LCRO 189/2016

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [City]Standards Committee [X]
BETWEEN	**EM** Applicant
AND	**FN AND GP** Respondents

DECISION

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

Introduction

[1] Ms EM has applied for a review of a decision by the [City] Standards Committee [X] which found there had been unsatisfactory conduct on her part pursuant to s 12(c) of the Lawyers and Conveyancers Act 2006 (the Act) for contraventions of rules 3.2, 4.1.1 and 9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the rules) arising from the transfer of instructions from Ms EM to the respondents' new lawyer.

Background

[2] In May 2015 the respondents instructed Ms EM to act for them in the sale and purchase of properties, all but one of which did not proceed. By December 2015 the respondents were committed to an unconditional agreement to sell their property, with

settlement scheduled for 26 February 2016, but had not yet committed to a purchase. The deposit had been paid by the purchasers, via the real estate agent, into Ms EM's trust account. Ms EM says the respondents' instructions to her were that they wanted her to hold the money, they did not want to apply it to reduce their mortgage. Ms EM was instructed that money would be applied to the respondents' next purchase, and says that the respondents had agreed to pay her fees pursuant to the terms of her engagement with them which authorised her to deduct her fees from funds held on their behalf in her trust account.

[3] Ms EM was away from work from just before Christmas, and on and off throughout January 2016.

[4] On 29 January the respondents phoned her, and they arranged to meet on 4 February to discuss the next steps towards purchasing another property. At that stage the respondents did not tell Ms EM whether or not they had lined up another property to buy.

[5] On 3 February 2016 the respondents terminated Ms EM's instructions, and instructed a new lawyer, Mr HR. Ms EM received an authority to uplift the respondents' files on Friday, 5 February 2016, with a request that she courier all the documents and files urgently.

[6] Monday, 8 February 2016 was a public holiday.

[7] Mr HR emailed Ms EM again on 9 February asking her to urgently confirm the file was on its way or could be collected.

[8] Ms EM was at work on 9 and 10 February, and says she was busy.

[9] At the review hearing Ms EM said she was aware that she needed to arrange with the bank for the release of her undertaking, and that the e-dealing would need to be altered, or removed completely. She refers to the need for cooperation from others in attending to those matters. Ms EM also says she had never been in the situation before where her instructions were terminated after the agreement had been declared unconditional, before settlement, and in circumstances where she was holding funds for the clients, and had given undertakings.

[10] Ms EM says she spoke to a Friends Panel member, and acted according to the advice she was given by that person, which included checking with the client whether they were prepared to pay a double up of costs for changing representation.

Ms EM also says that she was very mindful of her obligation to the respondents to ensure she transitioned their file in an orderly manner, and that she had to prioritise her workload. As settlement of the respondents' sale was scheduled for 26 February, she did not consider that release of the respondents' files or money was particularly urgent, and she allocated priority to it accordingly, within the parameters of urgency imposed by her other matters.

[11] On 11 February 2016, as suggested by the Friends Panel member, Ms EM sent an email directly to the respondents saying that Mr HR's assistant had arrived to collect the files that morning. Ms EM said she was happy to hand files over, and explained the steps she had already taken towards settlement, including requesting a discharge of the mortgage from the bank, preparing and despatching settlement statements, and giving undertakings. She said the e-dealing had been set up authorising her firm to complete the conveyancing on the basis of authority and instruction forms that she had already drafted, that needed only to be signed for her to complete settlement. Ms EM explained that handing the files over would result in duplication of costs for the respondents, said that she would deduct her fees from the funds she held, and asked for confirmation of how the respondents wished to proceed.

[12] At the review hearing Ms EM said her understanding was that she was authorised to communicate directly with the respondents, even though they were represented by Mr HR, for the purpose of confirming their instructions and arranging for the orderly transfer of the matters to Mr HR. That is correct.

[13] Ms FN forwarded the email to Mr HR, who took issue with Ms EM having contacted his client directly, although he did not contend that she had exerted undue pressure on the respondents not to terminate the retainer, or to re-engage her. He confirmed to Ms EM that his firm would take over all matters to do with the conveyancing, and that Ms EM would have to withdraw her undertakings to the bank. He confirmed that his clients accepted liability for the cost of any work undertaken by Ms EM "up to the termination of [her] retainer at 5:50 pm on 3 February 2016", saying the settlement statement Ms EM had prepared, dated 3 February, was received by the purchaser's lawyer on 4 February.

[14] Mr HR instructed Ms EM to transfer the respondents' money from her trust account to his, and expressed the view that she was not entitled to deduct her costs.

[15] He also advised Ms EM that the file would be uplifted the following morning at 9am, and that he could hold $1,500 in his trust account pursuant to his undertaking, "pending resolution of any matters relating to [Ms EM's] costs".

[16] Ms EM responded saying she would attend to the matter in due course, and advise when the files would be ready to be uplifted.

[17] On Friday 12 February Mr HR emailed Ms EM again asking her to action the authority to uplift without any further undue delay, and confirm the respondents' money had been deposited to his trust account as instructed.

[18] Ms EM did not respond.

[19] On Monday 15 February 2016 Mr HR's office again requested the respondents' money urgently, and a timeframe for delivery of the file.

[20] Ms EM responded saying she anticipated the respondents' file and money would be transferred before the end of the week.

[21] A further email from Mr HR's office recorded a phone discussion with Ms EM on 15 February in which it was contended she had not provided any reason for delaying payment, and that the respondents required their money to pay a deposit. Mr HR's office requested confirmation that the respondents' money would be paid into that firm's trust account by Wednesday, 17 February in cleared funds. Ms EM's urgent reply was requested.

[22] Ms EM paid the respondents' money over to Mr HR's office that day and prepared a statement and invoices which she sent by courier to the respondents, with copies to Mr HR's office. Mr HR's office confirmed receipt of the respondents' money into his firm's trust account of an amount less than the deposit that had been paid to Ms EM's trust account, and asked her to urgently account.

[23] On 19 February Mr HR's office sent an email to Ms EM requesting a copy of the statement Ms EM had apparently sent directly to the respondents, and posted to Mr HR's office, and sought to make arrangements for collection of the file.

[24] On 22 February Ms EM sent an email to Mr HR's office asking when the courier would come to uplift the respondents' files, and attaching invoices for her fees. Ms EM also attached a statement setting out the fees she had deducted from the

respondents' money held in her trust account, before she had forwarded the balance to Mr HR's office on 17 February.

Complaint

[25] On 2 March 2016 the respondents complained to the New Zealand Law Society Complaints Service about deficiencies in the service Ms EM had provided, delays in releasing their files and money from her trust account, and the amount of her fees. They said her delays in handing over their files and money had caused them significant stress.

[26] Ms EM's reply of 3 May 2016 responded to the allegations. In particular she said she did not consider the delay in releasing the files, documents, records and funds she held on behalf of the respondents was undue.

[27] Ms EM says the request coincided with her holiday period, and a time at which she was attending a New Zealand Law Society conference. She says that the files were all released as requested, "well before settlement". Ms EM says the respondents had asked her to deliver invoices and statements by courier, and she had done that, and provided a copy to Mr HR's office.

[28] Ms EM did not explain specifically what she had been doing at various times that prevented her from attending to the respondents' authority and instruction to hand over the files to Mr HR. She conveyed a general sense of being busy with other matters, and the suggestion that the respondents' urgency was overstated.

[29] She says the respondents did not ask her to provide an estimate or quote, and she gave neither.

Decision

[30] The Committee considered Ms EM was entitled to deduct her fair and reasonable fees from the respondents' money before passing the balance on to Mr HR's office, and that she therefore had not contravened s 110 of the Act.

[31] The Committee determined the respondents' complaint about delays on the basis that Ms EM's conduct had been unsatisfactory. The Committee found that Ms EM had not responded to the respondents' calls to her in a timely way; and had

unduly delayed releasing the respondents' files and money after they terminated the retainer.

[32] As to fees, the Committee's view was that it had jurisdiction to consider that aspect of the respondents' complaint, although the fees were less than $2,000, because special circumstances for the purposes of regulation 29, meaning abnormal, uncommon, or out of the ordinary circumstances, existed.

[33] The Committee said:

> With regards to the invoice rendered in relation to the third agreement for the [ABC] Road property, Ms EM's retainer was terminated, however, further work was carried out by Ms EM following termination of the retainer. The Committee considers that this is abnormal, uncommon and out of the ordinary. As such, the Committee considers that there are special circumstances that would justify dealing with the complaint about fees.
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> Having determined that it has jurisdiction to consider the complaint about the fees charged by Ms EM, the Committee notes that Ms EM's retainer was terminated on 3 February 2016. While the invoice rendered by Ms EM states that it is for services rendered to 3 February 2016, these were also charged for services following termination of the retainer. This occurred when Ms EM was specifically advised not to do any further work on the transaction.
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> [123 Bank] confirmed that Ms EM requested the discharge of mortgage on 4 February 2016 which was after the retainer had already been terminated. The Committee is also concerned that the date on the rates information from [City] Council may have been manipulated in some manner. In the Committee's experience, the rates information statement provided by [City] Council always contains details of the exact date when it was requested. In this case, however, it does not, although the statement states that the rates position is as at 4 February 2016.
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> As it is clear from the evidence that Ms EM continued to do work after the retainer had been terminated, the Committee does not consider that the fees charged by Ms EM in relation to the third agreement for the [ABC] Road property are fair and reasonable. The terms of engagement also states that:
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> In the event of termination, you are responsible for the value of recorded on billed time plus disbursements to the date of termination.

[34] On that basis, the Committee found Ms EM had charged a fee that was not fair and reasonable, thereby contravening rule 9, and that there had been unsatisfactory conduct on the part of Ms EM pursuant to section 12(c) of the Act.

[35] The Committee ordered Ms EM to reduce her fees by $622, to $500 plus GST and disbursements. She was also ordered to pay a fine of $1,000 and costs of $1,000.

[36] Ms EM disagreed, and applied to this Office for a review.

Application for review

[37] Ms EM's application for review proceeds on the basis that throughout her retainer she responded to enquiries from the respondents in a timely manner; that there was no undue delay in her releasing the respondents' files or money; and that her fees were fair and reasonable. She contends her conduct was not unsatisfactory in any way.

[38] Ms EM did not challenge the Committee's finding that she was entitled to deduct her fees from the respondents' money before passing that on to Mr HR's office, and that she therefore had not contravened s 110 of the Act.

[39] The respondents did not reply to Ms EM's application for review.

Review hearing

[40] Ms EM attended a review hearing by telephone on 17 May 2017. The respondents did not attend, and the review hearing proceeded in their absence with their consent.

Nature and scope of review

[41] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[1]

> … 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.
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> 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" …
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> … 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.

[1] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

[42] More recently, the High Court has described a review by this Office in the following way:[2]

> 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.

[43] 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 Ms EM's comments at the review hearing; and

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

Analysis

Delay in replying

[44] Rule 3.2 requires lawyers to respond to enquiries from clients in a timely manner.

[45] The respondents say Ms EM was difficult to get hold of, and did not respond to their calls.

[46] On review, Ms EM says she received three calls from the respondents on 29 January, and they made an appointment to see her on 4 February.

[47] The respondents' complaint in this regard was short on detail, and they have produced no evidence to refute the detail of what Ms EM says in the course of this review.

[48] Three calls in one day is not sufficient to raise a professional standards issue. In the circumstances, there is insufficient evidence to support adverse finding. In this regard, the Committee's determination of unsatisfactory conduct is reversed.

Delay in releasing files and money

[2] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[49] Rule 4.4.1 says that, upon changing lawyers a client has the right either in person or through the newly appointed lawyer to uplift all documents, records, funds, or property held on the client's behalf. In particular, Ms EM was obliged to act upon any written instruction to uplift documents "without undue delay".

[50] The respondents sent their email terminating the retainer on 3 February. Ms EM requested the discharge of mortgage on 4 February, as which time I presume she gave undertakings to the bank. There are two options, either she did not see the respondents' email, or she did not act in accordance with it. As there is no evidence either way, charitably, I assume the former. However, that does not alter the facts that the retainer was terminated on 3 February, or that Ms EM did work after 3 February.

[51] Ms EM then received the authority to uplift the respondents' documents on Friday 5 February, and wrote encouraging the respondents not to change lawyers on 11 March. On simple contractual principles, she could not unilaterally change the terms of her engagement so she could charge for attendances after the retainer was terminated. Although she says she has no record of the timing of events, the date and content of that communication are inconsistent with Ms EM having taken steps to remove herself from the conveyancing transaction by withdrawing her undertaking to the bank, or amending or removing the e-dealing. As 11 February, it appears Ms EM was still in control of the transaction, and had not taken steps to act on the written request to uplift that she had received two working days before. Ms EM then provided the files and the funds to Mr HR's office on 17 February.

[52] Taking into account the weekends and statutory holidays, it took Ms EM two working days to react in any way to the request to uplift documents, and a total of 7 working days to give full effect to the written instruction to uplift documents.

[53] Rule 4.4.1 required Ms EM to act on the written instruction without undue delay. The rule did not require her to act immediately, or to hand over the files and the money immediately. The question of whether delay is undue depends on the particular circumstances.

[54] Ms EM says that she was still catching up with the backlog of work that had accumulated for her over the Christmas period. Although Ms EM says she is a sole practitioner, that consideration is of very limited weight. Ms EM was aware that settlement was on 26 February. She was aware that she had the respondents' money in her trust account, and that they intended to apply their money towards their next

purchase, subject to the deduction of Ms EM's fees. She says the respondents did not tell her whether they had signed an agreement to purchase another property, and she was not aware of any particular urgency in transferring either the files or the money.

[55] Ms EM emphasises the difficulties presented to her by the fact that the e-dealing had already been set up, and she had given undertakings to the bank. She had to undo both of those things before she was relieved of her obligations in relation to the respondents. It appears Ms EM attended to both of those matters on or about 11 February. Ms EM says she acted in accordance with the advice she received from the Friends Panel member.

[56] Ms EM says she felt harassed by the respondents' new lawyers, and that they were unusually pushy, given settlement was still some weeks away. Ms EM cannot rely on what she perceives to be a history of difficulties with Mr HR's office as an excuse for any delay on her part. She acknowledges that the respondents' new lawyer had an obligation to his clients to proceed in a timely way having accepted instructions.

[57] Ms EM says that when she was made aware that the respondents needed access to the money urgently for a particular purpose, she reprioritised her workload, so she was in a position to release the respondents documents and money the same day. She says if she had known there was particular urgency, she would have prioritised the release of the respondents' files and money sooner.

[58] The respondents do not say that they told her why they needed the money urgently, and in a sense that is irrelevant. Other than Ms EM's fees, it was the respondents' money to do with as they wanted, not Ms EM's.

[59] However, Ms EM's terms of engagement entitled her to deduct her fees, and she first had to calculate what those were, and prepare a statement. There does not appear to have been any particular impediment to her promptly completing those tasks, other than an unusually heavy workload because of the time of year.

[60] On one view, the entirely predictable and regular occurrence of Christmas, its associated holidays and burgeoning workloads, are matters practitioners can reasonably be expected to manage.

[61] An alternate view is that a finding of unsatisfactory conduct arising from a failure to prioritise work effectively, resulting in a delay of two working days before any

steps were taken to act on the written request to uplift, and seven working days to complete her response to it, seems heavy-handed, in all the circumstances.

[62] Ms EM sought advice, then acted on the written request to uplift documents, she simply did not complete all of the tasks until the need for urgency was explained to her. While Ms EM could have done better, in all the circumstances a finding of unsatisfactory conduct is not warranted.

[63] In this regard, the Committee's determination of unsatisfactory conduct is reversed.

Were the fees fair and reasonable?

[64] Rule 9 precludes lawyers from charging a client more than a fee that is fair and reasonable for the services provided, having regard to the interests of both client and lawyer and having regard also to the factors set out in rule 9.1.

[65] Rule 9.1 sets out a list of factors to be taken into account in determining the reasonableness of the fee in respect of any service provided by the lawyer to the client.

[66] The Committee's view was that it was not reasonable for Ms EM to charge a fee for work done after the respondents had terminated her retainer, and in circumstances where her terms of engagement expressly stated that she would charge fees for work done prior to the termination of the retainer.

[67] In the circumstances, although Ms EM had to undo the work she had done, setting up the e-dealing and giving undertakings to the bank, presumably on 4 February, she was contractually bound only to charge fees for work she did prior to the termination of the retainer. Her terms of engagement did not allow her to charge fees for anything after the retainer was terminated.

[68] The retainer was terminated shortly after 5pm on 3 February. Ms EM, according to her own terms of engagement, could not charge for any work she did after that; but she did.

[69] Ms EM must be taken to have known what her own terms of engagement enabled her to do. If she did not know, she can be presumed to have checked them when Mr HR's office advised her that the respondents accepted liability for payment of her fees up to the point where they had terminated the retainer.

[70] Ms EM's invoice of 17 February 2015 for account number 101371–4 includes a number of attendances that can only have occurred after Ms EM's office received notice of termination of the retainer from the respondents.

[71] Even excluding the Committee's concerns over whether the dates on certain documents were tampered with at Ms EM's office, it is not satisfactory for Ms EM to have charged for the further work that was carried out at her office after the retainer had been terminated, when her terms of engagement prevented her from rendering any such charge, and she is taken to have known the timing of the termination by then. Ms EM could not pass on the costs involved in attending to matters after the retainer was terminated to the respondents.

[72] In the sense of regulation 29, and whether this Office has jurisdiction to consider the fee complaint, I consider it is abnormal, uncommon and out of the ordinary for a lawyer to render fees that are clearly not in accordance with their terms of engagement. I consider those are circumstances that justify dealing with the complaint about fees.

[73] The same reasoning underpins the question of whether the fee itself was reasonable. Ms EM was entitled to charge a fair and reasonable fee for attendances during the course of the retainer. Her fees afterwards are not fair and reasonable because they are inconsistent with the express wording of the terms of engagement. Those fees should not have been charged to the respondents. The Committee calculated a reduction of $622 was appropriate, and certified a fair and reasonable fee for the services was $500. There is no good reason to depart from that view. The fee of $500 is confirmed as fair and reasonable for the services provided during the course of the retainer under that account.

[74] Ms EM's fees are otherwise confirmed as fair and reasonable.

Consequential orders – s 156

[75] There is no reason to interfere with the orders made pursuant to s 156. Those are confirmed.

Costs on review

[76] The LCRO has discretion to order costs on review pursuant to s 210 and the LCRO's Costs Orders Guidelines. The Guideline amount where a practitioner has

requested a hearing and been unsuccessful is $1,200 for a straightforward review. Ms EM is ordered to pay $1,200 accordingly.

Decision

[77] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the two findings of unsatisfactory conduct in relation to contraventions of s 12(c) based on contraventions of rules 3.2 and 4.4.1 are reversed.

[78] Pursuant to s 211(1)(a), 152(1) and 12(c) of the Lawyers and Conveyancers Act 2006 the determination that there has been unsatisfactory conduct on Ms EM's part for contraventions of rules 9 and 9.1 is confirmed.

[79] Pursuant to s 210 of the Lawyers and Conveyancers Act 2006 Ms EM is ordered to pay costs of $1,200 on review within 28 days of the date of this decision.

DATED this 19th day of May 2017

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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 EM as the Applicant
Ms FN and Mr GP as the Respondents
[City] Standards Committee [X]
The New Zealand Law Society