, it appears that it was some time after the introduction of energy

[8] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55.

efficiency loans before lawyers generally became aware of such loans and how they worked. This is illustrated in an article published by the Auckland District Law Society Inc. (ADLSi) in March 2014 which noted that in Auckland "the targeted rate may be discovered on a LIM report … with a note that the property is on the PIR Register (Property Interests Register)". Also, that ADLSi was "contacting all Councils which operate these programmes with a view to them including specific information about targeted rates with all rating requests".[9]

[45] Secondly, the copy of the 2012/2013 [Area] District Council rates assessment notice addressed to the WDs at the property, produced to this Office, clearly shows "Energy Efficiency Rate 1 Heat Smart Programme", and the rate of $741.85 in the "Description of Rate" section of that assessment.

[46] Thirdly, the Property Law Section "Property Transactions Practice Guidelines", September 2009, which applied in 2011, recommended that a LIM condition be included in agreements for sale and purchase, and if not stated "consider getting a LIM report (with the purchaser's approval)".

[47] In summary, the WDs chose not to include a LIM condition in the sale and purchase agreement. They state that after they had signed the agreement Mr YB did not advise them to obtain a LIM report, or explain to them what a LIM report was.

[48] Mr YB, on the other hand says, as noted, that "clearly [the WDs] did not request a LIM report", had negotiated the purchase themselves, "and accepted … to take over the loan as rate payment yearly".

[49] In the absence of a statement from either Mr YB or Ms UF that they either did or did not advise the WDs to obtain a LIM report or discuss that with them, I consider it more probable than not that they did not do so.

[50] However, their failure to do so must be viewed in the context of the transaction. Apart from the conveyancing aspects of the transaction carried out by YB Legal, the WDs had largely taken responsibility for the "due diligence" aspects of their acquisition of the property. They negotiated the purchase of the property with the vendors without input from a real estate agent, or a lawyer. They elected not to include a LIM condition in both agreements. They arranged a valuation, and a builder's report themselves which Mr YB says were not provided to him. It appears that they arranged finance.

---

[9] Joanna Pidgeon "Disclosure of Insulation Loans and Ownership of Chattels by Third Parties" (28 March 2014) <www.adls.org.nz>; see also New Zealand Law Society "Wellington Lawyers alerted to voluntary targeted rate" updated July 2016 (first published 1 May 2012) <www.lawsociety.org.nz>.

[51] Even though they had arranged finance, at the eleventh hour their bank financier informed them that $13,000 of the bank mortgage loan would be retained to cover the cost of cladding required for the house thereby necessitating an application for another loan on hardship grounds to bridge that gap. The focus of both the WDs and YB Legal was on these issues.

[52] It is both sensible and prudent for a purchaser to obtain a LIM report. However, on the particular facts of this matter, as noted, the WDs having already made enquiries directly with the vendors, and having obtained a valuation and a builder's report elected not to do so by removing the LIM condition when they signed both agreements. Overall, although I have concluded that Mr YB did not, on the balance of probabilities, advise the WDs about a LIM report I do not consider that a disciplinary response is warranted in these particular circumstances.

(2) Responding to the WDs concerns

(a) Responding to inquiries

[53] Lawyers are required to provide regulated services to clients "in a timely manner", "respond to enquiries from the client in a timely manner", "inform the client if there are any material and unexpected delays in a matter" and "promptly answer requests for information or other inquiries from the client".[10]

[54] To enable a lawyer to respond to complaints raised by clients, a lawyer:[11]

> must ensure that the lawyer's practice establishes and maintains appropriate procedures for handling complaints from clients with a view to ensuring that each complaint is dealt with promptly and fairly by the practice

(b) Discussion

[55] As noted earlier, the WDs contacted Mr YB on 19 May 2016, four and a half years after YB Legal had acted for them on the purchase of the property. Mr YB was not acting for them at that time. They explained that they had recently sold the property, and in doing so "found [the] outstanding … Energy Efficiency loan on the property" which had been taken out by the previous owners who sold the property to them.

---

[10] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules, rr 3, 3.2, 3.3, 7.2.
[11] Rule 3.8. See also New Zealand Law Society "Practice Briefing: Running an Effective Internal Complaints Process" <www.lawsociety.org.nz>.

[56] The concerns raised with Mr YB, alleging non-disclosure of the Heat Smart loan details to them and by implication questioning Mr YB's competence, were by nature a complaint. In such circumstances Mr YB owed them a professional duty to respond as provided in r 3.8 noted above.

[57] Mr YB informed them by email on 20 May 2016, that he had noted their concerns, and would "locate [their] old file and reply".

[58] Three months later, on 26 August 2016, in reply to a follow up by Mr WD, Mr YB explained why he had not responded earlier to the WDs' request of 19 May 2016. He stated that:

(a) not knowing the WDs' new address, he had written to them at the address of the property;

(b) he had been expecting to hear from the WDs' new lawyer, who had acted for the previous owners who sold the property to the WDs;

(c) his former legal executive, Ms UF, who acted for them on the purchase had moved to Wellington;

(d) having retrieved the file, he sent it to Ms UF for her comment;

(e) Ms UF who at that time was moving to a new law firm, replied on 6 July 2016 returning the file by post;

(f) because the address on the package which contained the file was incorrect, the package was sent to Mr YB's previous postal address, not to YB Legal's business address; and

(g) he had been away on leave during this period.

[59] Mr YB added that he had assumed that the WDs' new lawyer, Ms TG, would have explained how the Heat Smart loan worked, namely, payments debited on the rates assessment which the WDs had paid since they purchased the property. He stated that they would have seen the reference to this "targeted rate" on the rates assessment.

[60] Having received another request from the WDs on 30 August 2016, Mr YB sent the file to them by courier on 6 September 2016.

[61] It will be noted that r 3.8 requires that the lawyer's complaints procedures deal with complaints "promptly and fairly". In a decision from this Office, where the complaints procedure of the firm provided that complaints about one partner be referred to the other partner, the LCRO held that it was "incumbent on [the other partner] to respond directly and not delegate the responsibility for the response back to" the lawyer complained about. Although the LCRO considered that the response time of six months was "unacceptable", it was the lawyer's partner who had not responded and no adverse finding was made against the lawyer.[12]

[62] In a more recent decision where the firm's complaints process similarly provided for complaints to be referred to partners other than the partner who handled the work, it was held in the circumstances of that matter that although the response time of approximately four months was "not prompt", the ability of the lawyer to respond was "not entirely in his hands".[13]

[63] Mr YB does not seek to excuse himself from the time he took to respond to the WDs' concerns. He says that he sought to explain why. Whilst I consider that Mr YB, could have provided a copy of the relevant material to the WDs at the outset, in my view the fact that he did not do so in the particular circumstances he has described does not automatically lead to an adverse finding.

[64] In those circumstances, having notified his insurer, as he would have been obliged to do, and having obtained the insurer's approval, the most straightforward approach for him would have been to provide the WDs with copies of the material they requested such as was available. This would have, at least, provided the opportunity at an early stage to address their concerns, rather than resulting in them making a formal complaint three months later. In this regard, I refer to the Law Society's Practice Briefing: Running an Effective Internal Complaints Process, which includes the helpful recommendation that:[14]

> If properly managed [the practice's complaints process] can resolve complaints rapidly and prevent them escalating and/or resulting in a formal complaint to the Lawyers Complaints Service. All staff should be trained to recognise a complaint and how the complaints process within the firm operates.

[65] Whilst it is open to me to make an adverse finding against Mr YB for the way in which he responded to the WDs concerns, I do not propose to do so for the reason that having sent Ms UF the file for comment, the delay which followed was not entirely within Mr YB's control.

---

[12] *KR v WH* LCRO 141/2010 (14 May 2012) at [22].
[13] *ZAA v YBC* LCRO 242/2013 (27 June 2017) at [88].
[14] New Zealand Law Society, above n 11.

[66] Moreover, because I have not made an adverse finding in respect of the Heat Smart loan, and LIM issues, I do not consider it necessary for consumer protection reasons to do so in the particular circumstances of this aspect of Mr WDs' complaint.

Decision

[67] For these reasons, pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

DATED this 10th day of January 2018

_____

B A Galloway
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:

Mr WD as the Applicant
Mr as the Respondent
[Area] Standards Committee
The New Zealand Law Society