LCRO 187/2011

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Wellington Standards Committee 2
BETWEEN	**IZ** of Wellington Applicant
AND	**SB** of North Island Respondent

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

DECISION

[1] Mr SB (the Practitioner) acted for Mr IZ (the Applicant) in relation to the purchase of a property for the sum of $615,000. The Applicant negotiated the purchase through F who was, it appears, also a director/shareholder of the vendor company which had a purchase contract with the registered proprietor. F also appeared to have had some involvement in organising accommodation for contractors ([...] workers), and it was proposed that the property being purchased by the Applicant would be rented to contractors; the Applicant anticipated a rent of about $1,800 per week.

[2] The Sale and Purchase Agreement between the Applicant and his vendor was signed in April 2009, and had been prepared by the vendor's lawyer. It did not include any rental guarantee and the Applicant was concerned about a financial shortfall if the anticipated rent income did not eventuate. The Applicant had raised this with F, who, as an inducement, offered to effectively guarantee the rental income for a specified period of

time if this would enable the contract to be made unconditional. This was a personal guarantee offered by F, and arranged between F and the Applicant.

[3] In the event that contract did not proceed because the Applicant was unable to secure finance. He nevertheless remained interested in purchasing the property.

[4] By June it became evident that the bank was taking some action in relation to foreclosing on the property against the registered proprietor. The Applicant was informed by F that he (F) had entered an unconditional purchase agreement on the property but was willing to give the Applicant a first option to purchase it. In an email dated 14 June 2009 the Applicant informed the Practitioner that F had gone unconditional on his purchase of the property, and had offered it to him for the lower sum of $592,500, further indicating the possibility of lowering his "finders" fee. He added that if the bank approved finance then his concern was to protect himself against the possibility that the rental company would not fill the property. He informed the Practitioner that any offer would need to be conditional upon F agreeing to his initial offer "*of paying $1,000 per week for up to six months in the event accommodation solutions let me down*". The Applicant asked to chat with the Practitioner; an email sent by the Practitioner to the vendor's solicitors advised that his client was hopeful of resurrecting the original contract albeit on different terms.

[5] The Applicant then learned that the contract between F and the vendor was still subject to mortgagee approval, and on 26 June he sent a letter to the Practitioner which referred to the vendor having a glitch in going unconditional with F, and as the only alternative to his purchasing the property looked like a mortgagee sale, he informed the Practitioner he was in a strong position now to make a low offer of around $500,000, and if confirmation of finance could be obtained from the bank, he explored the possibility of making an unconditional offer to purchase the property. It appears he had in mind that this offer would be made to the registered proprietor.

[6] However, in the event the Practitioner prepared a new Sale and Purchase Agreement between the Applicant and F's company with an offer to purchase the property for $540,000. This contract included a special clause 15.0 that provided a rental guarantee by the vendor for a period of up to six months. The Agreement was sent through to the Applicant on 30 June for signature, who returned it signed that same day to the Practitioner's office.

[7] An email from the Applicant sent the next day (1 July) asked the Practitioner to 'hold fire' on the Agreement, as it appears that the bank still had some questions about

finance. However, later that day the Practitioner sent to the vendor's solicitor the signed offer, subject to short timeframe for finance.

[8] Later on that same day (still 1 July), the vendor's solicitor wrote to the Practitioner to say that the rental guarantee had only been available on the original price of $615,000 and that on the reduced price, that guarantee was no longer available.

[9] The following day, 2 July, the vendor's solicitor emailed the Practitioner again. He referred to discussions that had occurred between "their respective clients" who had agreed that the purchase price should be increased to $550,000, with the rent guarantee condition being amended to begin two weeks after settlement. This email was forwarded to the Applicant on the same day.

[10] This was followed by a discussion between the Practitioner and the Applicant. The Practitioner's evidence was that he discussed the contract, including the amended clauses, with the Applicant who was happy with the amendments to the contract and authorised the Practitioner to initial the changes on his behalf. By email the Practitioner sought the Applicant's confirmation as to these changes, and by return the Applicant confirmed that the contract should be approved.

[11] The property then settled. Subsequent to settlement, although there was a short period of rental, the anticipated accommodation arrangements did not eventuate and the Applicant sought to call in the guarantee. F declined to accept liability for the full six months rent, arguing that the guarantee only applied up to the time that a tenancy was secured, contending that there had been a tenancy (albeit of short duration) which negated any further liability. There was a dispute between the Applicant and F as to the interpretation and application of the guarantee. When this was not resolved, and on the advice of the Practitioner, the Applicant took the matter to the Disputes Tribunal. However this was not before the Applicant had expressed his disappointment with the Practitioner in the way matters had turned out.

[12] The Applicant failed to succeed in the Disputes Tribunal, the Adjudicator noting that the Respondent identified by the Applicant was F personally, and that the rental guarantee had been made by the vendor company. It appears that the vendor company was by then struck off the Company Register.

[13] The Applicant sought further contact with the Practitioner who was, on the evidence, somewhat tardy in responding to him.

[14] The Applicant complained to the New Zealand Law Society alleging failure by the Practitioner to have protected his interests, and failing to respond to his emails when he ran into difficulties.

[15] The Standards Committee considered all of these matters, but declined to uphold the complaints, particularly noting that the Applicant was aware that no personal guarantee was available when the second contract was prepared. The Committee noted that he (the Applicant) had been astute enough to have sought such a guarantee for the initial contract, and was aware that the guarantee had been declined in relation to the later contract.

[16] In that regard, the Standards Committee appears to have overlooked the fact that the final contract did in fact contain a rental guarantee, not from F personally but from the vendor company.

[17] It was the core of the Applicant's complaint against the Practitioner that no rental guarantee had been included in the Sale and Purchase Agreement, or that the rental guarantee had not been given by F personally. He disputed having seen the email from the vendor's lawyer saying that the guarantee was not available. That is, he did not dispute that the 'email string' was forwarded to him, but explained that there was nothing in the header of the email to have alerted him to the fact that the vendor had not agreed to the rental guarantee.

[18] My review of the Standards Committee decision included consideration of the Standards Committee file, the information provided by the parties for the review and also their evidence at a hearing.

[19] The evidence I have considered suggests that the Applicant was fully alive to the issue of the guarantee. It showed that immediately after the rejection of the guarantee clause by the vendor, the Applicant and F had met and this had resulted in an agreement between them that the Applicant would increase the offer and in return get an amended vendor guarantee clause. The Practitioner was not a party to this discussion or the resulting agreement. I accept the Practitioner's evidence that he discussed the amended clauses with the Applicant prior to the latter confirming that the Practitioner should confirm the amendments to the vendor's lawyer. The Practitioner's caution is demonstrated by his email to the Applicant of 2 July 2009 in which he refers to their telephone discussion concerning the amendments, and seeking the Applicant's approval in writing.

[20] In summary, the evidence shows that the original contract did not include any vendor rental guarantee and that the Applicant had dealt directly with F and secured a personal guarantee from him to support certain rental arrangements. That contract lapsed.

[21] The second contract, at a lower purchase price, included a rental guarantee clause but this was rejected by the vendor. Following direct negotiations between the Applicant and F, agreement was reached between them that amended both the price and the guarantee clause. The Practitioner's advice was not sought in relation to that arrangement. Having examined all of the correspondence, I find no basis for concluding that the Applicant was unaware of the nature of the guarantee.

[22] The Applicant also questioned the legal efficacy of the guarantee clause as it had been drafted, following a comment made by the Disputes Tribunal Adjudicator about the clarity of the drafting of it. However this was not relevant to the adjudicator's decision who declined the claim for different reasons. The guarantee clause has not been tested and its legal efficacy cannot be resolved through the disciplinary machinery of the New Zealand Law Society or this office. For the purposes of this review, the Applicant has not demonstrated that the Practitioner has failed in any professional way in relation to the drafting of that clause. At the review hearing evidence was given that the vendor company has been restored to the company register, and that the Applicant appeared to have an existing remedy against the vendor.

[23] The final review issue concerned delays by the Practitioner in responding to the Applicant's enquiries after settlement. While making no adverse finding, the Standards Committee criticised the Practitioner's delays in responding. My review of the file shows the criticism was justified. It would have been preferable had the Practitioner be more explicit about the reasons for delay, rather than not responding to the Applicant in a timely fashion. The Practitioner admitted that he could have done better; and he offered his apology to the Applicant.

[24] In my view the Practitioner's delay in responding to his client delays was marginal, and I find no basis for interfering with the Committee's decision.

Decision

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

DATED this 19th day of March 2012

Hanneke Bouchier
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:

IZ as the Applicant
SB as the Respondent
SA as Representative of the Respondent
The Wellington Standards Committee 2
The New Zealand Law Society